



Draft Determination

T-Ports Pty Ltd, Wallaroo

Exemption assessment of port terminal services under the
Port Terminal Access (Bulk Wheat) Code of Conduct

13 February 2023

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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 made a draft determination that T-Ports Pty Ltd (T-Ports) should be an exempt service provider of port terminal services provided by means of its port terminal facility at Wallaroo, South Australia.

If the ACCC makes a final determination consistent with this draft determination, T-Ports will be subject to a lower level of regulation, as it will not be required to comply with Parts 3 to 6 of the Code in the course of providing port terminal services via its port terminal facility at Wallaroo, South Australia.

In making its draft determination the ACCC has carefully considered the matters listed at subclause 5(3) of the Code.

In doing so the ACCC has analysed a range of factors it views as relevant to its consideration of these matters. These include:

- the characteristics of T-Ports' facility, alongside the broader SA grain export industry; and
- the level of competitive constraint T-Ports' facility will be subject to.

This assessment was based on information available to the ACCC at the time of making this draft determination.

Summary of views

The ACCC's draft views are:

- T-Ports will be subject to a high level of competitive constraint from other providers of bulk grain export port terminal services, primarily as a result of Viterra's Wallaroo facility (and to a lesser extent as a result of Viterra's Port Giles facility, ADM's Port Pirie facility, and PTSPs at Port Adelaide).
- T-Ports is not an exporter or an associated entity of an exporter as defined by clause 3 of the Code. T-Ports will therefore be unlikely to be incentivised to (or be in a position to) discriminate in favour of itself (or an associated entity) in the course of providing bulk grain export port terminal services at its Wallaroo facility.
- As an exempt service provider, it is expected that T-Ports could engage more freely in commercial negotiations with exporters and offer tailored access agreements. It would also face reduced direct and indirect Code-compliance costs, largely due to having greater flexibility in how it provides its services.¹
- Providing T-Ports with increased operational flexibility (in circumstances where it has competition-based incentives to provide exporters with fair and transparent access to its services) would:
 - be in T-Ports' legitimate business interests
 - be in the public interest, including the public interest in having competition in markets, and may promote competition in upstream and downstream markets

¹ In considering issues relating to operational flexibility, the ACCC notes that: T-Ports' intends to use the same TSV at its Wallaroo and its Lucky Bay facilities; and T-Ports is an exempt service provider of port terminal services in relation to its Lucky Bay facility.

- likely be in the interests of exporters who may require access to T-Ports' port terminal services
- likely promote the efficient operation of T-Ports' facility and may promote efficient investment in port terminal facilities.

The ACCC's views are based on an analysis of the extent to which T-Ports competes with other providers of bulk grain export port terminal services. The ACCC has also considered the extent of any competitive constraint imposed by markets for containerised grain export port terminal services, domestic demand for grain (including bulk wheat), and the upcountry storage and handling market. The ACCC's views on the level of competitive constraint T-Ports' Wallaroo facility is subject to are set out in Chapter 2 of this document.

The ACCC's consideration of the matters that the ACCC must have regard to in making an exemption determination (listed at subclause 5(3) of the Code) is set out in Chapter 3. A high-level summary of the ACCC's consideration of the matters listed at subclause 5(3) of the Code is presented in Table E.1 below.

Table E.1: Summary of the ACCC's consideration of the matters listed at subclause 5(3) of the Code

Subclause 5(3) matter	ACCC view
a) the legitimate business interests of the port terminal service provider	<ul style="list-style-type: none"> • The increased operational flexibility and reduced Code-related compliance costs associated with an exemption would be in T-Ports' legitimate business interests.
b) the public interest, including the public interest in having competition in markets g) the promotion of competition in upstream and downstream markets	<ul style="list-style-type: none"> • Exempting a new entrant PTSP in the Wallaroo catchment area would likely promote competition between PTSPs and would likely also promote exporter participation in the market for bulk grain export port terminal services in the Wallaroo catchment area. • Promoting competition between PTSPs and exporter participation in the Wallaroo catchment area is in the public interest, including the public interest in having competition in markets, and may promote competition in upstream and downstream markets.
c) the interests of exporters who may require access to port terminal services	<ul style="list-style-type: none"> • Overall T-Ports will be subject to a high level of competitive constraint and will have strong incentives to provide exporters fair and transparent access to port terminal services at its Wallaroo facility. • It is likely that the greater operational flexibility and reduced compliance costs associated with an exemption will benefit exporters through more competitive service offerings.
d) the likelihood that exporters of bulk wheat will have fair and transparent access to port terminal services	<ul style="list-style-type: none"> • Exempting T-Ports in relation to its Wallaroo facility is unlikely to reduce the likelihood that exporters of bulk wheat will have fair and transparent access to their port terminal services. • The ACCC's view reflects that:

	<ul style="list-style-type: none"> ○ T-Ports will be subject to a high level of competitive constraint which provides it with strong incentives to provide exporters with fair and transparent access to its services at this facility, and ○ T-Ports is not an exporter or an associated entity of an exporter.
<p>e) the promotion of the economically efficient operation and use of the port terminal facility</p> <p>f) the promotion of efficient investment in port terminal facilities</p>	<ul style="list-style-type: none"> ● T-Ports has strong competition-based incentives to provide exporters with fair and transparent access to services at its Wallaroo facility and to provide the benefits of increased flexibility to exporters. ● The ACCC therefore considers that an exemption: <ul style="list-style-type: none"> ○ would likely promote the efficient operation and use of T-Ports' port terminal facility; and ○ may promote efficient investment in T-Ports' port terminal facilities and port terminal facilities more broadly through the elimination of unnecessary regulatory burden.
<p>h) whether the port terminal service provider is an exporter or an associated entity of an exporter</p>	<ul style="list-style-type: none"> ● The ACCC understands that T-Ports is not an exporter or an associated entity of an exporter. ● T-Ports will therefore be unlikely to be incentivised to (or be in a position to) discriminate in favour of itself (or an associated entity) in the course of providing bulk grain export port terminal services at its Wallaroo facility.
<p>i) whether there is already an exempt service provider within the grain catchment area for the port concerned</p>	<ul style="list-style-type: none"> ● Viterra is not an exempt service provide in relation to its nearby Wallaroo facility (which has largely the same catchment area as T-Ports' Wallaroo facility) or in relation to its Port Giles facility (which likely competes for grain located on the Yorke Peninsula). ● However, there are a number of exempt service providers that may compete for grain located within certain parts of the Wallaroo catchment area: <ul style="list-style-type: none"> ○ Viterra's, Semaphore's, and Cargill's facilities at Port Adelaide. ○ ADM's Port Pirie facility.
<p>j) any other matters the ACCC considers relevant</p>	<ul style="list-style-type: none"> ● The ACCC does not consider there to be any other matters relevant to this assessment.

Consultation on this draft determination

Stakeholder submissions assist the ACCC to undertake its assessment of exemption applications. The ACCC encourages stakeholders to make submissions in response to this

draft determination. The process for making a submission is set out in Section 1.4 of this document.

Submissions must be received before **5:00pm (AEDT), 10 March 2023**.

1. Introduction

The Code is set out in Schedule 1 of the *Competition and Consumer (Industry Code – Port Terminal Access (Bulk Wheat)) Regulation 2014* and is a prescribed mandatory code of conduct for the purposes of Section 51AE of the *Competition and Consumer Act 2010* (Cth). It 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.²

The Code provides that the ACCC or the Minister for Agriculture (the Minister) may determine that a PTSP is an ‘exempt service provider’ of port terminal services provided by means of a specified port terminal facility.

1.1. Exempt service providers

PTSPs that are not exempt service providers 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 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
- publish current standard terms and reference prices for each port terminal facility that it owns or operates.

Part 3 of the Code requires a PTSP:

- not to discriminate in favour of its own trading business or an exporter that is an associated entity, and not hinder an exporter’s access to port terminal services;
- to enter into an access agreement with an exporter regarding its port terminal services (or negotiate the terms of such an agreement) if an exporter makes a request and certain criteria are satisfied;
- to deal with disputes about the terms of an access agreement via specified dispute resolution processes including mediation and arbitration; and
- to include a dispute resolution mechanism in its standard terms and to vary its standard terms in accordance with a specified procedure.

