



Prepared for:

Viterra Operations Pty Limited

Charles River Associates Report on the Benefits of Code Exemption for Viterra Grain Export Terminals

Prepared by:

Chris Pleatsikas
Andy Baziliauskas
Charles River Associates

Date: November 7, 2019

TABLE OF CONTENTS

EXECUTIVE SUMMARY	1
1. THE EVOLUTION OF REGULATIONS AND THE GRAIN SUPPLY CHAIN IN SOUTH AUSTRALIA.....	4
1.1. THE REGULATORY ENVIRONMENT, 2008-PRESENT	4
1.2. THE ACCC'S PREVIOUS REVIEWS OF VITERRA'S CAPACITY ALLOCATION PROTOCOLS.....	6
2. THE EVOLUTION OF THE GRAIN SUPPLY CHAIN IN SOUTH AUSTRALIA	8
2.1. GRAIN EXPORT MARKET.....	8
2.2. GRAIN SUPPLY CHAIN	9
2.2.1. Producers.....	9
2.2.2. Marketers	11
2.2.3. Export Terminals.....	11
3. VITERRA HAS NO INCENTIVE TO DENY ACCESS TO COMPETING EXPORTERS.....	15
3.1. ALTERNATIVES TO VITERRA TERMINALS FOR PRODUCERS AND EXPORTERS	16
3.1.1. Competing Terminals in South Australia	16
3.1.2. Costs of Entry and Capacity Expansion.....	17
3.1.3. Competition from Port Terminals in Other States	18
3.2. SUBSTANTIAL COSTS OF DENIAL OF ACCESS TO VITERRA TERMINALS.....	19
3.3. VERTICAL ARITHMETIC: COMPARING BENEFITS AND COSTS.....	19
3.4. VITERRA'S CURRENT TERMINAL PRICING DEMONSTRATES A LACK OF INCENTIVE TO DENY ACCESS TO GLENCORE AGRICULTURE'S COMPETITORS.....	22
4. BENEFITS OF EXEMPTION	23
4.1. ECONOMIC BENEFITS OF CONTRACTUAL FLEXIBILITY	23
4.2. VITERRA'S CURRENT CAPACITY ALLOCATION PROTOCOLS.....	24
4.3. CAPACITY ALLOCATION AT EXEMPT TERMINALS.....	26
4.4. LIKELY CHANGES TO VITERRA'S PROTOCOLS	26
4.5. BENEFITS OF CONTRACTUAL FLEXIBILITY	29
4.6. EXEMPTION WILL ALLOW FOR DE-FRAGMENTATION OF THE TRADING SEGMENT	29
5. SUMMARY AND CONCLUSIONS.....	31

EXECUTIVE SUMMARY

Since the elimination of the single desk arrangements for the Australian wheat industry in 2008, the Australian grain industry has undergone a substantial transformation. Producers¹ have become fewer, larger and more sophisticated; exporters have deepened their operations in Australia; and new port terminals have entered in South Australia and other States. As a direct consequence of these developments, grain markets—including any markets for export port terminal services—are much more competitive today compared with five or ten years ago. Viterra no longer has any significant market power in the supply of port terminal services, if it ever did, as producers and exporters can, and do, access export markets through competing export terminals in South Australia and Victoria.

These competing terminals have sufficient combined capacity to handle all competitor export volumes in South Australia. As a result, Viterra cannot deny access to exporters in order to allow Glencore Agriculture Pty Ltd (“**Glencore Agriculture**”) to monopolize any market for the purchase of grain from producers in South Australia.

The *Port Terminal Access (Bulk Wheat) Code of Conduct* (the “**Code**”) and the ACCC’s oversight of Viterra’s capacity allocation system (as set out in its Port Loading Protocols) harms producers, exporters and Viterra by limiting Viterra’s ability to allocate and price capacity at export terminals efficiently. Capacity allocation protocols used by exempt terminals, which are not subject to regulatory review and are therefore guided by market forces, typically feature longer-term capacity commitments by terminals and exporters, and more flexible terms, including pricing terms. We expect that Viterra would shift towards more commercially flexible allocation mechanisms such as those used at exempt terminals if its own terminals were not constrained by ACCC oversight.

This would be likely to result in capacity commitments of longer duration and possibly less capacity allocated to short term capacity (“**STC**”)—thereby incentivizing efficient investment and planning by both Viterra and exporters, and more efficient use of terminal capacity—and more timely adaptations to changing market conditions and exporter requirements. This would result in the use of more efficient pricing structures, which would reduce exporters’ costs and facilitate increased sales in export markets, including the development of niche demand for specialty grains. To maximize efficiency and benefit producers, Viterra and exporters need the flexibility to adapt to changes in market conditions without the delays and limitations caused by regulatory oversight.

Since grain port terminals in South Australia are competitive, regulatory oversight is unnecessary and therefore imposes costs without providing off-setting benefits.

When exercising its oversight over Viterra’s capacity allocation protocols, the ACCC has placed undue emphasis on ‘fair’ or ‘open’ access to terminal capacity for smaller exporters and potential entrants into the exporting business.

¹ We use the term “producers” synonymously with “growers” in this document.

This harms producers and provides artificial (or inefficient) benefits only to smaller exporters who obtain access to Viterra's terminals on terms, and for capacity allocations, that they would not obtain in a competitive allocation process. The result has been the fragmentation of the exporting sector in South Australia, which has seen a disproportionate amount of capacity reserved for smaller exporters and potential entrants.

The costs of export sector fragmentation to the grain industry—in addition to the costs resulting from limiting contract duration and flexibility—include the loss of economies of scale and scope that would otherwise be achievable by successful exporters. Larger exporters from South Australia have a smaller share of export volumes compared to other states, where terminals are exempt, which is likely the result of the ACCC artificially benefitting smaller, less efficient exporters through its oversight of the Code.

The ACCC appears to interpret its mandate under the Code as requiring that smaller exporters and entrants have fair and equal access to capacity at Viterra's port terminals, whether or not it is economically efficient, or cost-minimizing, to allocate scarce capacity to these exporters. This approach artificially supports smaller and less efficient exporters in the name of fairness and equal access, and encourages fragmentation of the exporting sector.

Competition regulation should not be used to protect smaller individual exporters regardless of whether they are efficient. The artificial support of inefficient exporters harms grain producers by preventing efficient contracting and the efficient configuration of the industry. It is also unnecessary, as smaller exporters will survive and flourish in an unregulated market if they are efficient and innovative.

The costs of ACCC oversight, in terms of inefficient capacity allocation practices and the fragmentation of the exporting sector, are ultimately borne by producers. The benefits of exemption will therefore ultimately flow to producers in South Australia.

Exporters of grain from Australia, including from South Australia, sell their grain into highly competitive world markets. The South Australian bulk grain industry is a price taker within the global market and, as a result, any increases in grain supply chain costs in South Australia cannot be passed through to purchasers in export markets. Accordingly, there is intense pressure for all suppliers within the supply chain to minimize costs, while maintaining product quality, since cost increases will be borne entirely by owners within the supply chain in South Australia. If the industry in South Australia is competitive—which we show it is—reductions in supply chain costs in South Australia will largely benefit producers in the form of higher prices for their products. Exemption of Viterra's port terminals from the Code will incentivize significant cost reductions and quality improvements at these terminals, and the beneficiaries will largely be producers, through competition by traders for their grains.

The market for the purchase of grain from producers in South Australia is competitive and will remain competitive if Viterra's terminals are exempted from the Code. The total capacity of existing competing terminals (or terminals to be operational in the very near future) in South Australia exceeds the volumes historically exported by exporters who compete with Glencore Agriculture. Proposed or planned new entry of bulk grain export terminals will further expand capacity available to competing exporters, with the costs of further entry or expansion of capacity at existing competing ports clearly not prohibitive.

Viterra does not have the ability or incentive to deny terminal access to competing exporters, as exporters could, and would, easily switch to competing terminals in South Australia and Victoria, and/or establish new facilities, if Viterra were to reduce the volume of capacity it allocated to competing exporters. Our modelling demonstrates that denial of access would only result in substantial profit loss for Viterra, with no offsetting benefit to Glencore Agriculture, as it would have no ability to reduce prices paid to producers in South Australia since it cannot limit competition from competing exporters. The market for the purchase of grain would therefore remain competitive upon exemption, and the benefits of exemption would be ultimately passed through to producers.

This report is structured as follows:

Section 1 provides an overview of the regulation of wheat port terminal services, including a timeline of changes in regulations.

Section 2 provides an overview of the South Australia grain supply chain and discusses how the supply chain has evolved since the elimination of the single desk.

Section 3 discusses the alternatives to Viterra's port terminals for producers and exporters in South Australia and explains that Viterra has no incentive to deny terminal access to competing exporters.

Section 4 discusses the benefits to producers, exporters, and other stakeholders arising from exemption of Viterra's port terminals from the Code.

Section 5 provides a summary and conclusions.

1. THE EVOLUTION OF REGULATIONS AND THE GRAIN SUPPLY CHAIN IN SOUTH AUSTRALIA

Since the 1990s, the Australian grain export industry has evolved from a single-desk model for wheat to a dynamic market with lively competition among both marketers and export terminal operators. This evolution has been driven by a series of regulatory changes that moved the market towards privatization and deregulation.

In 1999, the Australian Wheat Board (“**AWB**”) was privatized, becoming owned by growers, while still remaining the sole exporter of wheat in Australia. As a response to this change, the Wheat Export Authority (“**WEA**”) was established by government to regulate the industry. AWB had also been responsible for authorizing a sole Bulk Handling Authority (“**BHA**”) in each state for the purposes of handling and storage.² Each BHA was a state-owned monopoly or farmer-owned cooperative.³

Around the same time as AWB’s privatization, South Australia’s BHA, the South Australian Co-Operative Bulk Handling Limited (“**SACBH**”) company, was also undergoing structural changes. The SACBH was demutualized to form AusBulk and United Growers Holdings. These two entities eventually merged with ABB Grain Ltd. (the privatized Australian Barley Board).

It was only in 2009 that Viterra entered the market after its purchase of ABB Grain Ltd.

1.1. THE REGULATORY ENVIRONMENT, 2008-PRESENT

The single desk arrangements for bulk wheat exports in Australia ended with the *Wheat Export Marketing Act 2008* (“**WEMA**”). The new wheat export marketing arrangements introduced in 2008 required bulk wheat exporters in Australia to be accredited by Wheat Exports Australia, which was intended to promote competition in the purchase of wheat from growers and to provide protection to producers from default by exporters. In response to concerns that vertically integrated firms would deny access to their export terminals to competing exporters, an access test (which applied only to bulk wheat) was implemented. The access test, as laid out in the WEMA, stated the following:

A person passes the access test in relation to a port terminal service at a particular time if:

(a) at that time, there is in operation, under Division 6 of Part IIIA of the Competition and Consumer Act 2010, an access undertaking relating to the provision to wheat exporters of access to the port terminal service for purposes relating to the export of wheat; and

(b) the access undertaking obliges the person to comply, at that time, with the continuous disclosure rules in relation to the port terminal service (see subsection (4)); and

² U.S. Congress, Office of Technology Assessment. Grain Quality in International Trade: A Comparison of Major U.S. Competitors. February 1989. Page 121.

