Prepared for:

Viterra Operations Pty Limited

CRA Comments on the ACCC's Draft Determinations Regarding Code Exemption for Viterra Grain Export Terminals

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This submission provides comments in response to the ACCC's Draft Determination, dated 6 October 2020, regarding its exemption assessment of port terminal services provided at Viterra Operations Pty Ltd's (**Viterra**) terminal facilities in South Australia.

I. Executive Summary

The ACCC's Draft Determination provides that Viterra's Port Adelaide Inner Harbour and Outer Harbour port terminal facilities should be exempt from Parts 3 to 6 of the *Port Terminal Access (Bulk Wheat) Code of Conduct* (**Code**), and that its Port Lincoln, Wallaroo, Port Giles, and Thevenard facilities should not be exempted.

In rendering the Draft Determination decision, the ACCC does not appear to have considered the updated analysis presented in the CRA supplemental report dated 9 January 2020 (**CRA Supplement Report**). As explained in the CRA Supplemental Report, Viterra's terminal margin is likely substantially higher than the terminal margin assumed in the initial CRA report dated 7 November 2019 (**Initial CRA Report**) where CRA had assumed a $10/tonne terminal margin. This higher margin would further increase Viterra's losses that would result from any denial of access to competing exporters and reinforces the conclusion that Viterra does not have incentive to deny access to competitors. The Draft Determination also presents an analysis that involves variations to some of the assumptions used in CRA's original illustrative model for the purpose of assessing the profitability for Viterra of denying access to competing exporters.

In addition, the Draft Determination sets out the ACCC's view that *favourable* access is a more relevant consideration than the *denial* of access considered in CRA's illustrative model. However, the changed assumptions proposed by the ACCC are not realistic, and the Draft Determination fails to consider a number of factors that limit or eliminate any potential benefits to Viterra from favouring Glencore Agriculture. These factors include (but are not limited to) the following:

- Glencore Agriculture would have limited, if any, ability to reduce the prices paid to growers if Viterra merely favoured Glencore Agriculture over other exporters (i.e., rather than denying access altogether); and
- exporters and producers would have the ability and a strong incentive to seek re-regulation of Viterra's terminals, and the ACCC would have the ability to easily reverse its exemption decision, if Viterra were to inflict harm.

The largest competing exporters in South Australia have substantial bargaining power that they could use to prevent attempted discriminatory behaviour by Viterra, including credibly threatening to construct or sponsor the construction of competing terminals. If competing terminals were developed, this would cause substantial and long-term damage to Viterra's profitability. The ACCC's Draft Determination does not address any of these issues.

For these and other reasons, the ACCC's critique of CRA's illustrative 'profit and loss' model of access denial are misguided. In particular, the Draft Determination claims that the CRA model is 'finely balanced' on the basis that the modelling shows that Viterra's profit would only decline by 1.3 percent if Viterra were to deny access to competing exporters. However, this profit decline is expressly based on the unrealistically conservative assumptions used in the CRA model precisely for the purpose of showing that, even on those assumptions (which were deliberately favourable to Viterra—in the sense of minimising its expected losses—when compared with any likely or realistic scenario), a denial of access would be unprofitable. Based on reasonable inputs, the conclusions one should derive from the model are therefore not 'finely balanced' at all. This is clearly illustrated by the updates to the terminal margin

inputs contained in the CRA Supplemental Report, which show a significant decrease in Viterra's likely profit from any denial of access.

The ACCC also critiqued CRA's illustrative model for not including certain adjustments to the volumes used in the model to account for recent terminal entry and exit. The Draft Determination purports to show that denial of access by Viterra becomes profitable if these adjustments are made. While this is technically correct (i.e., in the sense that all models are sensitive to changes in assumptions and inputs), any denial of access remains unprofitable if the model is adjusted to reflect scenarios that are not unrealistic and speculative. This is the case even when using CRA's conservative assumptions, which are explicitly biased towards a conclusion that denial by Viterra could be profitable.

The Draft Determination also contains a number of findings that are not supported by evidence or economic reasoning. For instance, throughout the Draft Determination, the ACCC notionally balances the potential benefits of exemption—including contractual flexibility and stronger investment incentives—against the purported potential harms (including the potential for Viterra to provide preferential or discriminatory access to its terminals in favour of Glencore Agriculture). However, the Draft Determination does not seek to quantify—nor even provide qualitative estimates—of either the purported harms or benefits associated with continued regulation, or the likelihood that any of the purported harms or benefits would actually occur.