Part 4 of the Code requires a PTSP to have, publish and comply with a port loading protocol which includes a capacity allocation system (and requires that the capacity allocation system must be approved by the ACCC if it involves the allocation of port terminal capacity more than 6 months in advance).

Part 5 of the Code requires a PTSP to annually publish the expected capacity of its port terminal facility for the following 12 months, publish updates on the available capacity of its

² Port Terminal Access (Bulk Wheat) Code of Conduct, clause 2.

port terminal facility on at least a weekly basis, and publish certain information on volumes of grain stored at port 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 IVB of the *Competition and Consumer Act 2010* (Cth).

1.2. T-Ports' exemption application

On 4 November 2022 T-Ports submitted an application to the ACCC seeking to be determined by the ACCC as an exempt service provider of port terminal services via its port terminal facility at Wallaroo.

T-Ports' Wallaroo facility is currently under construction. T-Ports' application indicates that:

- The construction program is advancing with port silos and bunker storage expected to be complete for grain receipt in harvest 2022-2023.³
- The port causeway and ship loading infrastructure for the facility is due to be completed for export in mid-2023.
- The facility will use a shallow draft transshipment vessel (TSV) to tranship grain to deep-water ocean-going vessels.
- The same TSV will be used at T-Ports' Wallaroo facility as is used at its Lucky Bay facility.

Aspects of T-Ports' application are referenced in this document as relevant. The full application is available on the ACCC's website at: <https://www.accc.gov.au/regulated-infrastructure/wheat-export>.

The ACCC considers assessing the appropriateness of imposing a lower level of regulation on new entrants prior to their entering the market to be consistent with the Code's objective to 'reduce unnecessary regulatory burden on port terminal service providers'.⁴

Establishing the proposed level of regulation that T-Ports' Wallaroo facility will be subject to prior to the commencement of export services will also provide certainty to the applicant and access seekers.

As such, and given the facility's advancing construction, the recent receipt of grain, and the expected timing of readiness for export operations, the ACCC considers it appropriate to release a draft determination in relation to T-Ports' application now.⁵

1.3. Previous SA exemption assessments

This draft determination makes reference to the ACCC's previous assessment of exemptions for a number of port terminal facilities located in SA, including:

³ The ACCC notes that T-Ports received the first load of grain into its Wallaroo facility on 8 November 2022. See: <https://tports.com/t-ports-new-wallaroo-export-facility-receives-its-first-load-of-grain/>

⁴ Explanatory Statement, Competition and Consumer (Industry Code—Port Terminal Access (Bulk Wheat)) Regulation 2014.

⁵ The ACCC notes that T-Ports received the first load of grain into its Wallaroo facility on 8 November 2022. See: <https://tports.com/t-ports-new-wallaroo-export-facility-receives-its-first-load-of-grain/>

- All 6 of Viterra’s SA facilities.⁶
- T-Ports’ Lucky Bay facility.⁷
- ADM’s Port Pirie facility.⁸

On 3 April 2020 the ACCC released a final determination granting T-Ports an exemption for port terminal services by means of its port terminal facility at Lucky Bay.

On 2 July 2020 the ACCC released a final determination exempting Cargill Australia Limited in relation to its port terminal facility at Port Adelaide (Inner Harbour).

On 27 April 2021 the ACCC released final determinations granting Viterra exemptions for port terminal services by means of its port terminal facilities at Port Adelaide Inner Harbour and Outer Harbor, and not granting Viterra exemptions in relation to its Wallaroo and Port Giles facilities. On 20 July 2021 the ACCC released further final determinations not granting Viterra exemptions in relation to its Port Lincoln and Thevenard facilities (collectively, the 2021 Viterra determinations)

On 24 September 2021 the ACCC released a final determination granting ADM Trading Australia an exemption for port terminal services by means of its port terminal facility at Port Pirie.

References to previous exemption assessments and the related analysis are included in both the body of this document and in footnotes, where relevant.

1.4. Consultation on the draft determination

The ACCC invites public submissions on the draft determination set out in this document. Please include detailed reasons to support the views put forward in your submission.

The ACCC prefers that submissions be sent via email in Microsoft Word format (although other text readable document formats will be accepted). Submissions should be sent to both of the following email addresses:

transport@acc.gov.au

Timothy.Ozimec@acc.gov.au

Please address submissions to:

Mr Matthew Schroder
General Manager
Infrastructure & Transport - Access & Pricing Branch
ACCC
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Due date for submissions

Submissions must be received before **5:00pm (AEDT), 10 March 2023**.

⁶ See: <https://www.accc.gov.au/regulated-infrastructure/wheat-export/exemption-from-parts-of-the-wheat-port-code/viterra-wheat-port-exemption-assessment>

⁷ See: <https://www.accc.gov.au/regulated-infrastructure/wheat-export/exemption-from-parts-of-the-wheat-port-code/t-ports-lucky-bay-wheat-port-exemption-assessment>

⁸ See: <https://www.accc.gov.au/regulated-infrastructure/about-regulated-infrastructure/regulatory-projects/adm-trading-australia-wheat-port-exemption-assessment>

Confidentiality of information provided to the ACCC

The ACCC strongly encourages public submissions. Unless a submission, or part of a submission, is marked confidential, it will be published on the ACCC's website and may be made available to any person or organisation upon request.

Sections of submissions that are claimed to be confidential should be clearly identified. The ACCC will consider each claim of confidentiality on a case-by-case basis. If the ACCC refuses a request for confidentiality, the submitting party will be given the opportunity to withdraw the submission in whole or in part. The ACCC will then assess the exemption application in the absence of that information.

For further information about the collection, use and disclosure of information provided to the ACCC, please refer to the ACCC publication *ACCC & AER Information Policy: collection and disclosure of information*, available on the ACCC website.

Further information

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

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2. Competitive constraint faced by T-Ports' at Wallaroo

The ACCC considers that the level of competitive constraint faced by a PTSP is relevant to its consideration of several of the matters listed at subclause 5(3) of the Code.

To assess the level of competitive constraint that T-Ports will be subject to in relation to its Wallaroo facility, the ACCC considered:

- the grain catchment area relevant to T-Ports' Wallaroo facility (the Yorke Peninsula and the Upper and, to a lesser extent, Mid North regions; collectively the Wallaroo catchment area), including the extent to which it 'overlaps' with the grain catchment areas of other ports (Section 2.1),
- the sources and level of competitive constraint that T-Ports will be subject to in its grain catchment area, including from other providers of bulk grain export port terminal services, and relevant markets for containerised grain export port terminal services and domestic demand (Sections 2.2 to 2.4).

The ACCC's assessment of the grain catchment area relevant to this assessment and the level of competitive constraint faced by T-Ports are drawn on in Chapter 3 (the ACCC's consideration of the matters it must consider in granting an exemption, listed at subclause 5(3) of the Code).

2.1. The Wallaroo catchment area and the extent to which it overlaps with the grain catchment areas of other ports

An assessment of grain catchment areas is required to determine whether and to what extent other port terminal facilities compete with T-Ports' Wallaroo facility. The identification of the general area where a PTSP's facility is likely to source grain from is also relevant to the assessment of whether T-Ports' Wallaroo facility is subject to a level of competitive constraint from local markets for containerised grain export port terminal services and domestic consumption.

The ACCC notes that the Code does not define 'grain catchment area', however the ACCC understands that the grains industry generally refers to it as a geographic area within which it is typically economically viable for grain to move to a particular port for export. Grain catchment areas generally relate to the established transportation links, including rail networks and road pathways, that connect each port terminal facility to grain growing regions, as well as associated upcountry grain storage facilities.

The ACCC recognises that there is a level of fluidity to grain catchment areas. However, the ACCC considers that the extent to which it is economically viable for exporters (or growers) to move grain from certain geographic areas to different ports is relevant to the assessment of the extent to which PTSPs competitively constrain each other.