³ *Ibid.*, page 121.

(c) *at that time, the person complies with the continuous disclosure rules in relation to the port terminal service.*

The access undertaking required in the legislation is a document that sets out matters relevant to obtaining access to a particular service. These matters may include the terms and conditions on which the service provider will offer access, the price for the service, and dispute resolution processes in the event the parties cannot agree.⁴

Furthermore, the continuous disclosure rules in relation to a port terminal service required a person to make available on their website:

- (a) *a current statement setting out the person's policies and procedures for managing demand for the port terminal service (including the person's policies and procedures relating to the nomination and acceptance of ships to be loaded using the port terminal service); and*
- (b) *a current statement (a loading statement) setting out a unique slot reference number for each ship (a loading ship) scheduled to load grain using the port terminal service.*⁵

The legislation further stipulated that the loading statement sets out a series of 11 additional criteria for each loading ship. It also required that the loading statement be updated each business day and that the ACCC receives a copy of the information set out in the loading statement in a manner of form approved by the ACCC.⁶

By 2010, the Productivity Commission found that the benefits of the access test would diminish and that they could become costly in the long term.⁷ The Commission recommended that, from 1 October 2014, regulated access should rely on Part IIIA of the *Competition and Consumer Act 2010* (Cth) ("**CCA**"), with continuation of mandatory disclosure, supplemented by a voluntary code of conduct by all port terminal services operators.⁸ As the Commission suggested, the access test remained in place until 2014.

It was envisioned that access issues after 30 September 2014 would be governed by general competition law and that the Code, including the continuous disclosure requirements, should be voluntary. However, in 2012, the *Wheat Exporting Marketing Amendment Act* required a *mandatory* code of conduct—the current *Port Terminal Access (Bulk Wheat) Code of Conduct*—be implemented to replace the access test as there was still concern regarding the transition to a fully deregulated wheat industry. In summary, under the mandatory Code, a port terminal service provider is required to:⁹

⁴ ACCC, "National access regime under Part IIIA". Available at <https://www.accc.gov.au/regulated-infrastructure/about-regulated-infrastructure/acccs-role-in-regulated-infrastructure/national-access-regime-under-part-iiia>.

⁵ WEMA, Part 2, Division 9, Paragraphs 4 (a)-(b).

⁶ WEMA, Part 2, Division 9, Paragraphs 4 (d)-(e).

⁷ Wheat Export Marketing Arrangements: Productivity Commission Inquiry Report. No 51, 1 July 2010. Page 2. Herein referred to as the "Productivity Commission Report".

⁸ *Ibid.*, page 2.

⁹ Holman Fenwick Willan, *The Future of Australia's Wheat Export Market*. April 2012. Available at <https://www.hfw.com/Mandatory-code-of-conduct-Australian-bulk-wheat-Sept-2014>.

- deal in good faith with exporters;
- not discriminate in favor of itself or an associated entity in providing a port terminal service to an exporter or hinder an exporter's access to port terminal facilities;
- enter into an access agreement or into negotiations about the terms of an access agreement with an applicant exporter, subject to certain conditions being satisfied;
- have a port loading protocol, which includes an ACCC approved capacity allocation system, for each port terminal facility that it owns or operates; and
- comply with continuous disclosure rules.

The mandatory Code therefore had—and continues to have—a very similar flavor to the access test as it still requires terminal operators to enter into access agreements and abide by continuous disclosure rules, with only the latter of the two having been recommended by the Productivity Commission.

In the months leading up to the expiration of the access test, a draft Code was circulated that would have the mandatory Code automatically expire on 30 September 2019, five years after its implementation. By the time the final Code was circulated, there was no automatic expiry or repeal date included. Rather, the ACCC would exempt individual terminal operators on a case-by-case basis and only require the operator to comply with the publishing requirements of the Code. Mandated reviews of the Code are required, reflecting the government's commitment to deregulation and the evolving nature of Australia's bulk wheat exporting market.¹⁰

1.2. THE ACCC'S PREVIOUS REVIEWS OF VITERRA'S CAPACITY ALLOCATION PROTOCOLS

We have examined the ACCC's analyses of various terminals' Code exemption applications, and its review of Viterra's application to introduce long term agreements ("**LTAs**") for the allocation of capacity. It is clear from our review that the ACCC's primary concern with exemption from the Code and with allowing Viterra broader discretion to allocate terminal capacity among exporters, is that a Viterra unconstrained by regulation or oversight may use its discretion to reduce the amount of capacity that it allocates to competitors of Glencore Agriculture. The ACCC appears to believe that Viterra has the incentive to allocate more terminal capacity to Glencore Agriculture and less to competitors. In its review of Viterra's LTA application, the ACCC states:

*Viterra's proposed capacity allocation system gives priority access to capacity to larger exporters who seek more capacity at more ports or months in their applications. It is also relevant that, as a vertically-integrated port operator, Viterra will have the discretion and incentive to favour its own trading arm, Glencore, in any allocation.*¹¹

¹⁰ Australian Department of Agriculture, Regulation Impact Statement: Mandatory Code of Conduct for Grain Export Terminals. September 2014. Page 35.

¹¹ ACCC, Viterra application seeking capacity allocation system approval: Draft decision. 16 July 2015. Page 3. Herein referred to as the "ACCC Draft Decision 2015".

In summarizing its concerns with Viterra's LTA proposal, the ACCC stated that the Long Term Capacity ("LTC") allocation proposal "*preferences larger exporters (including Glencore Agriculture) to the potential detriment of smaller exporters*"¹² and raises "*potential concerns about the effects on upstream and downstream markets*".¹³ If Viterra allocates "LTC in a manner that favours only a few large exporters, this could force other exporters to exit the SA grain industry."¹⁴

Our analysis addresses concerns about the effect of exemption on the upstream market for the purchase of grain from producers in South Australia. Such effects are an appropriate focus of concern, although we demonstrate below that facts show that these concerns are unfounded. From the perspective of the economic efficiency of the Australian grain sector or the Australian economy as a whole, whether inefficient exporters may exit the industry in South Australia, or Viterra reduces the amount of capacity allocated to some inefficient exporters, is not relevant unless this can be shown to cause other harms, such as a reduction in competition that reduces the prices received by producers for their grain.

This is consistent with previous finding by Australian courts that the objective of the misuse of market power provisions of the Australian competition legislation (section 46 of the CCA) is to promote competition rather than the interests of particular persons or competitors. It is also consistent with the 2017 reforms to the CCA which also proceeded on the basis that the focus of the misuse of market power provisions is the competitive process, rather than protection of individual competitors. The Government's supplementary Explanatory Memorandum to the Bill that amended section 46 clarifies that the objective of this section "*is not to shield inefficient competitors from the natural effects of strong competition in a market*".¹⁵

This is the appropriate role of competition law, which seeks to promote economic welfare of Australians, rather than artificially encouraging the entry or maintenance of inefficient competitors at the expense of other stakeholders and the efficiency of the Australian economy more generally.

¹² *Ibid.*, page 45.

¹³ *Ibid.*, page 46.

¹⁴ *Ibid.*, page 46.

¹⁵ Commonwealth of Australia, Supplementary Explanatory Memorandum – Competition and Consumer Amendment (Misuse of Market Power) Bill 2016, page 9

2. THE EVOLUTION OF THE GRAIN SUPPLY CHAIN IN SOUTH AUSTRALIA

2.1. GRAIN EXPORT MARKET

Exporters of grain from Australia, including from South Australia, sell their grain into highly competitive world markets. According to the Essential Services Commission of South Australia (“**ESCOSA**”) “*South Australia is a relatively small player in the global market for bulk grain*” with a static presence on the global market, which:

“... largely reflects continued pressure from international low cost producers (Russia, Ukraine, and Argentina) that ensures South Australia has to remain competitive simply to retain market share”.¹⁶

ESCOSA reports that:

Globally, Viterra faces pressure to be efficient in outturning bulk wheat to vessels, and to keep fees as low as possible, while maintaining the quality at required specification. To do so, Viterra should focus on the efficiency of its whole supply chain, from receiving bulk grain upcountry to transporting it to port and then loading it onto vessels. Otherwise, Viterra risks losing business to interstate and overseas competitors.¹⁷

The South Australian bulk grain industry is a price taker within the global market and, as far as we are aware, there are no other export terminals in the world that are subject to as onerous regulations as apply in South Australia, including where the operator is vertically integrated.¹⁸

Increases in grain supply chain costs in South Australia therefore cannot be passed through to purchasers in export markets. Accordingly, there is intense pressure for all suppliers within the supply chain to minimize costs, while maintaining product quality, since cost increases will be borne entirely by owners within the supply chain in South Australia. Conversely, if the industry in South Australia is competitive—which we show below it is—reductions in supply chain costs in South Australia will largely flow through to producers in the form of higher prices for their products.

In Section 4 below, we explain that exemption of Viterra's port terminals from the Code will incentivize significant cost reductions and quality improvements at terminals, and the beneficiaries will largely be producers, through the mechanism of competition by traders for their grains.

¹⁶ ESCOSA, Inquiry into the South Australian bulk grain export supply chain costs: Final report. December 2018 (“ESCOSA Report”), page 15.

¹⁷ ESCOSA Report, page 42.

¹⁸ Globally, there is one port terminal in Russia subject to open access requirements. However, the port terminal operator is able to commercially negotiate agreements and is not subject to non-discrimination obligations.

2.2. GRAIN SUPPLY CHAIN

The supply chain for export and domestic grains consists of: 1) upcountry storage and handling; 2) freight transport to the port or the domestic buyer; and 3) export port services and ocean freight to a destination market. A grain producer will typically sell its grain directly to either an accumulator, exporter or to a domestic buyer. In the case of exports, an exporter pays the producer for grain delivered to an upcountry storage facility. The cost of freight to the upcountry storage location is generally borne by the producer, and the exporter generally pays the remainder of the logistics costs of delivering the product onto the ship for export (upcountry storage and handling, freight to port, and port terminal handling costs). In South Australia, exporters that use Viterra's storage infrastructure typically purchase logistics inputs (storage, freight to port, and port services) from Viterra through Viterra's Export Select product.