Where the ACCC finds that exemption should not be granted (as in the case of Port Lincoln), the ACCC seems to justify that decision based on a view that *any* potential risk of harm should be avoided, even though exemption is likely to result in substantial benefits and efficiencies. The Draft Determination does not appear to attempt to balance any potential for harm against the certainty of efficiencies that could be realised.

Likewise, the analysis of Viterra's alleged upcountry market power in the Draft Determination is highly speculative, and the relevance of any upcountry market power for assessing whether Viterra's port terminals should be exempted is unclear.

It is critical that any assessment be based on clearly articulated economic reasoning and actual evidence to support any weighting of considerations, which should be undertaken explicitly, rather than simply being speculative and/or unsubstantiated.

II. The ACCC Did Not Deal With the Analysis Provided in CRA's Supplemental Report

In the CRA Supplemental Report, CRA provided additional information and analysis to assist the ACCC in assessing Viterra's exemption application. However, the ACCC's Draft Determination does not appear to address the information and analysis provided in that report.

In particular, the CRA Supplemental Report provided an updated estimate of terminal margins, based on the Peninsula Ports' *Information Memorandum* compiled by Free Eyre Limited. The Initial CRA Report assumed an export terminal margin of $10/tonne to analyse the profitability of a strategy to deny terminal access by Viterra. In the CRA Supplemental Report, CRA cited the margins in the *Information Memorandum* to show that a $10/tonne margin assumption is highly conservative (i.e., any realistic port margin is likely substantially higher that $10/tonne). A higher margin would result in an even lower profit (or greater losses) from any denial of terminal access or favourable access arrangements.

The *Information Memorandum* provided projected Contribution Margins and EBITDA margins for the planned Sheep Hill grain export terminal on the Eyre Peninsula for each year from 2022 to 2026. The projected Contribution Margin was calculated as Revenue per tonne less Variable Operating Costs, which

is the variable margin – the relevant margin for CRA's profitability of denial analysis. This projected margin ranges from $38.14/tonne in 2022 to $42.93/tonne in 2026. The EBITDA margin is the Contribution Margin less Fixed Operating Costs/Overheads, and ranges from $30.26/tonne in 2022 to $36.79/tonne in 2026. Although the EBITDA margin understates the variable margin, CRA revised its denial of profitability analysis using the lowest EBITDA margin in the *Information Memorandum*.

As set out in the Initial CRA Report:

> *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.*[1]

The Initial CRA Report also explained that a higher terminal margin reduces the profitability of any denial of terminal access by Viterra, all else equal, because the loss in profit to Viterra from denial of access—which reduces throughput at Viterra terminals—would increase. This is clearly borne out by CRA's calculations of the profitability of denial of access if a terminal margin of $30/tonne was assumed.[2] The CRA Supplemental Report shows that, if the other input assumptions are maintained at their initial levels (which are very conservative, as explained in the next section), increasing the terminal margin to $30/tonne from $10/tonne increases the losses associated with denial substantially.

The CRA Supplemental Report further demonstrates that, in maintaining the margin at $30/tonne and changing the other input assumptions to make them even more biased towards profitable denial of access by Viterra, any denial of access would *still* remain unprofitable. For example, if the switching percentage is reduced to 40 percent from 60 percent and the exporter margin is increased to $7.50/tonne from $5.00/tonne, denial of access remains unprofitable.

III. The ACCC's Analysis of CRA's Profit and Loss Analysis is Misguided

The ACCC provides several technical critiques of CRA's analysis of the denial of profitability (the CRA 'profit and loss' model) starting on page 53 of the Draft Determination. The ACCC's analysis is discussed below. First, however, we comment on the ACCC's assertion that "*favourable access is a more relevant consideration than the denial of access*."[3]

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[1] CRA Report, 7 November 2019, page 15.