2.1.1. Assessment of the Wallaroo catchment area and the PTSPs that compete in it

The ACCC considered the grain catchment area for Viterra's Wallaroo facility (as well as Viterra's other facilities and the SA grain market more broadly) in detail in the context of its assessment of Viterra's exemption applications (the 2021 Viterra determinations).⁹ In doing

⁹ Documents relevant to this assessment, including Viterra's exemption applications, are available on the ACCC website at: <https://www.accc.gov.au/regulated-infrastructure/wheat-export/exemption-from-parts-of-the-wheat-port-code/viterra-wheat-port-exemption-assessment>

so the ACCC considered a range of factors, including stakeholder views and Grain Trade Australia's (GTA) 'Location Differentials'.

In its 2021 Viterra determinations, the ACCC concluded that:

- The catchment area for Wallaroo extends between the Yorke Peninsula and the Upper and (to a lesser extent) Mid North regions of SA (see figure 2.1).
- It is unlikely that the Port Adelaide catchment area extends to the Yorke Peninsula in general. There does however appear to be some competition between Viterra at Wallaroo and alternate PTSPs located at: Port Adelaide for grain grown in the Upper and Mid North regions of SA; and Port Pirie for grain grown in the Upper North region.
- The Upper and Mid North regions are unlikely to fall within the catchment area of Viterra's Port Giles facility due to the large freight advantages associated with moving grain from these regions to Port Adelaide, Port Pirie, and Wallaroo.¹⁰

Figure 2.1: Map of Eastern SA T-Ports' port terminal facilities



Source: Map sourced from PIRSA. Map cropped and annotated by the ACCC to include Lucky Bay and Eastern SA's port terminals. See:

https://www.pir.sa.gov.au/primary_industry/crops_and_pastures/crop_and_pasture_reports

The ACCC notes that the Wallaroo catchment area described in T-Ports' exemption application is largely consistent with the ACCC's view in its 2021 Viterra determinations.

In its application T-Ports submitted that:

Wallaroo's grain catchment area encompasses the Yorke Peninsula (primary region), the Mid North and Upper North regions of South Australia. The largest participant in grain supply in these regions is Viterra.

¹⁰ See pages 223, 224, and 240 of the April 2021 Viterra Final Determinations. Available at: <https://www.accc.gov.au/regulatinfrastructure/wheat-export/wheat-export-projects/viterra-wheat-port-exemption-assessment/final-determinations-innerharbour-outer-harbor-wallaroo-and-port-giles>

On the Yorke Peninsula a significant proportion of storage is located at port, with Viterra's Port Giles and Wallaroo facilities able to store 514,100 tonnes and 757,500 tonnes of grain at port respectively. In addition, Viterra operate storage sites at Ardrossan and Bute on the Yorke Peninsula. The Mid and Upper North regions contain a relatively higher number of alternate storage sites, that are predominantly owned by Viterra.

Smaller participants include GrainFlow, which operates an upcountry site in Maitland, Mallala and Crystal Brook and ADM, which operates a storage site at Port Pirie.¹¹

Having considered the currently available information, the ACCC considers that the analysis and views expressed in relation to the Wallaroo catchment area in the 2021 Viterra determinations remain suitable for purposes of informing its assessment of T-Ports' Wallaroo facility.

2.1.2. ACCC view on the Wallaroo catchment area and the PTSPs that compete within it

The ACCC considers that the catchment area for T-Ports' Wallaroo facility is largely the same as the catchment area for Viterra's Wallaroo facility. This view reflects:

- the close location of T-Ports' Wallaroo facility and Viterra's Wallaroo facility; and
- that both facilities rely on the same type of transport infrastructure (road) for the delivery of grain.¹²

Consistent with the views expressed in T-Ports' exemption application and the 2021 Viterra determinations, the Wallaroo catchment area extends between the Yorke Peninsula and the Upper and (to a lesser extent) Mid North regions of SA.

The ACCC also notes that there may be facilities owned by other PTSPs and not located at Wallaroo that compete for grain grown within certain parts of the Wallaroo catchment area:

- PTSPs located at Port Adelaide may compete for grain in the Mid and Upper North regions.
- ADM's Port Pirie facility may compete for grain grown in the Upper North region.
- Viterra's Port Giles facility likely competes for grain on the Yorke Peninsula.

2.2. Level of competitive constraint imposed by other providers of bulk grain export port terminal services.

Competing PTSPs impose the most direct form of competitive constraint on a PTSP.

Consistent with the views set out in Section 2.1.2, the ACCC considers Viterra's Wallaroo facility to be the port terminal facility most relevant to the assessment of the competitive constraint imposed on T-Ports' Wallaroo facility. This is because T-Ports' Wallaroo facility:

- is located close by to Viterra's Wallaroo facility; and
- shares largely the same catchment area as Viterra's Wallaroo facility.

T-Ports' facility will also be subject to a lesser level of competitive constraint as a result of facilities located at Port Giles (Viterra), Port Adelaide (Cargill, Semaphore and Viterra) and Port Pirie (ADM).

¹¹ T-Ports Pty Ltd, *Wallaroo Port – Application for exemption from Parts 3 – 6 of the Port Terminal Access (Bulk Wheat) Code of Conduct*, 4 November 2022, p. 4.

¹² The ACCC previously discussed arrangements relating to road freight in the 2021 Viterra Determinations (see p. 123).

The ACCC considers the following matters to be relevant to the assessment of the level of competitive constraint imposed by competing PTSPs:

- the nature of the services offered by competing PTSPs; and
- the likely amount of spare capacity competing PTSPs have to offer.

2.2.1. The nature of the services offered by competing PTSPs

If an applicant is competing with a PTSP (or multiple PTSPs) that can provide services that are equivalent to or potentially more efficient than its own, that competing PTSP would be expected to impose a high level of competitive constraint on the applicant. This is because, in circumstances where an applicant's existing and potential customers can secure equivalent (or potentially more efficient or additional) services from a competitor, the applicant is likely to have strong incentives to offer exporters fair and transparent access to its services.

Table 2.1 sets out the nature of the services offered by T-Ports and Viterra at Wallaroo.

Table 2.1: Overview of port terminal facilities at Wallaroo

	T-Ports	Viterra
Rail receipt	No	No
Road receipt	Up to 1,000 mt/hr	2,150 mt/hr
Loader rate	1,000-1,500 mt/hr onto the TSV 1,200 mt/hr from the TSV to the ocean-going vessel ¹³	800 mt/hr
Storage capacity	20,500mt at port, 240,000mt nearby ¹⁴	192,000 at port, 565,500mt nearby.
Annual capacity estimate	170,000mt, ramping to 500,000mt in the mid-term. ¹⁵	1,012,000mt ¹⁶
Port of anchorage declared depth	-- ¹⁷	9.5m

¹³ In its application T-Ports indicated that it expects minimum daily load rates of 7,000 tonnes per weather working day once all operating variables are factored in.

¹⁴ The ACCC notes that T-Ports refers its bunker storage site as "upcountry" in its exemption application. However, the ACCC understands that the bunker storage is located nearby to its Wallaroo facility (and a similar distance as Viterra's bunker storage site is located from its Wallaroo facility). As neither T-Ports' or Viterra's bunker storage sites are directly attached to their respective facilities, grain may be required to be transported by road services.

¹⁵ In its application T-Ports submitted that it anticipates the combined capacity across both its Lucky Bay and Wallaroo facilities would be circa 1.4 million tonnes, or 700,000mt per port. T-Ports also submitted that its business case capacity estimate for its ports totals 1.1 million tonnes (600,000mt at Lucky Bay, and 500,000mt at Wallaroo), and that the shipments commencing at its facility at Wallaroo will not reduce the business case capacity of its Lucky Bay facility or vice versa. This notwithstanding, the ACCC notes that the intended use of common infrastructure (i.e. the same TSV) across both facilities creates the potential for operational issues or commercial decisions (in relation to the TSV or either facility) to affect both facilities.

¹⁶ ACCC estimate based on capacity made available by Viterra at its Wallaroo facility in the 2021-22 season, adjusted for tolerance.

¹⁷ See below discussion of TSV model and loading of vessels.