The return to the grain producer is the price received from the exporter, less production costs and freight to upcountry storage. The return to the exporter is the price received in the export market, less the price paid to the producer, in-country and port logistics costs (usually based on the Export Select service costs¹⁹), ocean freight costs (which may be paid by the export customer), and any other costs incurred. The maximum price that an exporter is willing to pay to a producer for its grain is the price received, or expected to be achieved in the export market, less in-country and port logistics costs, ocean freight costs, and any other costs. That is, the maximum price an exporter is willing to pay to the producer is the price that would make its profit, or net return, non-negative.

In a competitive market for the purchase of grain from producers, any increases or decreases in any other cost components or prices in export or domestic markets will affect the prices received by producers. For example, an increase in export prices will increase the prices paid to producers in a competitive market for the purchase of grain from producers by exporters. An increase in the price of terminal services, or an increase in freight costs resulting from transporting grain to a more distant terminal, will increase an exporter's costs and reduce the maximum price that the exporter will pay for a producer's grain. This may reduce the price received by producers, depending on the costs of other producers remaining in the market for the purchase of grain.

2.2.1. Producers

In 2017/2018, there were approximately 22,000 farms in Australia with at least 40 hectares sown to grains, oilseeds or pulses. Approximately 8,575 of these are in the Southern region (Victoria, South Australia, and Tasmania). The total number of grain farms in Australia has fallen by 34 percent since 2000/2001, and, since the elimination of the single desk in 2008/2009, the number of grain farms in Australia has fallen by about 5,400, or more than 19 percent. The number of grain farms in the Southern region has fallen by about 1,650 since 2008/2009, or about 16 percent.²⁰

¹⁹ While Export Select includes freight in a service bundle, freight services are also provided by independent entities.

²⁰ Figure 26, Australian Bureau of Agricultural and Resource Economics and Sciences ("ABARES"), Grain Farms. Available at <http://www.agriculture.gov.au/abares/research-topics/surveys/grains#table2>.

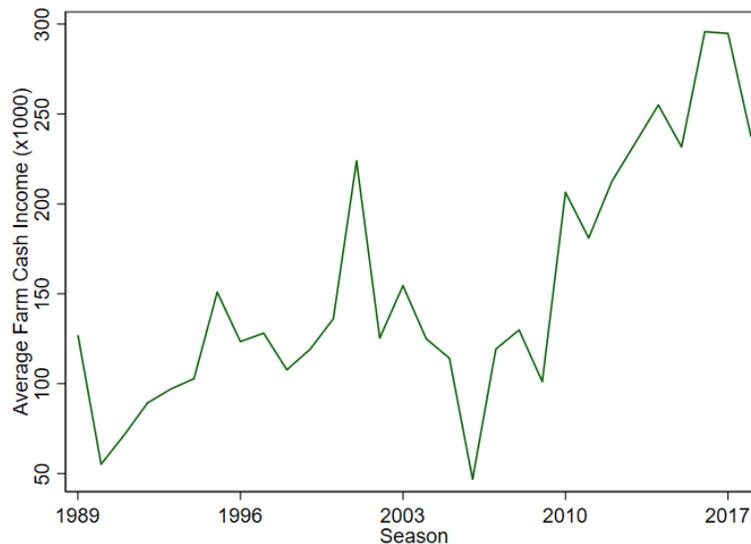
Farms have also become larger. The number of small grain farms in Australia with less than 600 hectares, which made up 67 percent of all grain farms in 2008/09, fell by more than 6,000 between 2008/2009 and 2017/2018, while the number of large farms with more than 2,400 hectares increased by 12 percent. Table 1 shows the change in distribution of grain farms in Australia between 2008/2009 and 2017/2018.²¹

**Table 1:
Number of Grain Farms in Australia, 2008/2009 and 2017/2018**

	<600ha	600-1,200ha	1,200-2,400ha	>2,400ha	Total
2008-09	18,772	3,825	3,148	2,100	27,845
2017-18	12,620	4,931	2,530	2,360	22,441
Change	-6,152	1,106	-618	260	-5,404
Change (%)	-33%	29%	-20%	12%	-19%

Average grain farm cash income has also been increasing, especially since the elimination of the single desk. As Figure 1 below shows, average cash income for grain farms varied around an average of about \$117,000 with no upward trend between 1989/1990 and 2008/2009, and then started trending upward, increasing substantially between 2008/2009 and 2017/2018—by about \$165,000, or 127 percent—before dropping slightly in 2018/2019.²²

**Figure 1:
Average Farm Cash Income, Grain Farms in Australia, 1989-90 to 2018-19**



In summary, grain farms in Australia, including the Southern region, have become fewer, larger, and more profitable since the elimination of the single desk in 2008. This suggests that producers as a whole have likely become more sophisticated and therefore better able to identify market opportunities and protect their interests through increased bargaining power in negotiations with exporters and traders.

²¹ *Ibid.*, Figure 31.

²² *Ibid.*, Figure 1.

2.2.2. Marketers

Traders/marketers purchase grain from producers (and from each other) for sale to domestic or foreign buyers and arrange transport between upcountry storage and buyers. There have been private traders in the domestic market for wheat since 1989, private traders in relation to non-bulk wheat exports since 1999, and private traders in the bulk wheat export segment since elimination of the single desk in 2008.²³ Table 3 below reports the shares of throughput through South Australia port terminals by exporter by season from 2011/2012 to 2017/2018.

Table 3:
Exporter Share of Throughput at South Australia Port Terminals

Exporter	2011/12	2012/13	2013/14	2014/15	2015/16	2016/17	2017/18
Glencore Agriculture	44%	45%	36%	30%	41%	42%	35%
CBH	6%	13%	13%	13%	14%	12%	12%
Cargill	20%	10%	12%	16%	7%	8%	6%
ADM	13%	11%	12%	6%	7%	8%	6%
Bunge	3%	5%	6%	3%	10%	5%	10%
Others	14%	16%	21%	31%	21%	24%	29%

Source: ACCC Bulk Grain Ports Monitoring Report, 2017-2018, Table 7.2.

The exporting sector in South Australia is more fragmented relative to other States where port terminals are exempt from the Code. Approximately 10 different bulk exporters exported grain through Viterra terminals in the 2018/2019 season. According to the Bulk Grain Ports Monitoring Report, exporters outside of the top five accounted for 29 percent of throughput at port terminals in South Australia in 2017/2018 and accounted for a higher proportion at Port Lincoln (42 percent).

The share of small exporters in other States is much lower than in South Australia. In Victoria, which accounted for about 12 percent of grain exports from Australia in 2017/2018, exporters outside of the top five accounted for only 15 percent of throughput in 2017/2018, and the top two accounted for 72 percent. In Western Australia, which accounted for 56 percent of exports from Australia in 2017/2018, exporters outside of the top five accounted for only 20 percent of throughput, with the top two accounting for 67 percent.

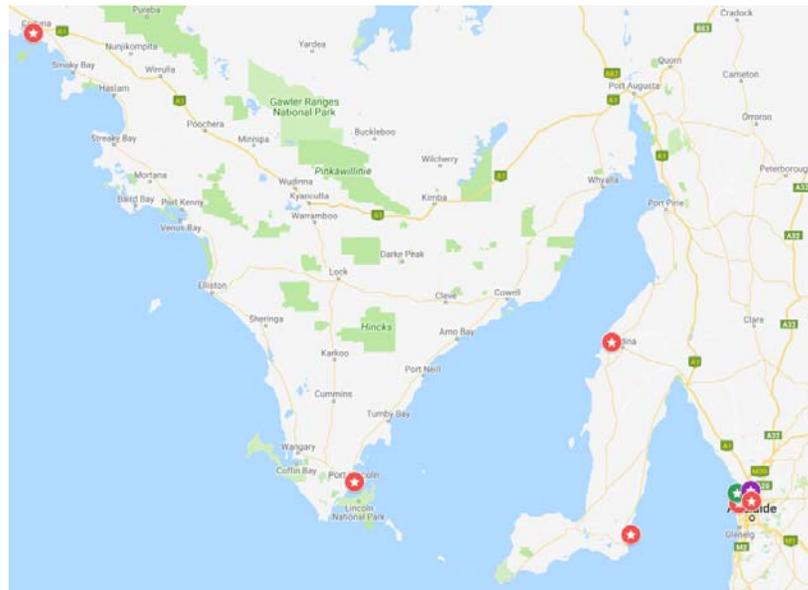
All (or virtually all) terminals in Western Australia and Victoria are exempt, and therefore the relatively low shares among small exporters in these States likely reflect, in part, the outcome in a market without regulatory requirements to allocate capacity to smaller exporters.

2.2.3. Export Terminals

Viterra owns and operates six grain export terminals in Australia, all of which are located in South Australia. Figure 3 maps the locations of bulk grain export terminals in South Australia, including the competitor terminals at Port Adelaide (LINX is represented by a green circle and Port Adelaide Semaphore is marked with a purple circle). Table 4 presents the total grain throughput for each of the existing Viterra and competitor terminals during the 2017/18 season. These competitor terminals are discussed in more detail below.

²³ Productivity Commission Report at pages 72-73.

**Figure 3:
Bulk Grain Export Terminals in South Australia**



**Table 4:
Throughput by Terminal, 2017/18**

Terminal	Throughput (mmt)	Share
Port Adelaide LINX	0.24	4.1%
Port Adelaide Semaphore	0.27	4.6%
Port Adelaide Viterra	2.35	40.0%
Port Giles Viterra	0.74	12.6%
Port Lincoln Viterra	1.58	26.9%
Thevenard Viterra	0.13	2.2%
Wallaroo Viterra	0.57	9.7%

Source: ACCC Bulk Grain Ports Monitoring Report, 2017-2018, p. 60.

There are currently two operating export terminals in South Australia owned and operated by competitors—LINX Port Adelaide and Semaphore Port Adelaide—and another terminal on the Eyre Peninsula—T-Ports' Lucky Bay terminal—which is expected to be operational for the 2019/2020 season.

LINX in Port Adelaide. LINX is a mobile loading facility established by Patrick in 2015 at Berth 29 at Port Adelaide Inner Harbour. This facility, which was exempted from the Code in October 2017, has been used for export by Cargill. In the 2015/2016 season, 192,000 tonnes were exported from this facility, while during the high harvest season of 2016/2017, about 420,000 tonnes were exported.²⁴ AEGIC indicated that the potential capacity of the LINX facility is about 1.5 million tonnes.²⁵ Information provided by Viterra

²⁴ ACCC Bulk Grain Ports Monitoring Report 2016-2017, page 57.

²⁵ AEGIC, Australia's grain supply chains: Costs, risks and opportunities. At page 32.

indicates that the maximum monthly capacity handled by LINX to date was 83,248 tonnes in June 2018. On an annualized basis, this represents almost 1 million tonnes.