[2] The ACCC's *Draft Questions in response to supplementary submission* suggested that our updated terminal margin of $30/tonne overstates the actual margin based on a revenue of $25/tonne cited in the ESCOSA Final Report. In our response to the ACCC's questions (dated 3 June 2020), we explained that the ESCOSA revenue figure does not include fee revenue from other services, such as monthly storage, blending, working overtime shifts to accommodate accumulation, late vessel nomination fees, and vessel variation fees. Viterra loses the margin on these other services if it loses export volume at its terminals. Accordingly, these losses should be included in the ACCC's analysis. Nevertheless, if one assumes the margin is as low as $17.50/tonne (which is 70% of the ACCC's assumed $25/tonne revenue and is approximately the EBITDA percentage margin in the *Peninsula Ports Information Memorandum*), denial of access becomes more unprofitable (profit falls by about 16%) and remains unprofitable for a wide range of values for other inputs.

[3] ACCC Draft Determination, page 56.

III.1 Disincentives to Provide 'More Favourable Access' to an Associated Entity

The difference between 'more favourable access' and complete denial is that the former involves providing a favoured entity (i.e., an associated entity) with the most desirable capacity slots. According to the Draft Determination, this incentive is likely strengthened in circumstances where capacity is constrained.[4]

There are several factors that limit Viterra's incentive to favour its associated entity, Glencore Agriculture, in the provision of access to Viterra's export terminals. In our analysis of denial of access, the primary factor limiting Viterra's profitability from any denial of access to its terminals is the lost terminal profit caused by exporters switching to competing terminals. This is also an important factor when considering Viterra's incentive to favour Glencore Agriculture. However, there are also several other limiting factors, including the following:

- The benefits to Glencore Agriculture, in terms of a higher trader margin, would be substantially lower in the case of 'partial' denial of access (if indeed any such benefits existed), compared to any complete denial of access. In fact, it is unclear how, if competitors continue to have access to Viterra terminals (which would be the case if Viterra did not fully deny access to competing exporters), Glencore Agriculture could reduce prices paid to producers (i.e., increase its trader margins) at all, much less increase margins by the 300 percent CRA assumed in its illustrative model. In a hypothetical scenario of less favourable access to Viterra terminals, competing exporters may potentially incur somewhat higher supply chain costs (although the Draft Determination does not provide any indications of the cost disadvantages that would be faced by competing exporters) and, to the extent they did face higher costs, this could hypothetically reduce the competitive constraints on Glencore Agriculture in the purchase of grain from producers. However, these competitive constraints would by no means be eliminated. The gain to Viterra/Glencore Agriculture from partial denial of access would therefore likely be much lower relative to 'full' denial of access (i.e., because there would be much stricter limits on Glencore Agriculture's ability to increase its trading margins than would be the case for full denial of access).[5]
- If Viterra's terminals were exempted from Parts 3-6 of the Code, and Viterra subsequently reduced terminal access for competing exporters in a way that harmed them and/or producers, the harmed parties would have a strong incentive to bring any problems to the attention of the ACCC. If the ACCC found actual harms, it could easily and quickly respond by reversing the exemption. As explained in our report, Viterra, as well as exporters and producers, would benefit substantially from the supply chain efficiencies that would likely result from exemption.[6] Viterra would lose these benefits if it took any material actions that would cause the ACCC to reverse the exemption, providing a strong incentive to forego anti-competitive discrimination that would risk reversing an exemption.
- The largest exporters in South Australia, besides Glencore Agriculture, are CBH Ltd, Cargill Australia Limited (**Cargill**), Archer-Daniels-Midland (**ADM**), and Bunge Agribusiness Australia. These are large and sophisticated companies with global operations. If Viterra attempted to discriminate in favour of Glencore Agriculture when providing terminal access, third party exporters could use existing competing terminals or establish new terminal operations of their

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[4] ACCC Draft Determination, pages 55-56.

[5] There may be other risks to Glencore Agriculture that the ACCC has not considered in its consideration of incentives for Viterra to favour Glencore Agriculture over competing exporters, including price risks associated with purchasing a significantly greater share of the South Australian grain harvest.