Source: T-Ports Pty Ltd, *Wallaroo Port – Application for exemption from Parts 3 – 6 of the Port Terminal Access (Bulk Wheat) Code of Conduct*, 4 November 2022; ACCC, *Final determinations – Viterra Inner Harbour, Outer Harbor, Wallaroo, and Port Giles*, 27 April 2021

As set out above T-Ports' Wallaroo facility has a significantly smaller estimated annual capacity (ramping from 170,000mt to 500,000mt in the mid-term) when compared to Viterra's Wallaroo facility (at an estimated annual capacity of 1,012,000mt).

T-Ports' Wallaroo facility also has substantially lower road receipt rates (1,000 t/hr compared to 2,150 t/hr) and less storage capacity (260,500mt compared to 757,500mt) than Viterra's Wallaroo facility. However, both the loading rate onto T-Ports' TSV and from its TSV to the ocean-going vessel are higher than the overall loading rate at Viterra's Wallaroo facility.

Viterra's Wallaroo facility has a port of anchorage declared depth of 9.5 metres. The ACCC understands that this means larger deep water vessels (such as Panamax vessels) cannot be fully loaded at the facility.¹⁸ Facilities located at deep water ports (or facilities otherwise able to fully load larger vessels) can be advantaged over facilities located at shallower ports as they allow for the use of larger, more economically efficient, vessels.

In considering the loading of vessels at T-Ports' Wallaroo facility, the ACCC notes;

- T-Ports intends on using the same TSV at its Wallaroo facility, that is currently in use at its Lucky Bay facility.
- The transshipment model involves the loading of the ocean-going vessel in open water; this means that T-Ports' Wallaroo facility is able to fully load deep water, ocean going vessels.
- The transshipment model 'double handles' grain (i.e., it requires grain to be loaded onto a vessel twice) compared to more conventional port infrastructure.

The ACCC considers that the nature of the services offered by Viterra at its Wallaroo facility (i.e. a nearby and significantly larger operation with more storage at-port) mean that it will impose a high level of competitive constraint on T-Ports' Wallaroo facility. While acknowledging there are differences in the loading practices of each facility (including in relation to the size of vessels that can be loaded), the ACCC considers that T-Ports will have a strong incentive to provide exporters fair and transparent access to its Wallaroo facility in order to attract and retain exporters.

2.2.2. Likely amounts of spare capacity offered by competing PTSPs

The ACCC considers that the amount of capacity available at competing port terminal facilities can impact the strength of a PTSP's incentives to provide fair and transparent access to its services.

The ACCC generally considers that an exporter's ability to shift part or all of its business to a PTSP that can best accommodate its needs depends on:

- the number of PTSPs competing in a particular grain catchment area, and
- the amount of port terminal capacity available to exporters competing in that grain catchment area.

¹⁸ The ACCC understands that Viterra can fully load larger deep water vessels at its Port Giles and Port Adelaide Outer Harbor facilities (as well as at its Port Lincoln facility on the Eyre Peninsula).

The ACCC considers that, in circumstances where a PTSP is aware that its competitors can meet all or part of its customers' capacity needs, this likely provides a strong incentive for that PTSP to provide exporters with fair and transparent access to its services.

When considered on an annual basis (as shown in Table 2.2) Viterra's Wallaroo facility generally appears to have had spare capacity in most seasons. However (as shown in Table 2.3) Viterra's Wallaroo facility may face capacity constraints during the peak period in high production seasons (i.e., at times when there is high demand for shipping capacity) and appears to have exceeded released capacity offered in the peak period of some seasons.¹⁹

Table 2.2 – Annual capacity utilisation at Viterra's Wallaroo facility²⁰

Season	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20	2020-21	2021-22
Utilisation	65%	63%	55%	79%	56%	11%	23%	48%	53%

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

Table 2.3 – Peak period capacity utilisation at Viterra's Wallaroo facility²¹

Season	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20	2020-21	2021-22
Utilisation	134%	114%	68%	120%	86%	13%	45%	N/A	85%

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

In considering capacity and capacity utilisation at Viterra's Wallaroo facility the ACCC also notes that Viterra increased the annual capacity available at the facility for the 2021-22 season. Capacity utilisation for the 2013-14 to 2019-20 seasons at Viterra's Wallaroo facility is discussed in further detail in the 2021 Viterra Determinations.²²

The ACCC considers that in the off-peak of the season, and during lower production seasons, T-Ports' Wallaroo facility will likely be offering services to exporters which could potentially have their capacity needs met by Viterra's Wallaroo facility. However, during peak periods (particularly during high production years), the potential for exporters to have their capacity needs met by Viterra's Wallaroo facility would be reduced. The competitive constraint upon T-Ports' Wallaroo facility would be somewhat lessened at these times. Overall the ACCC considers that T-Ports will likely face a high level of constraint as a result of the capacity of Viterra's Wallaroo facility.

2.2.3. ACCC view on level of competitive constraint imposed by other PTSPs on T-Ports' Wallaroo facility

The ACCC considers that T-Ports will be subject to a high level of competitive constraint from competing PTSPs.

The basis for this view is that:

¹⁹ The peak period is the period where demand for bulk grain shipment port terminal services is highest. In SA this is typically from 1 December until 31 May.

²⁰ Annual capacity calculated on the basis of the maximum available capacity for Viterra's Wallaroo facility, inclusive of tolerance, for the 2013-14 to 2021-22 period (i.e. the 2021-22 season). The ACCC notes the capacity utilisation is higher when using the amount of capacity (including tolerance) for the specific season (as opposed to the maximum capacity released over the 2013-14 to 2021-22 seasons).

²¹ Peak period capacity determined using the capacity figures (inclusive of tolerance) listed for each port as provided to the ACCC by Viterra in submissions to the 2021 Viterra determinations.

²² See pages 68-73, and 226 of the April 2021 Viterra Final Determinations. Available at: <https://www.accc.gov.au/regulatinfrastructure/wheat-export/wheat-export-projects/viterra-wheat-port-exemption-assessment/final-determinations-innerharbour-outer-harbor-wallaroo-and-port-giles>

- T-Ports' Wallaroo facility will compete for grain on the Yorke Peninsula with Viterra's Wallaroo facility. It will also compete to a lesser extent with Viterra's Port Giles facility, ADM's Port Pirie facility, and facilities at Port Adelaide.
- Viterra's Wallaroo facility is a significantly larger scale operation than T-Ports', with higher receival rates and more storage onsite and nearby.
- T-Ports' Wallaroo facility will likely face a high level of constraint from Viterra's Wallaroo facility, though this would be somewhat lessened during peak periods (particularly in high production years).

2.3. Level of competitive constraint imposed by markets for containerised grain exports

As grain can be exported either in bulk or via containers, containerised grain exports have the potential to provide an alternative export path to a PTSPs' operations. The ACCC understands that:

- containerised grain export markets allow growers and exporters to access international customers who demand high quality and niche grain products in relatively small volumes (compared to the bulk market);
- some international customers are unable to receive grain via bulk shipments due to limitations in port infrastructure or lack of finances, and so receive grain via containers; and
- exporters may respond to price signals in the global container trade and bulk vessel markets.

Containerised grain exports are therefore not a perfect substitute for bulk grain exports. However, containerised grain exports may provide a viable alternative export path for some growing regions, niche, and high-quality products, or for particular destinations. The ACCC therefore considers containerised exports have the potential to impose some level of competitive constraint on PTSPs, including T-Ports' Wallaroo facility.

2.3.1. Level of competition T-Ports' Wallaroo facility faces from markets for containerised grain export port terminal services

SA has the second smallest containerised grain export market in Australia; on average containerised grain exports account for approximately 6% of SA grain exports.²³ On average, 86% of SA's containerised grain exports are exported through Port Adelaide.