Semaphore in Port Adelaide. Semaphore provides bulk out-loading services from Osborne Berth 1 at Port Adelaide. Semaphore commenced operations at Port Adelaide in 2016 and was exempted from the Code in July 2017. In its Code exemption submission to the ACCC, Semaphore indicated that it expects that the terminal can handle up to 220,000 tonnes per marketing season, but it intends to increase capacity through storage improvements, machinery enhancements, and other improvements.²⁶ Information provided by Viterra indicates that the highest monthly throughput to date at Semaphore was 68,336 tonnes. On an annualized basis, this represents 820,000 tonnes.

T-Ports at Lucky Bay on the Eyre Peninsula.²⁷ T-Ports expects to begin providing bulk grain export services at its terminal at Lucky Bay, on the Eyre Peninsula, from January 1, 2020. This terminal is located about 180 km (by road) northeast of Viterra's Port Lincoln terminal. The Lucky Bay terminal will use shallow draft Trans-Shipment Vessels ("TSV") which require only four metres of depth in the harbour terminal and can transfer grain to deep water vessels anchored in the Spencer Gulf. Extrapolating from a mean operational loading rate of 10,800 tonnes per day, across seven days a week for a full year,²⁸ the terminal has a maximum loading capacity of 3.6 million tonnes per year. T-Ports estimates that the Lucky Bay terminal has a freight cost advantage for local producers relative to Viterra's Port Lincoln and Thevenard terminals of up to \$15/tonne for several hundred kilometres around Lucky Bay. The investment cost for the Lucky Bay terminal was \$115 million.²⁹

As noted in Viterra's exemption application, there are three new export terminals that are also being proposed for South Australia:

- T-Ports has proposed a terminal at Wallaroo, which is expected to handle 350,000-500,000 tonnes of grain annually. This facility would provide direct competition to Viterra's terminal in Wallaroo.
- Free Eyre has proposed a new deep-water port facility capable of loading Panamax vessels at Port Spencer, which is about 70 kilometers north of Viterra's Port Lincoln terminal on the Spencer Gulf in the Eyre Peninsula. The total cost of this project was estimated to be \$140-180 million.³⁰ The expected capacity of this terminal is 1 million tonnes annually, with expected throughput of 800,000 tonnes.³¹ The State Government has granted major project status to this project.³²

²⁶ Semaphore Container Services Pty Ltd Application for Exemption from the Port Terminal (Bulk Wheat) Code of Conduct, May 2017, page 6.

²⁷ This project received feasibility study funding from the Eyre Peninsula Grain Growers Rail Fund.

²⁸ T-Ports Application for exemption from the Competition and Consumer (Industry Code - Port Terminal Access (Bulk Wheat)) Regulation 2014, page 2.

²⁹ Grain Central, "New South Australian terminal to export grain this year", 14 March 2018. Available at <https://www.graincentral.com/cropping/grains/new-south-australian-terminal-to-export-grain-this-year/>.

³⁰ Grain Central, "Deepwater port planned for SA's Eyre Peninsula", 5 June 2019. Available at <https://www.graincentral.com/logistics/deepwater-port-latest-development-planned-for-sas-eyre-peninsula/>.

³¹ Baker Young, "SA Infrastructure/Grain Port Opportunity, Capital Raising Term Sheet".

³² Eyre Peninsula Tribune, "Free Eyre secures Port Spencer land and major project status from Centrex", 5 June 2019. Available at: <https://www.eyretribune.com.au/story/6202471/port-land-settled/>.

- Emerald Grain and Eyre Peninsula Co-operative Bulk Handling have proposed a new facility at Cape Hardy on the Eyre Peninsula.³³ The Eyre Infrastructure Project (Iron Road) is listed as a priority project with a proposed delivery timeframe of 0-5 years in Infrastructure Australia's 2019 Infrastructure Priority List.³⁴

Further, since the exemption application, Archer Daniel Midlands ("**ADM**") is expected to commence bulk handling operations at Port Pirie in South Australia and is expected to export grain through Port Pirie by the end of 2019.³⁵

In addition to these new events in South Australia, several other new bulk grain export terminals have been recently constructed, or commenced operations, in Australia, including Riordan's terminals at Geelong and Portland, Queensland Bulk Terminals in Brisbane, Agri Terminal at Newcastle, WAPRES at Bunbury, and Quattro at Port Kembla.

The provision of port terminal services in South Australia has clearly become more competitive since the introduction of the Code. The entry of LINX and Semaphore at Port Adelaide and T-Ports in Lucky Bay provide options to exporters and producers that did not exist before. We explain in Section 4 that existing competing terminals in South Australia are likely to have sufficient capacity to handle all of the grain that has historically been shipped by exporters that compete with Glencore Agriculture, such that Viterra cannot harm competition for the purchase of grain by denying access to its port terminals.

Furthermore, we show in Section 4 that, based on historical capital costs for new grain export terminals, the cost of constructing a new terminal in South Australia is not prohibitive and the threat (or fact) of entry by new terminals disciplines any attempt by Glencore Agriculture to reduce prices to producers.

³³ Grain Central, "South Australian grain co-op signs up for port pact", 20 November 2017. Available at <https://www.graincentral.com/trade/south-australian-grain-co-op-signs-up-for-port-pact/>

³⁴ Infrastructure Australia, Infrastructure Priority List, September 2019. Available at: https://www.infrastructureaustralia.gov.au/sites/default/files/2019-09/infrastructure_priority_list_2019.pdf. Priority Projects are potential infrastructure solutions for which a full business case has been completed and has been positively assessed by the Infrastructure Australia Board.

³⁵ Transcript of Interview with Damien Bradford, National Accumulation Manager, ADM. October 16, 2019. See also "New Grain Option at Port Pirie", ADM, 17 September 2019. Available at <http://www.admgrain.com.au/news/details/new-grain-option-at-port-pirie>

3. VITERRA HAS NO INCENTIVE TO DENY ACCESS TO COMPETING EXPORTERS

The appropriate economic theory to assess whether Viterra has the ability and incentive to reduce the terminal capacity available to Glencore Agriculture's export competitors is "vertical foreclosure" – that is, the anticompetitive denial of access to an "essential" input to reduce competition in a downstream market.

The presumption underlying the economic rationale for the continued application of the Code is that Viterra has the incentive to deny terminal access to export competitors to Glencore Agriculture for anticompetitive purposes. The Code purportedly removes Viterra's ability to deny or reduce access by ensuring that its capacity allocation practices are non-discriminatory, and in particular by ensuring that Viterra does not exclude Glencore Agriculture's export competitors from terminal access. This section considers whether Glencore Agriculture in fact has an incentive to deny access to its terminals.³⁶

An analysis of foreclosure incentives assesses the effects of denying terminal access to competing exporters on the joint profits of Viterra and Glencore Agriculture. Denying access potentially causes benefits and costs to Viterra/Glencore Agriculture, and is profitable only if benefits exceed costs. Consequently, Viterra/Glencore Agriculture has the incentive to deny terminal access only if the benefits exceed the costs.

We begin with a discussion of the alternative exporting options that are available to exporters who purchase wheat from producers in South Australia. We then discuss the benefits and costs to Viterra from denying terminal access to competing exporters, in light of these alternatives for producers and exporters. We demonstrate that the benefits to Glencore Agriculture of denying access to Viterra's port terminals are extremely limited, if they exist at all. We also demonstrate that the costs to Viterra of denying access, in terms of lost gross margin on port terminal operations, are likely to be substantial.

The operation of port terminals involves significant fixed cost expenditures, and although we do not have specific information on Viterra's gross margins on terminal throughput, they are likely to be substantial in order to offset investment costs so as to allow Viterra to earn a competitive rate of return to capital on port terminal operations.

We show that, in a simple model of 'full' foreclosure (i.e. Viterra denies access to its port terminals to all competing exporters) using indicative but reasonable and very conservative input assumptions (i.e. assumptions that are likely biased towards finding that Viterra has an incentive to deny terminal access), the costs to Viterra from denying terminal access to competing exporters are likely to exceed benefits to Glencore Agriculture, such that denying access is not profitable for Viterra.

³⁶ As discussed below, we argue that Viterra already has the ability to foreclose by raising terminal fees to competitors, and the fact that it chooses not to do so demonstrates that it does not have the incentive.

Simply put, if Viterra denied terminal access to competing exporters, it would lose substantial gross margin on the significant volume of exporter volume that would switch to competing port terminals (and the domestic and containerized export markets). Since exporters would continue to compete with Glencore Agriculture for grain from South Australian producers, Glencore Agriculture could not materially reduce the producer price and as a result the benefits to Viterra/Glencore Agriculture from denial of terminal access would be minimal. The net effect on the combined profits of Viterra/Glencore Agriculture would therefore be negative.

The fact that Viterra has not denied access to its port terminals by increasing terminal fees to export competitors (which it could do, given that port terminal fees are not directly regulated) supports this, and shows that, in the absence of regulation, Viterra does not have an incentive to reduce or deny access.

3.1. ALTERNATIVES TO VITERRA TERMINALS FOR PRODUCERS AND EXPORTERS

We first assess the primary competitive alternatives to Viterra export terminals that are available to producers and exporters in South Australia. These consist of competing export terminals in South Australia that are already in operation or are soon to begin operating, and entry by new terminals, some of which are already planned or proposed. It is the extent to which producers and competing exporters can use these alternatives to Viterra terminals without being materially disadvantaged that will largely determine whether Viterra has the ability and incentive to deny access to its terminals to the advantage of Glencore Agriculture.

3.1.1. Competing Terminals in South Australia

As indicated above, the highest monthly throughput at the LINX and Semaphore terminals at Port Adelaide, on an annualized basis, is 1 million tonnes and 820,000 tonnes, respectively. However, actual maximum capacity is likely substantially higher than these figures. For example, as noted above, the ACCC has indicated that the potential capacity of the LINX facility is about 1.5 million tonnes.³⁷ The total volume of grain exported by competing exporters (i.e. not Glencore Agriculture) through all terminals in Port Adelaide (including Viterra's terminals, LINX, and Semaphore) in 2017/2018 is estimated to be 1.83 million tonnes.³⁸ Thus, the competing ports in Port Adelaide have sufficient capacity to handle virtually all of the grain exported by competing exporters in 2017/2018, even assuming that competing terminals' capacity is equal to their current maximum annualized throughput, which is a combined 1.82 million tonnes.

Furthermore, in the bumper harvest season of 2016/2017, when South Australia reached its highest year of bulk grain exports,³⁹ competing exporters exported an estimated 1.92 million tonnes through port terminals in Port Adelaide.⁴⁰ The maximum annualized capacity of 1.82 million tonnes at LINX and Semaphore in Port Adelaide would be sufficient to service 95% of these exports.