[6] Section 4 of the CRA Report.

own. The barriers to doing this do not appear to be high in light of Cargill's establishment of an alternative supply chain at Port Adelaide and ADM's establishment of a sea freight route from Port Pirie. The long-term negative impacts on Viterra of such actions would be significant

- Any discrimination at terminals by Viterra that harms competing exporters would also increase their incentive to sponsor the construction of competing terminals to bypass Viterra. In particular, in relation to Port Lincoln, the ACCC has noted that there are several proposals for new facilities on the Eyre Peninsula.[7] The ACCC also stated that, although there may be barriers that would need to be overcome before entry actually occurs, the threat of entry may serve as a competitive constraint on Port Lincoln.[8] The threat of entry is particularly relevant in these circumstances, given the amount of actual entry that has occurred in export terminals in South Australia. However, notwithstanding this analysis, the Draft Determination concluded that, because the level of competitive constraint imposed by Lucky Bay on Port Lincoln is uncertain (because Lucky Bay only recently became operational, in March 2020), Port Lincoln is "*unlikely to be subjected to sufficient competitive constraint to support an exemption from Parts 3 and 6 of the Code*."[9] Thus despite acknowledging that the threat of entry may be a competitive constraint on Port Lincoln, the ACCC appears to have ignored this potentially important constraint.

III.2 The ACCC's Analysis of the CRA 'Profit and Loss' Model is Misguided

The ACCC has provided some technical critiques of the CRA 'profit and loss' model. We respond here briefly to these critiques.

The ACCC states that "*a number of assumptions have necessarily been made*" to arrive at conclusion that denial of access would be unprofitable to Viterra, citing:

- the use of 2017-2018 export data as representative;
- certain assumptions concerning Glencore Agriculture's trading margin ($1.50/tonne) and Viterra's port terminal margin ($10/tonne);
- the exporter volume that switches away from Viterra terminals (60 percent); and
- the increase in Glencore Agriculture's trading margin ($5/tonne).[10]

The Draft Determination further states that "*in considering these assumptions and CRA's conclusion, the ACCC notes that CRA's modelling indicates that* ***Viterra's incentive to completely deny access is finely balanced*** *i.e. the decrease in net profit for Viterra/Glencore Agriculture is only 1.3 per cent*"[11] (emphasis added). The ACCC then uses Tables 2.6 to 2.8 in the Draft Determination to show that changing certain input assumptions can make denial profitable for Viterra. For example, Table 2.6 shows the change in Viterra's profit from denying access for various combinations of the increase in the Glencore Agriculture trading margin and the switching percentage – assuming a lower Viterra terminal margin of $5/tonne, instead of $10/tonne as assumed in our initial illustrative model. The ACCC concludes that with this change to the terminal margin, "*there are significantly more scenarios under*

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[7] The ACCC acknowledges the proposals for new port terminal facilities at Port Spencer and Cape Hardy, both of which are located about half way between Port Lincoln and Lucky Bay): ACCC Draft Determination, page 150.

[8] ACCC Draft Determination, pages 145-146.

[9] ACCC Draft Determination, page 147.

[10] ACCC Draft Determination, page 56.

[11] ACCC Draft Determination, page 56.

which the denial of access becomes profitable if Viterra's port margin is assumed to be $5 per tonne (compared to the $10 per tonne margin shown in Table 2.7)".[12]

The ACCC's findings are technically correct in the sense of being mathematically correct, but are based on unrealistic assumptions. Most importantly, there is no evidence that Viterra's port terminal margin is as low as $5/tonne. In fact, as reported in the CRA Supplemental Report, it is likely that the relevant port margins are substantially higher than the conservative estimate of $10/tonne used in the Initial CRA Report. Consequently, the initial terminal margin assumption used in the Initial CRA Report was conservative and, in fact, the likely losses from denial of access would be much higher than the losses estimated in the initial CRA report.

Moreover, CRA explicitly referred to its model in the initial CRA report as "illustrative" and emphasized that the input assumptions for the illustrative model were generally conservative (i.e., the input values chosen for illustration explicitly favoured profitability of denial beyond what is warranted). For example, in addition to the conservative terminal margin, our assumption that only 60 percent of competitor export volume switched to competing terminals was conservative, since more than 60 percent of competitor volumes is likely to switch (which would further reduce the profitability of denial). Similarly, the assumption that Glencore Agriculture's trading margin would increase by 300 percent is conservative because any realistic increase would likely be smaller, which would also further reduce the profitability of denial.

CRA used the model to demonstrate that, even with these very conservative input assumptions, Viterra does not have an incentive to deny access to its terminals for competing exporters as it would be unprofitable to do so. In other words, the CRA model deliberately and explicitly chose conservative input values, which the Draft Determination now inappropriately cites as evidence that the model results are '*finely balanced'*.