²³ For more information, see Bulk grain ports monitoring report 2021-22 – data update

Table 2.4: Containerised grain exports from SA (2014–15 to 2021–22)

Season	Total bulk grain exports from SA	Proportion of total grain exports from SA exported by container	Proportion of total SA containerised grain exports that exported through Port Adelaide
2014-15	5.82Mt	3%	71%
2015-16	5.26Mt	2%	100%
2016-17	8.1Mt	4%	99%
2017-18	5.9Mt	6%	99%
2018-19	2.5Mt	16%	95%
2019-20	3.4Mt	14%	89%
2020-21	6.76Mt	8%	62%
2021-22	7.21Mt	5%	83%
Average	5.61Mt	6%	86%

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

While the proportion of containerised grain exports increased significantly in the 2018-19 and 2019-20 seasons, this largely reflects the reduction in bulk grain exports as a result of the drought. In the 2020-21 season (when bulk grain exports returned to levels more consistent with pre-drought averages), containerised grain export volumes (as a proportion of total grain exports) returned to a level more consistent with the historical average.

2.3.2. ACCC view on the level of competitive constraint imposed on T-Ports' Wallaroo facility by containerised grain export port terminal services

The ACCC considers that the market for containerised grain export port terminal services likely imposes limited competitive constraint on T-Ports' Wallaroo facility. This view reflects:

- the small size of the containerised grain export market in SA; and
- that the majority of containerised grain exported from SA occurs via Port Adelaide.

2.4. Level of competitive constraint imposed by domestic demand

The presence of domestic demand can affect the amount of grain available for export and a PTSP's services. This can impose a level of competitive constraint on PTSPs, including in relation to T-Ports' operation at Wallaroo. The ACCC understands that the industry generally considers Australia's domestic markets to have the 'first call' on grain; the amount of grain remaining after demand in domestic markets has been satisfied is often referred to as the 'exportable surplus'.

However, given differences in the type of grain required, the domestic market is often not a direct substitute for the bulk export market.²⁴ For example, the domestic feed market demands lower protein wheat compared to the overseas milling market's demand for high protein wheat.

²⁴ However, the ACCC understands that grain preferences are client driven (and therefore subject to change).

While the ACCC does not collect detailed data on where grain is processed or consumed within a particular state the ACCC notes that, overall, SA has a very small domestic market.²⁵

2.4.1. ACCC view on the level of competition T-Ports' Wallaroo facility faces from domestic demand

The ACCC notes that some industry stakeholders have expressed the view that since the domestic market has 'first call' on grain, it does not place a competitive constraint on the bulk export market. However, and consistent with views previously expressed,²⁶ the ACCC continues to consider that the presence of the domestic market imposes some constraint on bulk export markets.

The ACCC's view on the level of competition T-Ports' Wallaroo facility faces from domestic demand is similar to the detail set out in the 2021 Viterra determinations in relation to Viterra's Wallaroo facility.²⁷ In brief:

- SA's domestic consumption is largely located in the east of the state.
- The majority of grain grown on the Yorke Peninsula is exported through either Viterra's Port Giles or Wallaroo facilities.

As such, the ACCC expects that while T-Ports' Wallaroo facility may face some level of competition from the SA domestic market, in large part the impacts of the SA domestic market are likely limited to the Upper and Mid North regions.

2.5. Upcountry storage and handling markets

The state of competition in upcountry storage and handling markets is relevant to the assessment of an exemption application. For example, the ownership of a storage facility (or network of facilities) may affect the level of competitive constraint PTSPs impose upon each other.

The ACCC considered the broader SA upcountry storage and handling markets in detail in the 2021 Viterra determinations, including the effects of Viterra's bundling of storage and handling services.²⁸ In doing so the ACCC noted that Viterra is the dominant vertically integrated provider of port terminal services and upcountry services in the SA bulk grain export market.²⁹

In relation to upcountry storage in regions of relevance to the Wallaroo catchment area it was noted that:

²⁵ For more information, see pages 17 and 27 of the Bulk grain ports monitoring report 2021-22 – data update, available at: <https://www.accc.gov.au/publications/serial-publications/bulk-grain-ports-monitoring-reports/bulk-grain-ports-monitoring-report-data-update-2021-22>

²⁶ See pages 150-157 of the April 2021 Viterra Final Determinations. Available at: <https://www.accc.gov.au/regulatedinfrastructure/wheat-export/wheat-export-projects/viterra-wheat-port-exemption-assessment/final-determinations-innerharbour-outer-harbor-wallaroo-and-port-giles>

²⁷ See pages 228-229 of the April 2021 Viterra Final Determinations. Available at: <https://www.accc.gov.au/regulatedinfrastructure/wheat-export/wheat-export-projects/viterra-wheat-port-exemption-assessment/final-determinations-innerharbour-outer-harbor-wallaroo-and-port-giles>

²⁸ See pages 99-126, and page 227 of the April 2021 Viterra Final Determinations. Available at: <https://www.accc.gov.au/regulatedinfrastructure/wheat-export/wheat-export-projects/viterra-wheat-port-exemption-assessment/final-determinations-innerharbour-outer-harbor-wallaroo-and-port-giles>

²⁹ See page 115 of the April 2021 Viterra Final Determinations. Available at: <https://www.accc.gov.au/regulatedinfrastructure/wheat-export/wheat-export-projects/viterra-wheat-port-exemption-assessment/final-determinations-innerharbour-outer-harbor-wallaroo-and-port-giles>

- Viterra appears to own a significant proportion of the total storage on the Yorke Peninsula as well as in the Upper and Mid North regions (including significant at-port storage).
- The Upper and Mid North regions appear to contain some credible alternatives to Viterra's upcountry system.

The ACCC notes that, while T-Ports owns 2 upcountry storage sites in SA, they are not within the Wallaroo catchment area (these sites are located at Lock and Kimba on the Eyre Peninsula).³⁰

While acknowledging that information around the size and availability of third-party storage sites is limited the ACCC understands, with some exceptions, alternative third-party storage sites are likely relatively small compared to Viterra and, in the Upper and Mid North regions, predominantly deliver to the domestic and container markets.³¹

The use of rail and/or road networks to transport grain from upcountry storage facilities to port is also potentially relevant to the level of competition between bulk grain port terminal facilities. In its application T-Ports indicated that it does not have any ownership interests in road or rail freight companies.³² Viterra has also previously indicated that it does not have any interests in road or rail freight companies.³³

In relation to port terminal facilities located at Wallaroo, the ACCC notes that neither T-Ports' or Viterra's facility has rail access (i.e., both facilities rely on the delivery of grain by road).³⁴ Neither facility is therefore likely to be directly advantaged on the basis of access to a different type of transport infrastructure.³⁵

Given the above, the ACCC considers that Viterra's position in the upcountry supply chain has the potential to affect competition between the port terminal facilities located at Wallaroo. This may in turn increase the level of competitive constraint imposed on T-Ports' facility.

2.5.1. ACCC view on upcountry storage and handling markets

The ACCC considers that T-Ports' Wallaroo facility may face an increased level of competitive constraint as a result of upcountry storage and handling markets.

ACCC view on the overall level of competitive constraint T-Ports faces at Wallaroo

The ACCC considers that T-Ports' Wallaroo facility:

- will be subject to a high level of competitive constraint from other providers of bulk grain export port terminal services, primarily as a result of Viterra's Wallaroo facility (and to a lesser extent as a result of Viterra's Port Giles facility, ADM's Port Pirie facility, and PTSPs at Port Adelaide).

³⁰ The ACCC notes that T-Ports refers to the bunker storage site related to its Wallaroo facility as "upcountry" in its exemption application. However, the ACCC understands the bunker storage is located nearby to its Wallaroo facility (and a similar distance as Viterra's bunker storage site is located from its Wallaroo facility).

³¹ ESCOSA, Inquiry into the South Australian bulk grain export supply chain costs – Final Report, December 2018, p. 26. The ACCC also acknowledges the potential relevance of the presence of on-farm storage.

³² T-Ports, *Wallaroo – application for exemption*, 4 November 2022, p. 5.

³³ Viterra, *Application for exemption*, February 2020, p. 4.

³⁴ However, Viterra's Port Adelaide facilities both have rail access.

³⁵ The ACCC previously discussed arrangements relating to road freight in the 2021 Viterra Determinations (see p. 123).

- will be subject to limited competitive constraint because of the containerised grain export market.
- may face some level of competition from the SA domestic market.
- may face an increased level of competitive constraint as a result of upcountry storage and handling markets.