³⁷ AEGIC Report at page 32.

³⁸ Based on total tonnes exported and exporter market shares in the ACCC's Bulk Grain Ports Monitoring Report 2017-2018.

³⁹ ACCC Bulk Grain Ports Monitoring Report 2016-2017 at page 34.

⁴⁰ ACCC Bulk Grain Ports Monitoring Report 2017-2018. Estimated grain exports for Semaphore, LINX, and Viterra terminals at Port Adelaide are inferred from Figures 7.8-7.9. Glencore Agriculture export share is obtained from Table 7.3.

If we used instead the maximum capacity of 1.5 million tonnes for LINX cited by AEGIC, the capacity of competing terminals is more than 100 percent of the throughput of competing exporters, even in the bumper crop season of 2016/2017. As these terminals are located in Port Adelaide, the freight cost to these terminals is the same as to Viterra's terminals in Port Adelaide.

Total export throughput by competitors to Glencore Agriculture from terminals on the Eyre Peninsula (Viterra's Port Lincoln and Thevenard) was about 1.2 million tonnes in 2017/2018.⁴¹ If we very conservatively assume that Lucky Bay's capacity is "based on securing up to 600,000mt per annum,"⁴² then Lucky Bay can handle at least 50% of competitors' exports in 2017/2018. As noted above, however, the maximum loading capacity at T-Ports' Lucky Bay may be up to 3.6 million tonnes, which is more than enough capacity to handle competitor exports in 2017/2018 and also the bumper crop harvest in 2016/2017, when competing traders exported approximately 1.8 million tonnes of grain through Port Lincoln and Thevenard.⁴³

The total capacity of the competing terminals in South Australia could be up to 5.92 million tonnes (assuming 1.5 million tonnes for LINX, 800,000 tonnes for Semaphore, and 3.6 million tonnes for Lucky Bay). The total export volumes shipped by competing (non-Glencore Agriculture) exporters through terminals in South Australia was roughly 3.8 million tonnes in the 2017/2018 season and 4.6 million tonnes in 2016/2017.⁴⁴ Therefore, competing terminals have more than enough annual capacity to handle all the volume exported by competing exporters in 2016/2017 and 2017/2018.

As mentioned above, there are at least four new bulk grain export terminals (T-Ports at Wallaroo, Free Eyre at Port Spencer, the Cape Hardy terminal, and Port Pirie) in South Australia that have been proposed or are in the planning stages. These terminals would add more than 1.5 million tonnes of additional capacity that would be available to competitors.

3.1.2. Costs of Entry and Capacity Expansion

The information that is available to us suggests that entry of new terminals and expansion of capacity at existing terminals is feasible. Port terminals can be constructed, or capacity at existing terminals can be expanded, at sufficiently low cost. As such, even the threat of entry or expansion of port terminals eliminates any market power that Viterra might otherwise have in the supply of port terminal services and removes Viterra's incentive to deny access to its terminals for competing exporters. Exporters or producers—perhaps acting as a group to spread costs—can credibly threaten to sponsor entry or expansion at competing terminals if Viterra were to deny access to its terminals in order to reduce competition to Glencore Agriculture in the purchase of grain from producers in South Australia. This threat removes any incentive to deny access and does not require that additional capacity at competitor terminals actually be built.

⁴¹ ACCC Bulk Grain Ports Monitoring Report 2017-2018. Calculated based on port exports and exporter shares in Sections 7.2.4 and 7.2.6.

⁴² T-Ports Application for exemption from the Competition and Consumer (Industry Code - Port Terminal Access (Bulk Wheat)) Regulation 2014, page 2.

⁴³ ACCC Bulk Grain Ports Monitoring Report 2017-2018. Estimated grain exports at Port Lincoln and Thevenard are inferred from Figures 7.10 and 7.12. Glencore Agriculture export shares are obtained from Table 7.5 and 7.7.

⁴⁴ ACCC Bulk Grain Ports Monitoring Report 2017-2018. Calculated using exports and market shares reported or inferred from figures in Section 7.

Handling capacity at export terminals is largely determined by storage and logistics capacity and, in the case of T-Ports, the number of vessels that carry grain from the terminal to the ship. The cost to construct bunker storage is about \$24 to \$50 per tonne, depending on the type of construction, size, associated equipment and land. As noted above, T-Ports' Lucky Bay terminal uses TSVs to transfer grain from the terminal to deep water vessels, and it is our understanding that adding an extra TSV could theoretically double the shipping capacity at the Lucky Bay terminal, although some other supply chain constraints may limit available incremental capacity.

Mobile bulk loading plants are relatively inexpensive (relative to permanent infrastructure builds), can be moved from port to port or within ports as required, and do not require the construction of storage at port. Trucks provide the mobile storage capacity as they move grain from upcountry facilities to unload into the mobile ship loader hopper.

The available public information on the costs of construction of new entrant terminals also suggests that the sponsoring of new entry by producers, or more likely exporters, is a credible threat in response to a reduction in the producer price by Glencore Agriculture if it were to attempt to eliminate competition in the purchase of grain through denial of access to Viterra's terminals. Table 5 below shows the publicly reported construction cost and capacity for several new grain handling terminals in Australia. The last column is the estimated cost per tonne of capacity assuming that the terminal operates for twenty years (which is likely conservative as the lifespan of a terminal can be up to thirty years or more). Assuming that the construction and operating costs at port terminals in South Australia are similar to those at Viterra's port terminals, these costs per tonne of capacity provide rough proxies for the maximum producer price reduction that Glencore Agriculture could impose before triggering entry. That is, exporters could credibly threaten to construct, or sponsor the construction of, a new terminal rather than take price reductions in excess of the costs in this column.

This is a worst-case scenario, of course, since, as demonstrated above, existing new terminals in South Australia have sufficient capacity to handle competing exporter volumes in South Australia so that exporters would switch to these port terminals instead of incurring the costs of constructing new terminals.

**Table 5:
Costs of Construction for New Grain Terminals**

Owner	Location	Capacity (mt)	Construction Cost (millions)	Construction Cost per Tonne of Capacity (Over 20 Years)
Newcastle Agri Terminal	Carrington, NSW	1.5	\$28	\$0.93
Quattro	Port Kembla, NSW	1.3	\$75	\$2.88
T-Ports	Lucky Bay, SA	3.6	\$115	\$1.60

Sources: ABC News Australia and T-Ports News (for construction costs); T-Ports Application for exemption from the Code, Quattro Ports website, and ACCC Bulk Grain Ports Monitoring Report 2017/18 (for capacities).

3.1.3. Competition from Port Terminals in Other States

Existing competitor port terminals in South Australia (LINX and Semaphore in Port Adelaide, and T-Ports in Lucky Bay) are viable economic alternatives to Viterra's port terminals, and entry by new terminals in South Australia will provide additional close alternatives.

In addition, exporting through terminals in Victoria, namely terminals in Melbourne, Portland and Geelong, are alternatives for grain produced in South Australia, particularly in eastern South Australia near Port Adelaide and to the south and east, where the distance to terminals in Victoria is shorter and, as a result, the freight cost advantage of terminals in South Australia is lower.

Any attempt to reduce prices to producers near Port Adelaide will cause substantial substitution of volume towards ports in Victoria, which further reduces the incentive for Viterra to deny access to exporters that compete with Glencore Agriculture at its Port Adelaide terminals. The option of delivering wheat to domestic markets and containerized export terminals provides an additional constraint on Viterra pricing.

3.2. SUBSTANTIAL COSTS OF DENIAL OF ACCESS TO VITERRA TERMINALS

The loss to Viterra from denying terminal access to competing exporters is the gross margin lost on export volume that switches to other port terminals. Viterra's gross margins on exports through its terminals are used primarily to fund the substantial fixed costs of terminal operations. Absent specific data on Viterra gross margins attributable to grain exports, we assume that its margin is approximately 50 percent of revenue which, in our experience, is a reasonable assumption for a high fixed-cost industry. Given that, as set out below, terminal prices are in the \$20 per tonne range, a 50 percent gross margin represents \$10 per tonne. Based on the fact that Viterra's prices are not materially higher than prices at exempt terminals in Australia, and assuming that variable costs at Viterra port terminals are similar to variable costs at exempt terminals (which presumably compete with other terminals, otherwise they would not have been exempted from the Code), we consider that Viterra's gross margins represent a competitive rate of return on capital.

If Viterra were to deny access to its terminals, it would likely lose substantial terminal throughput, as exporters would likely retain their current producer customers and switch to exporting from competing terminals. Little, if any, producer volume would switch to Glencore Agriculture from competitors. This is because, as explained above, competing terminals in Port Adelaide and Lucky Bay on the Eyre Peninsula have more than enough capacity to handle competing exporter volumes, and terminal expansion and entry is viable if exporters increase their volumes substantially. However, in our model, we conservatively assume that only 60 percent of competing exporter volume switches to other terminals in the event that Viterra denies access to its port terminals.

3.3. VERTICAL ARITHMETIC: COMPARING BENEFITS AND COSTS

For our illustrative model of the profitability of denying terminal access to competing exporters, we make the following assumptions:

Pre-exemption:

- Glencore Agriculture and export competitors export through Viterra terminals. Based on 2017/2018 data, Glencore Agriculture exported approximately 2.1 million tonnes, and competing traders exported 3.3 million tonnes through Viterra terminals.
- As noted above, based on a hypothetical assumption of about 50 percent of revenues, we assume that Viterra earns a gross margin \$10 for each tonne exported by

Glencore Agriculture and its competitors through Viterra's terminals. This margin represents a contribution to the fixed costs of terminal operations,⁴⁵ and is likely to be in line with margins earned by exempt terminals. If Viterra were to deny competing exporters access to its terminals, it would likely also lose some contribution to profit on upcountry storage and logistics, as exporters and producers would switch to upcountry competitors, or use on-farm storage. Conservatively, we do not explicitly include such losses in our analysis.