The ACCC's view is that overall T-Ports' Wallaroo facility will be subject to a high level of competitive constraint. This will provide T-Ports with strong incentives to provide exporters with fair and transparent access to port terminal services at its Wallaroo facility. Because these incentives are the result of competition, the ACCC does not expect they will be impacted by exempting T-Ports from the application of Parts 3 to 6 of the Code in relation to services offered at its Wallaroo facility.

3. Consideration of whether T-Ports should be granted exemption

This chapter sets out the ACCC's assessment of whether it should determine, under subclause 5(2) of the Code, T-Ports to be an exempt service provider in relation to its port terminal facility at Wallaroo. This assessment draws on the analysis and findings contained in Chapter 2 of this draft determination regarding the level of competitive constraint faced by T-Ports.

Subclause 5(3) of the Code provides that in making a determination under subclause 5(2) 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.

Overlapping nature of subclause 5(3) matters

The ACCC notes that a number of the subclause 5(3) matters 'overlap' to some extent. For example, the ACCC considers that:

- the interests of exporters who may require access to port terminal services (subclause 5(3)(c)) includes an interest in having fair and transparent access to port terminal services (subclause 5(3)(d)); and
- exporters securing fair and transparent access to port terminal services (subclause 5(3)(d)) will likely promote efficient investment in port terminal facilities (subclause 5(3)(f)) and competition in relevant upstream and downstream markets (subclause 5(3)(g)).

The ACCC also considers that a PTSP's legitimate business interests needs to be balanced against a number of other subclause 5(3) matters, including other specific interests that the ACCC is required to consider. Unlike the examples of overlap noted above (subclauses 5(3)(c) and 5(3)(d); 5(3)(d), 5(3)(f) and 5(3)(g)), the ACCC does not consider that these

interests will always be aligned while the ACCC must have regard to each of the matters contained at subclause 5(3), and the ACCC's ultimate assessment includes a balancing of these interests.

For example, the ACCC considers that the legitimate business interests of the PTSP (subclause 5(3)(a)) will not necessarily align with the public interest in having competition in markets (subclause 5(3)(b)) and the interests of exporters who may require access to port terminal services (subclause 5(3)(d)), if the PTSP is not subject to sufficient competition in the provision of port terminal services.

(a) the legitimate business interests of the PTSP

In deciding whether to exempt a PTSP, subclause 5(3)(a) of the Code requires the ACCC to have regard to the PTSP's legitimate business interests.

Relevant submissions by T-Ports

In its exemption application T-Ports submitted that:

Parts 3 – 6 of the Code are onerous, and compliance with their obligations would add significant cost and complexity to T-Ports' operation, which are start-up in nature having experienced only three years of operation at Lucky Bay with yet to be proven operations at Wallaroo.

It is in T-Ports' legitimate business interest to prove the ongoing commercial viability of the business against significantly larger competitors, and this involves efforts to reduce its operating cost base including regulatory compliance costs to ensure a sustainable business model.³⁶

ACCC consideration

The ACCC generally expects that a PTSP's business interests will include reducing costs and operational constraints. The ACCC considers that an exemption will be in a PTSP's legitimate business interests where there are sound reasons why it is not necessary for the PTSP to be subject to all the Code's obligations. For example, obligations in the Code intended to prevent a PTSP exercising market power may not be necessary where competition otherwise provides a sufficient constraint.

The ACCC recognises that regulation imposes costs, both direct and indirect, on the regulated business. To the extent that compliance with the obligations under Parts 3 to 6 of the Code results in such costs, the ACCC considers that this is appropriate to the extent necessary to ensure that the Code's purpose is achieved (that is, ensuring that exporters of bulk wheat have fair and transparent access to port terminal services).

The ACCC is generally not in a position to assess the direct (or indirect) costs Parts 3 to 6 of the Code imposes upon PTSPs. The ACCC notes that T-Ports did not submit specific estimates in its exemption application in relation to its Wallaroo facility.

In relation to the direct costs of the Code, the ACCC accepts that the costs of compliance with the full Code are likely significant and that exemption from Parts 3 to 6 of the Code would substantially reduce a PTSP's direct compliance costs. The Department of Agriculture, Fisheries and Forestry³⁷ provided estimates on direct compliance costs prior to the commencement of the Code, as follows:

³⁶ T-Ports Pty Ltd, *Wallaroo Port – Application for exemption from Parts 3 – 6 of the Port Terminal Access (Bulk Wheat) Code of Conduct*, 4 November 2022, p. 5.

³⁷ Then the Department of Agriculture and Water Resources.

The mandatory code at its introduction was estimated to impose a lower direct cost of \$360,000 per year for operators subject to the full provision of the Code and only \$20,000 per year for exempt operators.³⁸

In addition to direct costs, the ACCC acknowledges that Parts 3 to 6 of the Code also have the potential to reduce a PTSP's flexibility to respond to its customers, imposing indirect costs. Increased operational flexibility also has the potential to benefit other parties, particularly exporters, in circumstances where exporters are able to secure fair and transparent access to port terminal services.

The ACCC also notes that the impact of compliance costs may be more significant for certain PTSPs (such as those with small scale or single facility operations), given the potential for compliance costs to be proportionately higher compared to other costs and revenues.

ACCC view

The ACCC considers that T-Ports' business interests include reducing costs and operational constraints.

As an exempt service provider, it is expected that T-Ports could engage more freely in commercial negotiations with exporters and offer tailored access agreements. It would also face reduced direct and indirect Code-compliance costs, largely due to having greater flexibility in how it provides its services.³⁹

As T-Ports will have strong competition-based incentives to provide exporters fair and transparent access to its services at its Wallaroo facility (which are not expected to be impacted by exempting T-Ports at its Wallaroo facility) the ACCC considers that increased operational flexibility and reductions in Code-related compliance costs will be in T-Ports' legitimate business interests.

However, in reaching its final decision, the ACCC considers that T-Ports' legitimate business interests must be balanced against the other matters the ACCC must have regard to in subclause 5(3) of the Code.

(b) the public interest, including the public interest in having competition in markets; and (g) the promotion of competition in upstream and downstream markets

In deciding whether to exempt a PTSP, subclause 5(3)(b) requires the ACCC to consider the public interest, including the public interest in having competition in markets, and subclause 5(3)(g) requires the ACCC to consider the promotion of competition in upstream and downstream markets.

Relevant submissions by T-Ports

In its exemption application T-Ports submitted that:

T-Ports Wallaroo facility will compete for grain in the overlapping grain catchment areas of the Yorke Peninsula, Mid and Upper North regions with Viterra's Wallaroo, Port Giles and Port Adelaide facilities, ADM's Port Pirie facility, Cargill's Port Adelaide Inner Harbor facility and Semaphore's Osborne facility.

³⁸ AEGIC, *Australia's grain supply chains – costs, risks and opportunities*, October 2018, p. 35.

³⁹ In considering issues relating to operational flexibility, the ACCC notes that: T-Ports' intends to use the same TSV at its Wallaroo and its Lucky Bay facilities; and T-Ports is an exempt service provider of port terminal services in relation to its Lucky Bay facility.

With regards to impact on competition in upstream and downstream markets, T-Ports is not vertically integrated and does not have any ownership interests in road or rail freight companies. Further, T-Ports is unable to receive grain via rail services at its Wallaroo facility and will own only 260,000 tonnes of upcountry storage.

T-Ports entering the market should promote competition in the upcountry storage market and the transport market by establishing a new export pathway, which gives potential storage and transport providers more options to deliver grain.⁴⁰

and

T-Ports is not an exporter, nor is it an associated entity of an exporter. Grain handling and loading services are offered to grain traders and exporters. As a privately owned investment company T-Ports does not benefit from vertical integration.⁴¹

ACCC consideration

Competition in relevant markets for bulk grain export port terminal services

The ACCC considers that competition in relevant markets for bulk grain export port terminal services can be promoted by:

- applying Parts 3 to 6 of the Code to PTSPs that are not subject to a level of competitive constraint which provides them with incentives to provide exporters fair and transparent access to their services (that is, using regulation to ensure that a range of exporters are able to access services fairly and transparently)
- removing the application of Parts 3 to 6 of the Code to PTSPs that are subject to a level of competitive constraint which provides them with incentives to provide exporters fair and transparent access to their services.

As noted in Chapter 2 the ACCC's view is that T-Ports will be subject to a high level of overall competitive constraint from other providers of bulk grain export port terminal services (primarily from Viterra's Wallaroo facility, and to a lesser extent Viterra's Port Giles facility, ADM's Port Pirie facility, and PTSP facilities at Port Adelaide). This will provide it with strong competition-based incentives to provide exporters with fair and transparent access to services at its Wallaroo facility. Such incentives are not expected to be impacted by exempting T-Ports in relation to its Wallaroo facility.

The ACCC considers that exempting a PTSP from having to comply with Parts 3 to 6 of the Code in circumstances where it has strong competition-based incentives to provide exporters with fair and transparent access to services has the potential to increase competition in the market for bulk grain export port terminal services. For example, an exemption may positively impact the number and nature of exporters that are able to participate in the catchment area. Additional operational flexibility would also likely be valued by exporters.⁴²

As such, the ACCC's view is that granting T-Ports an exemption may promote competition in the market for bulk grain export port terminal services in the Wallaroo catchment area. The ACCC notes that services that will be provided by T-Ports at its Wallaroo facility will represent a significant additional export pathway in the catchment area.⁴³

⁴⁰ T-Ports Pty Ltd, *Wallaroo Port - Application for exemption from Parts 3 - 6 of the Port Terminal Access (Bulk Wheat) Code of Conduct*, 4 November 2022, p. 5.

⁴¹ *Ibid*, p. 6.

⁴² In considering issues relating to operational flexibility, the ACCC notes that: T-Ports' intends to use the same TSV at its Wallaroo and its Lucky Bay facilities; and T-Ports is an exempt service provider of port terminal services in relation to its Lucky Bay facility.

⁴³ The ACCC also notes that, as discussed further below, T-Ports is not an exporter or an associated entity of an exporter.

Competition in upstream and downstream markets

The ACCC considers that promoting competition in markets for bulk grain export port terminal services may also promote competition in upstream and downstream markets. For example, the presence of a range of competing PTSPs (including non-vertically PTSPs), an increase in the number of exporters seeking bulk grain export port terminal services, or an increase in demand for these services, may increase the demand for goods and services in upstream and downstream markets (such as the grain acquisition market, markets for grain storage and handling and grain transportation services) and may also increase opportunities for parties to compete in these markets.

As noted above, the ACCC's view is that exempting T-Ports in relation to its Wallaroo facility would likely promote exporter participation in the Wallaroo catchment area. Accordingly, the ACCC also considers that exempting T-Ports may promote competition in upstream and downstream markets

ACCC view

The ACCC's view is that:

- exempting a new entrant PTSP in the Wallaroo catchment area would likely promote competition between PTSPs and would likely also promote exporter participation in the market for bulk grain export port terminal services in the Wallaroo catchment area.
- Promoting competition between PTSPs and exporter participation in the Wallaroo catchment area is in the public interest, including the public interest in having competition in markets. This may promote competition in upstream and downstream markets.

(c) the interests of exporters who may require access to port terminal services

Subclause 5(3)(c) requires the ACCC to consider the interests of exporters who may require access to port terminal services in deciding whether to exempt a PTSP.

The ACCC generally considers that an exemption will not be detrimental to the interests of exporters if they are likely to be able to access port terminal services on a fair and transparent basis (and therefore compete on their relative merits).

Relevant submissions by T-Ports

In its exemption application T-Ports submitted that:

T-Ports is not vertically integrated and therefore does not have incentives to discriminate or favour itself as an exporter or an associated entity exporter. As such, exporters are able to access port terminal services on a fair and transparent basis.

Granting an exemption will not adversely affect exporters. On the contrary, it is in their interests as exemption helps ensure that T-Ports can offer a viable alternative to the incumbent Viterra operations at Wallaroo and Port Giles on the Yorke Peninsula, and compete with the exempt Viterra, ADM, Cargill & Semaphore operations in the Upper North & Mid North catchment areas.

The continuation of another export pathway for SA grain is a positive development for exporters and growers. Further, the presence of an additional pathway may also alleviate potential constraints at alternate facilities.⁴⁴

⁴⁴ T-Ports Pty Ltd, *Wallaroo Port – Application for exemption from Parts 3 – 6 of the Port Terminal Access (Bulk Wheat) Code of Conduct*, 4 November 2022, p. 5.

T-Ports also submitted that:

We anticipate the grain trade customers currently operating out of Lucky Bay will also participate at T-Ports Wallaroo, although note ADM's export operations at Port Pirie and Cargill's export operations at Inner Harbour, Port Adelaide may temper their level of participation.⁴⁵

ACCC consideration

The ACCC considers that the obligations in Parts 3 to 6 of the Code seek to create certainty over how PTSPs provide their port terminal services. However these obligations can restrict a PTSPs operational flexibility in certain ways. For example, non-exempt PTSPs are required to, among other things:

- have a port loading protocol that includes a capacity allocation system,
- manage demand for port terminal services in accordance with that port loading protocol (and capacity allocation system)
- if the PTSP proposes to allocate capacity more than 6 months in advance, have its capacity allocation system (and any subsequent variations) approved by the ACCC.

The ACCC considers that where a PTSP is not subject to a level of competition that provides it with incentives to provide exporters with fair and transparent access to its services (or constrains its ability to discriminate in favour of itself or an associated entity), the application of the obligations in Parts 3 to 6 are required to provide certainty over the fairness and transparency of access provided by that PTSP. In these circumstances the ACCC considers that, to the extent the obligations in Parts 3 to 6 restrict a PTSP's operational flexibility, this is necessary to ensure that the Code's purpose of ensuring that exporters of bulk wheat have fair and transparent access to port terminal services is promoted. In these circumstances the ACCC considers that the application of Parts 3 to 6 of the Code to a PTSP is in the interests of exporters who may require access to port terminal services.

On the other hand, where a PTSP is subject to a level of competitive constraint that provides it with incentives to provide exporters with fair and transparent access to its services, the ACCC considers that the application of Parts 3 to 6 to the PTSP may be unnecessary. In these circumstances the ACCC considers that restrictions on a PTSP's operational flexibility would not be in the interests of exporters of bulk wheat.

ACCC view

As noted in Section 2, the ACCC's view is that overall T-Ports will be subject to a high level of competitive constraint and will have strong incentives to provide exporters fair and transparent access to port terminal services at its Wallaroo facility.

As T-Ports will be subject to a high level of competitive constraint, the ACCC considers it likely that the greater operational flexibility and reduced compliance costs associated with an exemption will benefit exporters through more competitive service offerings.⁴⁶

An exemption is therefore likely to be in the interests of exporters who may require access to port terminal services.

⁴⁵ T-Ports Pty Ltd, *Wallaroo Port – Application for exemption from Parts 3 – 6 of the Port Terminal Access (Bulk Wheat) Code of Conduct*, 4 November 2022, p. 4.

⁴⁶ In considering issues relating to operational flexibility, the ACCC notes that: T-Ports' intends to use the same TSV at its Wallaroo and its Lucky Bay facilities; and T-Ports is an exempt service provider of port terminal services in relation to its Lucky Bay 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) of the Code requires the ACCC to consider the likelihood that exporters of bulk wheat will have fair and transparent access to port terminal services.

Relevant submissions by T-Ports

In its exemption application T-Ports submitted that:

As a new entrant in port terminal services that does not benefit from vertical integration, T-Ports is incentivised to provide fair and transparent access to seek throughput and attract customers and therefore does not have incentives to discriminate or hinder access to third party exporters.⁴⁷

ACCC consideration

The ACCC considers the following to be key considerations in the assessment of the likelihood that exports will have fair and transparent access to port terminal services:

- the level of competitive constraint a PTSP is subject to; and
- whether the PTSP is an exporter or the associated entity of an exporter.