- All of Glencore Agriculture's exports in South Australia are shipped through Viterra's terminals.
- Glencore Agriculture earns a margin of \$1.50/tonne on exports. This is in the middle of the range of the margin of \$1-\$2/tonne cited by ESCOSA.⁴⁶

If Viterra denied access to its terminals after exemption, we assume:

- Viterra denies Glencore Agriculture's competitors access to any capacity at its terminals. That is, only Glencore Agriculture is allowed to export through Viterra terminals.⁴⁷
- If Viterra denies access to its terminals to competitors, some proportion of competitors' exports is lost to Viterra (i.e. with those competitors switching to other terminals in South Australia or Victoria, and the containerized market). We assume that only 60 percent of Viterra's export volume switches to competing terminals (or the domestic or containerized markets), which is conservative.
- The competitor export volume that does not switch to other terminals (40 percent) is exported through Viterra terminals with Glencore Agriculture as the trader (i.e. 40 percent of competitor exports are exported through Viterra terminals, now by Glencore Agriculture).
- Viterra loses the terminal margin on the 60 percent of competitor exports that switches to other terminals. Viterra retains the terminal margin on the 40 percent of competitor exports that are now exported by Glencore Agriculture and are still exported through Viterra's terminals.
- Glencore Agriculture's trader margin increases by \$5 per tonne (because it reduces the price it pays to producers for their grain as a result of reduced competition from competing exporters). This is a very conservative assumption, as it represents a more than 300 percent increase to the exporter margin. Since competing exporters would continue to have sufficient access to export terminal capacity in South Australia even if they were denied access at Viterra terminals, we expect that they would continue to compete to purchase wheat from producers in South Australia as vigorously as they do today. The impact of access denial to Viterra terminals on producer prices would be minimal, if there would be an increase at all. A producer price reduction of

⁴⁵ The operation of port terminals involves significant fixed costs and an operator's gross margins are, therefore, likely to be substantial in order to offset investment costs to allow the operator to earn a competitive rate of return to capital on port terminal operations.

⁴⁶ ESCOSA Report at page 23.

⁴⁷ For simplicity of exposition, our model assumes that Viterra's only foreclosure option is to completely deny terminal access to competing exporters. We do not consider 'partial' denial of access whereby Viterra increases port terminal fees or reduces (but doesn't eliminate) competing exporter access to its port terminals. Viterra would not have an incentive to engage in a partial denial of access because—as in the case complete foreclosure—exporter switching to competing terminals would substantially reduce Viterra's profits with minimal benefit to Glencore Agriculture.

less than \$5 per tonne would make denial of access even less profitable to Viterra/Glencore than calculated in our illustrative model.

- Glencore Agriculture's profits increase from:
 - higher margins earned by Glencore Agriculture on its current export volumes; and
 - margin (after a \$5 per tonne increase) on export volume diverted to Glencore Agriculture from competing exporters.

The net change in Viterra/Glencore Agriculture profit is the loss in Viterra terminal profit plus the gain in Glencore Agriculture exporter profit. If the net change in profit is less than zero, any denial of access is not profitable for Viterra/Glencore Agriculture.

Table 6 shows that, under these assumptions, the loss in profit to Viterra (which is the result of lost margin on reduced terminal throughput as competing exporters switch their exports to other terminals) outweighs the gain in profit to Glencore Agriculture (from the diversion of exports from competing exporters and the increase in margin (conservatively assumed to be \$5 per tonne for this illustration) on existing and diverted export volumes), even without taking into account the lost contribution to Viterra's fixed costs for upcountry storage and logistics. Accordingly, Viterra is not incentivized to reduce competitor access to its port terminals, as this would cause it to suffer overall profit losses.

**Table 6:
Vertical Arithmetic Example**

Current (Pre-Exemption)	
Glencore Agriculture exports through Viterra terminals	2.1 mmt
Competing exports through Viterra terminals	3.3 mmt
Total Exports through Viterra terminals	5.4 mmt
Viterra terminal gross margin (per tonne)	\$10/tonne
Viterra terminal gross profit	\$54.0m
Glencore Agriculture exports (Glencore Agriculture exports only through Viterra terminals)	2.1 mmt
Glencore Agriculture export gross margin	\$1.50/tonne
Glencore Agriculture export gross profit	\$3.15m
TOTAL Viterra terminal + Glencore Agriculture export profit	\$57.15m
Post-Exemption (full foreclosure of Viterra terminals)	
% of competing exports that switch from Viterra terminals	60%
Tonnes switching to alternative terminals (60% x 3.3 mmt)	1.98 mmt
Viterra terminal gross profit lost (1.98 mmt x \$10/mt)	-\$19.8m
Export volume gained by Glencore Agriculture [(1 - 60%) x 3.3 mmt]	1.32 mmt
Glencore Agriculture gross margin after \$5/tonne increase (\$5 + \$1.50)	\$6.5m
Increase in Glencore Agriculture trader gross profit on diverted export volumes assuming increased margin (\$6.50 x 1.32 mmt)	\$8.58m
Increase in Glencore Agriculture profit on current export volumes (\$5/mt x 2.1 mmt)	\$10.5m
Total increase in Glencore Agriculture trading gross profit	\$19.08m
TOTAL change in Viterra + Glencore Agriculture gross profit	-\$0.72m (-1.3%)

3.4. VITERRA'S CURRENT TERMINAL PRICING DEMONSTRATES A LACK OF INCENTIVE TO DENY ACCESS TO GLENCORE AGRICULTURE'S COMPETITORS

Viterra could theoretically deny access to Glencore Agriculture's export competitors today, without exemption from the Code, by increasing terminal fees.⁴⁸ Such a fee increase would increase export competitors' costs, thereby making them less effective competitors for the purchase of grain from producers. Increasing terminal fees to competitors would reduce the maximum payment that they could profitably offer to producers, which would allow Glencore Agriculture to reduce the prices it offers to producers without losing volume. However, a comparison of terminal fees across Australia shows that Viterra has not increased fees relative to other terminals.

AEGIC reported fees for a sample of grain terminals in Australia, which showed that fees in Outer Harbor ("OHB") are not substantially higher than fees at other port terminals in the sample. These fees are presented in Table 7.

**Table 7:
Viterra Port Terminal Fees (OHB) Compared to Other Port Terminals (AEGIC)⁴⁹**

	CBH Kwinana	GrainCorp Port Kembla	Viterra OHB	Emerald Melbourne	Quattro Port Kembla	NAT Newcastle
Intake Fee		\$0.00 - \$2.04	\$3.40 - \$4.40	\$6.00 - \$8.00	\$4.00	\$5.00 - \$7.00
Vessel Nomination		\$8.00	\$5.50	\$8.00	\$8.00	\$8.00
Vessel Loading or Terminal Shipping	\$12.20	\$11.39	\$12.07 - \$14.65	\$7.50	\$7.60	\$5.00
Storage						\$1.00
Inspection	\$0.31	\$0.31	\$0.26	\$0.25	\$0.25	\$0.50
Storage						\$1.00
Miscellaneous Port/Wharf Fees	\$2.40	\$2.66	\$2.62	\$2.40	\$2.35	\$1.45
Dust and/or Shrink- age Factor	0.20%	0.30%	0.15%	0.00%	0.40%	0.20%
Dust Charge	\$0.50	\$0.75	\$0.38	\$0.00	\$1.00	\$0.50
Base Cost	\$15.41	\$23.11 - \$25.15	\$24.23 - \$28.11	\$24.15 - \$26.15	\$23.20	\$21.45 - \$23.45

Source: AEGIC

The fact that Viterra has the ability to disadvantage Glencore Agriculture's export competitors through higher port terminal fees, but does not do so, evidences that it does not have the incentive to disadvantage Glencore Agriculture's export competitors. This supports our conclusion, based on the benefits and costs to Viterra/Glencore Agriculture of denying access, that no such incentive exists.

⁴⁸ The Code prevents Viterra from discriminating against competing exporters by charging higher fees while maintaining lower fees for Glencore Agriculture. However, if Viterra increased fees to all exporters—including Glencore Agriculture—the higher revenues paid by Glencore Agriculture could be viewed as an internal transfer to the benefit of Viterra, so that the combined revenues of Viterra/Glencore Agriculture would be unchanged. An across-the-board terminal price increase would therefore amount to a higher cost of competing exporters only.

⁴⁹ AEGIC Report, Table 6.

4. BENEFITS OF EXEMPTION

The benefits to the industry of exemption are likely substantial and, as shown in Section 3, these benefits will not be offset by any risk of anticompetitive harm, which we show is minimal, if it exists at all.

As a preliminary matter, in exercising its oversight over Viterra's capacity allocation protocols, the ACCC has emphasized equal non-discriminatory access, especially for smaller exporters and potential new entrants. It is virtually universally agreed by antitrust enforcers and regulators that the appropriate focus of competition law and access regulation is the protection of competition, not individual competitors. By protecting individual competitors—in this case, smaller competing exporters and potential entrants who may not be efficient—the ACCC potentially harms producers of grain by preventing efficient contracting and the efficient configuration of the industry.

4.1. ECONOMIC BENEFITS OF CONTRACTUAL FLEXIBILITY

It is widely recognized among economists, regulators and global antitrust enforcers that contractual freedom and flexibility are important drivers of the efficient functioning of supply chains, and these freedoms should be restricted only in a very limited set of circumstances, such as when there is a clear risk that parties would exercise contractual freedom to harm competition by, for example, imposing anticompetitive vertical restraints. The reason for this extreme caution against interfering with contractual freedom is not only that this would reduce economic surplus to the upstream and downstream firms, but also that the benefits of efficient supply chains flow primarily to final consumers and input suppliers when markets are competitive.⁵⁰ The economic argument in favor of permitting contractual flexibility does not rely on the assumption that flexibility will always lead to efficient outcomes, but rather on the recognition that it is not possible to identify, with any degree of certainty, the conditions under which contractual flexibility will cause economic harm.

Buyers and sellers in competitive markets use a wide variety of contractual arrangements to efficiently allocate resources and maximize the value of the buyer-seller relationship. Depending on market circumstances, efficient contracts can commit the buyer or seller to the other party for a substantial period of time (long term contracts) and can include volume commitments by the buyer or seller and vertical restrictions (for example, exclusivity or tying arrangements).

Parties to a contract can also use a variety of pricing mechanisms, such as non-linear pricing, loyalty contracts, royalties and slotting allowances, to ensure efficient resource allocation. Vertical contracts between upstream and downstream firms allow for the coordination of investment and production plans, and the alignment of incentives more generally.

Furthermore, buyers and sellers need to have the flexibility to revise the terms of their contract (and whether to enter into or maintain their contractual relationship) in response to changes in market circumstances. Otherwise, contractual terms that are efficient in one set of market circumstances may become inefficient once circumstances change, and these inefficient terms become locked in.

⁵⁰ Australia is a price taker in the world market for wheat and, as a result, supply chain efficiencies would likely be passed through to wheat producers through competition among exporters to purchase wheat. Section 3 explains that Viterra has no incentive to foreclose competing exporters from its port terminals and the market for the purchase of grain from producers in South Australia will remain competitive.