The ACCC considers that, in circumstances where a PTSP is subject to a high level of competitive constraint, it will have strong incentives to provide exporters fair and transparent access to its services without Parts 3 to 6 of the Code applying.

Where a PTSP has strong competition-based incentives, the ACCC considers that granting a PTSP an exemption is unlikely to reduce the likelihood that exporters of bulk wheat will have fair and transparent access to port terminal services.

As set out in Section 2 the ACCC's view is that overall T-Ports will be subject to a high level of competitive constraint and that this provides it with strong incentives to provide exporters with fair and transparent access to its services at its Wallaroo facility.

The ACCC considers that this competitive constraint is primarily the result of the presence of other bulk grain export port terminal service providers (in particular Viterra's Wallaroo facility, and to a lesser extent facilities at Port Giles, Port Pirie, and Port Adelaide).

As set out below in relation to subclause 5(3)(e) the ACCC understands that T-Ports is not an exporter or an associated entity of an exporter. It is therefore unlikely to be incentivised to (or be in a position to) discriminate in favour of itself (or an associated entity) in the course of providing bulk grain export port terminal services at its Wallaroo facility.

ACCC view

Exempting T-Ports in relation to its Wallaroo facility is unlikely to reduce the likelihood that exporters of bulk wheat will have fair and transparent access to port terminal services.

The ACCC's view reflects that:

- T-Ports will be subject to a high level of competitive constraint which provides it with strong incentives to provide exporters with fair and transparent access to its services at this facility, and

⁴⁷ T-Ports Pty Ltd, *Wallaroo Port - Application for exemption from Parts 3 - 6 of the Port Terminal Access (Bulk Wheat) Code of Conduct*, 4 November 2022, p. 6.

- the ACCC's understanding that T-Ports is not an exporter or an associated entity of an exporter.

(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.

Relevant submissions by T-Ports

In its exemption application T-Ports submitted that:

T-Ports would consider further investment in these operations, in response to customer demand. However, it would only be operationally and commercially efficient to do so if the operating costs of business, including compliance costs, were maintained at reasonable levels.⁴⁸

and

A reduction in the level of regulation will enable T-Ports to respond to its customers' needs more adeptly, innovate with its customers and open up competition to provide an additional efficient export pathway for customers.

T-Ports faces a substantial level of competition from Viterro at Wallaroo, as well as broader competition from Viterro at Port Giles and Port Adelaide, and ADM at Port Pirie to drive efficient operation of its port terminal facility.⁴⁹

ACCC consideration

The ACCC considers that exempting a PTSP in circumstances where it has strong competition-based incentives has the potential to promote the efficient operation of the relevant facility.

Efficient investment decisions are generally expected to occur in circumstances where adequate competition is present, or where there is sufficient regulatory intervention to ameliorate the absence of competition

As T-Ports has strong incentives to provide exporters with fair and transparent access to services at its Wallaroo facility absent the application of Parts 3 to 6 of the Code, the ACCC considers the application of these obligations may be unnecessary.

Avoiding the application of unnecessary regulation in these circumstances is likely to promote the efficient use of T-Ports' Wallaroo facility (as T-Ports would be able to operate the facility with increased operational flexibility and lower regulatory costs). This will likely result in improved (i.e., more competitive) service offerings to being made to exporters.

The ACCC considers that avoiding the application of unnecessary regulation in these circumstances may also encourage T-Ports to make efficient investments in its port terminal

⁴⁸ T-Ports Pty Ltd, *Wallaroo Port - Application for exemption from Parts 3 - 6 of the Port Terminal Access (Bulk Wheat) Code of Conduct*, 4 November 2022, p. 6.

⁴⁹ T-Ports Pty Ltd, *Wallaroo Port - Application for exemption from Parts 3 - 6 of the Port Terminal Access (Bulk Wheat) Code of Conduct*, 4 November 2022, p. 6.

facilities.⁵⁰ This is because a PTSP may be more inclined to invest in (existing or new) port terminal facilities it has a greater level of operational control over. The ACCC considers that exempting PTSPs that are subject to a high level of competitive constraint may also promote efficient investment in port terminal facilities more broadly.

ACCC view

T-Ports has strong competition-based incentives to provide exporters with fair and transparent access to services at its Wallaroo facility, and to provide the benefits of increased flexibility to exporters. The ACCC therefore considers that an exemption:

- would likely promote the efficient operation and use of T-Ports' Wallaroo port terminal facility; and
- may promote efficient investment in T-Ports' port terminal facilities and port terminal facilities more broadly through the elimination of unnecessary regulatory burden.

(h) whether the PTSP is an exporter or an associated entity of an exporter

In deciding whether to exempt a PTSP subclause 5(3)(h) requires the ACCC to consider whether the PTSP is an exporter or an associated entity of an exporter.

The ACCC considers that where a PTSP is also an exporter or the associated entity of an exporter, that PTSP likely has incentives to discriminate in favour of itself or the associated entity in the course of providing bulk grain export port terminal services. However, sufficient competitive constraints can limit a PTSPs ability to discriminate, whether or not it is an associated entity of an exporter, or for other reasons.

Relevant submissions by T-Ports

In its exemption application T-Ports submitted that:

T-Ports is not an exporter, nor is it an associated entity of an exporter. Grain handling and loading services are offered to grain traders and exporters. As a privately owned investment company T-Ports does not benefit from vertical integration.⁵¹

ACCC view

The ACCC understands that T-Ports is not an exporter or an associated entity of an exporter.

T-Ports will therefore be unlikely to be incentivised to (or be in a position to) discriminate in favour of itself (or an associated entity) in the course of providing bulk grain export port terminal services at its Wallaroo facility.

(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 facility concerned.

⁵⁰ In considering investment at T-Ports' facilities the ACCC notes T-Ports' intention to use the same TSV at its Wallaroo facility as is currently in use at its Lucky Bay facility.

⁵¹ T-Ports Pty Ltd, *Wallaroo Port - Application for exemption from Parts 3 - 6 of the Port Terminal Access (Bulk Wheat) Code of Conduct*, 4 November 2022, p. 6.

The ACCC generally considers that where a PTSP is competing with an exempt service provider within a grain catchment area, this supports the PTSP's case for exemption.

The ACCC considers that in circumstances where:

- a PTSP is not subject to a level of competitive constraint that provides it with incentives to provide exporters with fair and transparent access to its services, it may be appropriate that Parts 3 to 6 of the Code apply to the PTSP despite the presence of competing exempt PTSPs in the relevant grain catchment area.
- a PTSP has competition-based incentives to provide exporters with fair and transparent access to its services, the presence of exempt service providers in the relevant grain catchment area will support the case for the PTSP's exemption.

The ACCC generally considers that having different regulatory arrangements apply across PTSPs that have similar incentives to provide exporters fair and transparent access to their services may lead to distortions in competition and efficiency.

The ACCC considers this matter on a case-by-case basis, taking into account the full extent of competitive constraint operating on each facility.

ACCC view

Viterra is not an exempt service provider in relation to its Wallaroo facility (which is located close to, and has largely the same catchment area as, T-Ports' Wallaroo facility) or in relation to its Port Giles facility (which likely competes for grain located on the Yorke Peninsula).

However, there are a number of exempt service providers that may compete for grain located within certain parts of the Wallaroo catchment area:

- Viterra's, Semaphore's, and Cargill's facilities at Port Adelaide; and
- ADM Port Pirie.⁵²

The ACCC's view that T-Ports will be subject to a high overall level of competitive constraint and will have strong incentives to provide fair and transparent access to exporters at its Wallaroo facility. Accordingly, the presence of exempt facilities that may compete for grain located within certain parts of T-Ports' Wallaroo facility's catchment area supports the case for exemption.

(j) any other matters the ACCC considers relevant

The ACCC does not consider there to be any other matters relevant to this assessment.

4. Draft determination for T-Ports' Wallaroo facility

The ACCC's draft determination is that T-Ports should be determined by the ACCC as an exempt service provider of port terminal services provided by means of its port terminal facility at Wallaroo.

⁵² While PTSPs at Port Adelaide may compete for grain in part of T-Ports' Wallaroo's catchment area, they do not reside within it.