The ACCC's oversight has restricted Viterra's ability to use long term contracts to allocate capacity to exporters. The essence of long-term contracts is commitment. Without a legally enforceable commitment that the other party to the contract will uphold its end of the bargain, parties will be reluctant to make investment, forego alternatives, or take other actions that maximize the value of exchange between the two parties. More specifically, contracts transfer risk, align incentives, and minimize transactions costs. These are the types of benefits that are forfeited by Viterra and exporters as a result of the ACCC's interventions through the Code.

For the reasons discussed above, since the supply of grain terminal services in South Australia is competitive, to promote the efficiency of the grain sector Viterra and exporters should have the flexibility to respond to changes in market conditions, without having to seek permission from regulators on the basis that they will not harm competition. Regulation would only prevent Viterra and exporters from adopting some efficient practices, and delay the adoption of others, with no benefit to producers or other stakeholders.

4.2. VITERRA'S CURRENT CAPACITY ALLOCATION PROTOCOLS

Viterra's current LTA capacity allocation system was approved by the ACCC in December 2015. Prior to the adoption of LTAs, capacity at Viterra terminals was allocated via auction for short term capacity. The ACCC recognized that, in general, long term contracts provide potential benefits to both port terminal operators and exporters, which included the ability for terminal operators to better plan their supply chains and greater certainty for exporters in planning long-term grain export programs.⁵¹

The main features of the current system are that: i) LTC can be allocated for up to two seasons ahead but no longer; ii) a certain minimum amount of capacity (500,000 tonnes/quarter) must be reserved for STC allocation, which is released once a year and is booked on a first-in first-served ("FIFS") basis, and; iii) no single exporter can be initially allocated more than 40% of total LTC at OHB and Port Lincoln during the six month period from January to June 30 or, in all other cases, no single exporter can be allocated more than 50% of LTC initially made available at any terminal in any quarter. All of these restrictions were imposed to overcome objections stated by the ACCC.

Furthermore, the non-discrimination provisions of the Code in many cases prevent Viterra and exporters from negotiating price discounts for certain services or agreeing to different forms of pricing, such as bundling of certain terminal services. Under the Code, if an exporter seeks a discount for some terminal service from Viterra—perhaps to more effectively supply a customer or otherwise respond to a change in market conditions—then unless the discount is justified by a cost differential, Viterra must offer the discount to all other exporters if it also wants to grant the discount to Glencore Agriculture. Viterra may justifiably not wish to provide a competitive advantage to the exporter relative to Glencore Agriculture (Viterra's largest customer), while at the same time not want to lose revenue by offering the discount to other exporters for whom it may not be as important. The non-discrimination provisions of the Code may therefore be a disincentive for Viterra to provide the discount to the exporter in the first place, and the perverse result may be that some exporters pay higher prices than they would if price discrimination was not prohibited.

⁵¹ ACCC Draft Decision 2015.

Although the STC reserve was proposed by Viterra in its initial LTA application,⁵² this was done to address objections expressly raised by the ACCC. In its application for exemption, Viterra noted that it “*considers that reserving 500,000 tonnes of capacity each quarter for booking on a first-in-first-served basis is sufficient to meet the needs of smaller exporters, new entrants and any other genuine exporters that may not wish to enter into an agreement to acquire long term capacity.*” It is our understanding that Viterra may reserve less capacity if not for the ACCC’s oversight. The 2 million tonnes reserved for STC represents about 37 percent of throughput at Viterra’s terminals in 2017/2018. For the 2016/2017 season, 26 percent to 29 percent of total allocated capacity was reserved for STC. Since the STC reserve is volume-based and does not change with the size of the harvest, the reserve will represent a higher percentage of total throughput in seasons with a smaller harvest and with increasing volumes going to competitors’ port terminals.

These features of Viterra’s capacity protocols represent limitations on the types of contracts that Viterra and exporters can use. If the ACCC did not exercise oversight over Viterra’s capacity allocation practices, Viterra and exporters would have the freedom to sign capacity contracts that would allow exporters to reserve capacity for a longer term, would allow Viterra to allocate more capacity under long term agreements, and would allow Viterra to efficiently allocate more capacity to any exporter competitor (including Glencore Agriculture). Exemption would further allow Viterra and exporters to agree to use more efficient pricing practices and adapt to changing market conditions more quickly and flexibly. More generally, exemption would allow Viterra to better respond to individual exporters’ requirements and to more quickly adjust its capacity allocation methods in response to changing market conditions.

The ACCC’s oversight also imposes direct costs on Viterra and exporters. For example, it is our understanding that the direct costs to Viterra in relation to the LTA application and other parallel regulatory processes exceeded \$800,000. The costs of compliance to Viterra in terms of personnel time that could have been devoted to running the business and other expenses would have added significantly to the total costs. Furthermore, it took about one year for Viterra to obtain ACCC approval for its LTA protocols, which resulted in foregone efficiencies for at least one season.

To the extent that Viterra would avoid direct compliance costs and delay in implementation of efficient allocation practices in the future if its terminals were exempt from the Code, the benefits would likely be passed on through to producers through competition for the purchase of grain (which we show in Section 3 would remain strong upon exemption of Viterra port terminals from the Code). Furthermore, producers would also ultimately benefit from the elimination of regulatory delay.

In addition, reviews by the ACCC and other regulators ultimately increase the tax burden on taxpayers, and this burden will be lessened with exemption.

⁵² Proposed Variations to Viterra’s Port Loading Protocols to Introduce Long Term Agreements, 12 March 2015. Available at https://www.accc.gov.au/system/files/Viterra%20LTAs%20-%20Submission%20to%20ACCC%20-%20Redacted%20version_0.pdf.

4.3. CAPACITY ALLOCATION AT EXEMPT TERMINALS

As noted by AEGIC,⁵³ there are significant differences between capacity allocation practices and outcomes at exempt and non-exempt terminals. Capacity allocation at exempt terminals is presumably subject to competitive pressures and can therefore be deemed to be efficient. Although the nature of efficient practices varies across terminals depending on individual characteristics and requirements of the terminals, practices at exempt terminals can provide some insight into what practices would be efficient at non-exempt terminals should they obtain the same flexibility.

CBH's capacity allocation practices at its terminals in Western Australia, all of which are exempt from the Code, are substantially different from Viterra's practices, and the differences provide some indication of how the ACCC's oversight limits what Viterra can do. CBH negotiates, on a commercial basis, the allocation of LTC with exporters and subsequently enters into Long Term Agreements. In its Port Terminal Rules, CBH indicates that it negotiates with each customer on a commercial basis "*so as to operate the Port Terminal Facilities efficiently and flexibly and may offer each customer an opportunity to acquire a quantity of Long Term Capacity*".⁵⁴ All capacity that is not allocated through Long Term Agreements is released as spare capacity. This capacity may be taken up on a FIFS basis.⁵⁵ GrainCorp also does not reserve STC at its exempt terminals although, under its protocols for non-exempt terminals, 40 percent of capacity is reserved for STC. Quattro similarly does not reserve STC at its exempt Port Kembla terminal.

4.4. LIKELY CHANGES TO VITERRA'S PROTOCOLS

In an efficient competitive market, buyers and sellers are not prevented by regulatory oversight from adopting contractual arrangements to meet the operational and commercial requirements of exporters, or from revising their arrangements to respond to changing market conditions. The following are some examples of capacity allocation practices that Viterra could adopt upon exemption.

When required by exporters, increasing the duration of capacity allocation contracts.

Under the existing protocols approved by the ACCC, Viterra can only offer LTC to exporters for rolling 2-year periods. This limits the commitments that Viterra and individual exporters can make to each other, which reduces the certainty that is necessary for the terminal operator to invest and make long term plans. For example, with a longer-term commitment by Viterra to provide capacity at its terminals, exporters will have a stronger incentive to invest in developing export markets and supply relationships with grain producers in South Australia. For example, exporters will be better incentivized to enter into multi-year sales contracts with export customers, as well as invest in other infrastructure. Increased certainty about the amount of committed capacity by exporters in the long run will also support Viterra's incentive to invest in improvements and expansions to terminal capacity. Producers will benefit from the increased efficiency of investment and planning by exporters and terminals and will also benefit from increased infrastructure capacity during bumper harvests.

⁵³ AEGIC Report, Box 1, page 36.

⁵⁴ CBH Port Terminal Rules 2018/2019. Section 3.1 (a).

⁵⁵ *Ibid.*, Section 4.1 (c).

No (or reduced) STC reserve. The ACCC has required that Viterra make available at least 500,000 tonnes of capacity per quarter for booking as STC. The ACCC insisted on this requirement to ensure that potential new entrants and smaller exporters had sufficient access to terminal capacity. If Viterra were unconstrained by regulatory oversight, it may decide to reserve some capacity for short term allocation; over the past two or three years there has been limited demand for long term capacity at Viterra terminals (and substantial demand for short term capacity) and Viterra could choose to meet this increased demand by reserving some short term capacity. However, the regulatory requirement that Viterra reserve up to 40 percent of its total available capacity during every season limits Viterra's ability to respond to the requirements of exporters when demand changes such that it is efficient for exporters to request longer term capacity. The current system locks in short term capacity agreements and, as a result, reduces the ability of Viterra and exporters to contract for longer term capacity. For the reasons discussed below, since the market for terminal services in South Australia is competitive, there are no competitive benefits to the grain sector from protecting smaller exporters and entrants, and there are significant costs, including due to the likely inefficient fragmentation of the export sector in South Australia.

Pricing flexibility and discounting firm service. Some exporters place a high value on the ability to move booked capacity between slots within the term of a capacity allocation contract and are willing to pay a premium for this flexibility. Other exporters with a more certain stream of demand from customers may have little need for such flexibility. Both types of exporters, as well as Viterra (which incurs a cost when providing flexibility to an exporter to shift capacity) would benefit if Viterra adopted a pricing structure that provided a discount for a firm capacity commitment with a higher price for exporters seeking flexibility, since this would incentivize the efficient use of capacity.

Removing the cap on Initial LTC bookings. The ACCC requires Viterra to impose an "Initial Nomination Cap", which caps the Initial LTC that exporters can apply for in any quarter as part of the initial allocation process. The cap is 40 percent at OHB and Port Lincoln during the January to June period, and 50 percent in all other cases. We understand that it is Viterra's expectation that it is highly unlikely that any single exporter would seek to book a substantially higher proportion of Viterra's capacity than this cap, because doing so would be very costly to exporters in a drought year. Some larger exporters might seek marginally more capacity than these caps, in order to satisfy expected demand following bumper harvests. Again, because the terminal services market is competitive, as we demonstrate below, there is no risk to competition from allowing Viterra to allocate a higher percentage of capacity to some large exporters—including Glencore Agriculture—and there may be a substantial cost in terms of exporter fragmentation and foregone economies of scale for exporters if it cannot.

Greater flexibility to offer Additional Capacity. Viterra is subject to certain requirements for the offering of capacity that was not available at the time of initial release ("Additional Capacity"). In the case of Additional LTC, Viterra is required to follow the same detailed process as for Initial LTC—any additional capacity must be offered to all exporters and allocated in accordance with the detailed rules set out in the Protocols—and in the case of Additional STC, Viterra must make the new capacity available to all exporters on a FIFS basis unless the capacity is available in less than 6 months' time. If Viterra is exempt from the Code, it will be able to allocate additional long and short term capacity to exporters more flexibly and efficiently, in response to changes in market circumstances or in relation to specific customer requests.

Greater ability to accommodate increased capacity to exporters. The Protocols currently provide a +/-10 percent tolerance for bookings. Some exporters require a greater tolerance for operational reasons. There are a number of reasons why exporters may request a relatively small increase in capacity, such as end customer requirements, clearing out stock at port, an operational / safety need to load more grain to balance the vessel etc. The Code's restrictions prevent Viterra from offering this service (without a new booking), which would benefit these exporters.

Ability to roll capacity between years. Some exporters have requested the ability to roll capacity between years. The Protocols do not currently provide the flexibility required to meet these requests.

Additional/fundamental changes. It is our understanding that upon exemption Viterra could also consider more fundamental changes to its capacity allocation system, subject to negotiation with exporters and growers. This could involve the introduction of a new category of port capacity, where capacity is allocated to any of Viterra's port terminals (rather than capacity being allocated at a specific port terminal).

Increased flexibility for non-grain clients. Such clients could, for example, include Iluka and GRA for shipping at Thevenard. Increased flexibility is especially relevant in relation to shut downs for maintenance at terminals. It is our understanding that GRA identified this issue as the main reason for supporting Viterra's application for exemption at Thevenard. In its submission, GRA notes that Viterra is required to shut down the ship loader at Thevenard for 4 x 16 day blocks (64 days) per year for planned maintenance, and the timing and duration of these outages are "*apparently dictated*" by the Code (via the Port Loading Protocols). GRA has stated that, because of the capacity allocation agreements with grain clients, Viterra is (a) unable to split planned shut downs into a more ideal two smaller blocks of 8 days due to the grain slots; and (b) unable to load any non-grain vessels in slots that have been purposely unsold to grain clients and set aside for planned maintenance. During these shut down periods, GRA is unable to load ships with gypsum. Given that GRA is required to load 80 ships (that are evenly spread out across a year), these closures can cause hardship to GRA (including by interrupting its supply chains). In its submission, GRA states that there are specific examples to demonstrate this, "*with individual events incurring several hundred thousand dollars in consequential costs*". On this basis, GRA supports Viterra's exemption application at Thevenard, given that Viterra's "*ability to be flexible and efficient in their programming of maintenance on the ship loader is apparently compromised by their required compliance with the Code*". Accordingly, if Viterra were exempt from the Code, it could be more flexible and efficient in scheduling shut down periods for maintenance at its terminals.

In addition to these benefits, to the extent that Viterra's regulatory burden is lessened, its regulatory compliance costs will be reduced, and these costs will be passed through to exporters and producers. It will also be able to simplify its agreements, thereby reducing complexity for grain traders and shippers, making it easier for end-users and clients to price and execute grain shipments from South Australia (compared to other States).

4.5. BENEFITS OF CONTRACTUAL FLEXIBILITY

As noted above, Viterra's current capacity allocation protocols, and in particular maximum contract durations and the requirement to reserve 30 to 40 percent of capacity for STC, represent restrictions on Viterra and exporters. The protocols used by exempt ports provide examples of the likely characteristics of protocols that would be adopted by Viterra upon exemption. In particular, Viterra would likely allocate some capacity more than two years ahead and may (but not necessarily) allocate less capacity to STC, although reserving some capacity for STC may be efficient and may therefore likely be continued by Viterra.

In general, the freedom to choose the duration of a contract allows upstream and downstream firms to increase certainty and reduce risk, which provides the appropriate incentives to the parties to make investments to reduce costs and increase capacity as needed. Many of Viterra's actual and planned investments have 20- to 30-year lifespans, and long term contractual protections are required to provide sufficient certainty to incentivize such investments. Contractual flexibility will reinforce Viterra's ability to implement its current investment plans, which include:

- commitment to long term rail and road agreements, which may have high fixed costs, to ensure that Viterra has sufficient capacity to move crop during bumper harvests;
- investments in weighbridges and automated sampling to increase productivity, efficiency and reduce cost of supply chain;
- investments in electrical upgrades to facilitate platform or new technology/automation adoption and energy efficiency;
- investment in people and leadership development; and
- investment in quality management systems to support market access.

Longer term commitments would also provide the necessary protections for Viterra to further invest in its supply chain, such as infrastructure investments in asset upgrades and long term logistical services contracts with rail and road providers.

4.6. EXEMPTION WILL ALLOW FOR DE-FRAGMENTATION OF THE TRADING SEGMENT

As discussed previously, the exporting sector in South Australia is more fragmented relative to other States where ports are exempt from the Code. Because of economies in scale in exporting, some smaller exporters in South Australia are likely to be inefficient and may not survive in a competitive market without mandated 'fair' access to capacity at non-exempt terminals, which is likely to be the reason why they are much less prevalent in States where terminals are exempt.

Inefficient exporters who may lose some market share or not survive if exemptions are granted are likely the smaller exporters who are included in the 'Other' category that, according to the ACCC, accounted for 29 percent of export volumes in South Australia in 2017/2018 (which is a much higher share than in other States). The largest exporters in South Australia—Glencore Agriculture, CBH, Cargill, ADM, and Bunge—are sophisticated and have large global operations, and are likely to continue operations if Viterra's port terminals are exempted. They will continue to compete to purchase wheat from South Australian producers, and it is likely that some smaller efficient exporters will continue to thrive and possibly expand in an unregulated market. Producers will continue to benefit from five plus exporters competing to purchase their grain, and the impact of exemption of Viterra terminals will simply be that these exporters will have more efficient operations.

The largest buyers and importing countries purchase significant volumes of grain. Major shipments are made on Panamax vessels with capacity in excess of 50kmt, and the use of large vessels minimizes costs. Successful exporters require certainty of execution to commit to sales of this magnitude. In addition, South Australian exporters have a competitive advantage in traceability, sustainability, and quality management. These advantages require significant fixed cost expenditures in a quality control team, laboratories, chemical residue equipment, and multiple accreditations and certifications. These fixed costs are supported by economies of scale with benefits flowing through the supply chain in a competitive environment, including to producers.

In addition, producers receive substantial benefits from the investments in storage, sampling, weighing and inloading equipment made by the port terminal operator to reduce turnaround time, expanded operating hours, and in grain segregations and market pricing.

When market forces determine which exporters receive terminal capacity, economies of scale in exporting can be fully realized, which reduces costs along the supply chain. In a competitive exporting market—which, as we explain below, the South Australian market is likely to be if Viterra terminals are exempted from the Code—the benefits of increased economies of scale are passed on to producers. Supply chain cost reductions are also likely to make South Australian exporters more competitive in export markets.

It is our understanding that the ACCC has suggested that some smaller exporters are more likely to identify and exploit 'niche' export opportunities relative to large exporters. We have seen no evidence that this is likely to be the case. Large exporters with worldwide operations appear to be *more* likely to have the ability to identify such opportunities, given their international contacts and expertise. Furthermore, larger efficient exporters have every incentive to identify and exploit such opportunities, given the potential returns. To the extent that the ACCC is concerned that Glencore Agriculture has an incentive to foreclose smaller exporters to prevent them from exploiting niche markets, our analysis of foreclosure incentives indicates that these concerns are not valid.

5. SUMMARY AND CONCLUSIONS

The South Australian wheat supply chain has evolved considerably since the elimination of the single desk and the imposition of the Code intended to protect exporter access to grain export terminals. Grain producers have become larger, more sophisticated, and more experienced in finding profitable markets for their output. Most importantly, a number of new export terminals have either begun operations or will, in the near future, begin operations in South Australia, with combined capacity that exceeds the historical exports of traders who compete with Glencore Agriculture for the purchase of grain from producers in South Australia. Several new export terminals in South Australia have been proposed or are in the planning stage. Furthermore, many producers in South Australia can economically substitute towards competing ports in Australia, or to the domestic or containerized export markets, if Glencore Agriculture were to attempt to reduce prices paid to producers for their wheat. We have shown that, in light of these market circumstances, if its export terminals are exempted, Viterra will not have the ability or incentive to deny access to competing exporters, and Glencore Agriculture will continue to compete with other exporters to purchase wheat from producers in South Australia.

The Code, and the ACCC's oversight of Viterra's capacity allocation protocols, harms all stakeholders, and not just Viterra and Glencore Agriculture, by hindering the efficient evolution of the supply chain and the adoption of efficient contracting practices that have been adopted in other geographic areas where terminals are exempt.

The purported purpose of the Code is to ensure fair and equitable access to Viterra terminals for smaller exporters and potential entrants, in order to maintain competition for the purchase of wheat from producers. The actual outcome, however, is that the exporting segment of the supply chain has become fragmented, likely maintaining many small, inefficient exporters which may not survive on their merits in a competitive market. Smaller exporters that are efficient and innovative will survive and flourish in an unregulated market.

The economic cost of artificially supporting smaller exporters takes the form of lost economies of scale, which increases supply chain costs. The ACCC's oversight of Viterra's protocols also prevents the efficient adoption of contracts that would incentivize investments and efficient long-term planning and allow for more flexible, and efficient, pricing.

Since Viterra would have no ability or incentive to deny access to exporters that compete with Glencore Agriculture upon exemption from the Code, the market for the purchase of wheat from producers will remain highly competitive and the benefits of exporter de-fragmentation and more efficient capacity allocation protocols at Viterra terminals will ultimately flow to producers. Exemption will allow for the realization of these significant cost benefits. If an exporter fails to pass on a cost reduction in the form of a higher bid to a producer for their grain, it will lose export volume, and therefore margin, to a competing exporter. In some cases, an exporter may risk losing a large customer if it fails to procure enough volume because it fails to outcompete another exporter. Producers therefore have the most to gain from exemption.

We have provided several examples of capacity allocation practices that Viterra may adopt if its port terminals were exempted from the Code. However, it would be inefficient, and would defeat the purpose of exemption, to *require* Viterra to adopt these practices through regulatory oversight. The essence of the benefits of exemption is that Viterra would be able to quickly and flexibly adapt to changes in market conditions and the needs to exporters and other stakeholders. Regulatory oversight requiring Viterra to adopt certain practices would introduce delay and inflexibility, and would substitute the judgement of regulators for the discipline of the market.