In contrast to the approach adopted in the Draft Determination, any realistic and reasonable changes to the input assumptions that CRA used would actually be in the direction that further reduces the profitability of denial by Viterra (i.e., in the direction of increasing the losses Viterra would incur).

III.3 The ACCC's Revisions to the CRA Model for a 'Future Market' with Cargill and T-Ports are Incorrect

The ACCC notes that CRA modelled the market situation before the opening of Cargill's Berth 20 Inner Harbour and T-Ports' Lucky Bay, and the closure of LINX Port Adelaide. The Draft Determination claims that it would be more appropriate to model Viterra's incentives to deny access in a future *status quo* where the Cargill and Lucky Bay facilities are active, and the LINX facility is not active. With these assumptions, the ACCC adjusts (i.e., reduces) the volume exported by competitors through Viterra terminals, under the assumption that, in this alternative *status quo*, competing exporters will have already switched some volume to competing terminals because of increased capacity at these terminals. The ACCC then finds that, if none of the other input assumptions are changed, denial by Viterra now becomes profitable.

CRA does not dispute that, if one uncritically accepts the ACCC's changes to the CRA exporter volumes and then mechanistically runs the model with the same assumptions for the other inputs, denial becomes profitable. However, again this is irrelevant and inappropriate. The reason that denial becomes profitable in the ACCC's application of CRA's model is that reducing *status quo* exporter volume at Viterra terminals reduces the volume that switches to competing terminals in the case of denial, because the switching volume in the model is calculated as 60 percent multiplied by exporter volume at Viterra terminals.

[12] ACCC Draft Determination, page 57.

If, rather than assuming that the switching percentage stays the same, one assumes that the switching *volume* stays the same, then any denial of access in CRA's illustrative model remains unprofitable. In fact, if the switching volume stays the same, the profit loss (in both total dollars and as a percentage of profit without denial) is even higher than in CRA's initial model.[13] As we explained in the Initial CRA Report, our assumption for the illustrative model that 60 percent of competing export volume would switch to competing terminals with denial by Viterra is conservative (i.e. the actual switching percentage would likely be higher). Little, if any, volume would be likely to switch to Glencore Agriculture since competing terminals have sufficient capacity to handle incremental exporter volumes and terminal expansion and entry is viable if competing exporter volume increases substantially

In changing the initial conditions, as the ACCC does, there is no reason to maintain the 60 percent switching percentage assumption, rather than assuming that the same volume (in MT) switches. This demonstrates the pitfalls of mechanistically applying any model regardless of the circumstances and explains why the ACCC's adjustment is irrelevant and inappropriate. Under reasonable assumptions, Viterra's denial of access remains unprofitable.[14]

IV. There Are Significant Contradictions in the ACCC's Analysis

There are a number of significant contradictions and inconsistencies in the ACCC's Draft Determination. Some are discussed below.

IV.1 Lucky Bay was Granted Exemption While Port Lincoln Was Not

T-Ports was granted exemption for its Lucky Bay terminal on the Eyre Peninsula in April 2020.[15] In support of its decision to grant exemption, the ACCC noted that the "*T-Ports' facility will face a significant level of competitive constraint (mainly from Viterra's Port Lincoln port terminal facility)*" and "*T-Ports' facility should promote competition in the Eyre Peninsula market for bulk wheat export port terminal services (and related markets) which was previously serviced by a monopoly service provider*."[16] However, in its Final Position document, the ACCC notes that the T-Ports terminal would have up to a

[13] In the initial model without the ACCC's adjustments to the data, the volume that switches to competing terminals and is lost by Viterra is about 2 MT (60% multiplied by the 3.3 MT exported by competitors through Viterra terminals). If one mechanistically multiplies the new exporter volume after the ACCC's adjustments (2.64 MT) by the 60% switching percentage, the volume lost by Viterra is 1.6 MT (60% multiplied by 2.64). In the ACCC's adjustment, where denial of access occurs, Viterra loses terminal margin on a smaller volume, making denial more profitable. Glencore Agriculture's trading profit also decreases with this volume adjustment, but by less than the loss in terminal profit. As a result, Viterra's overall profit increases, and denial increases Viterra's profit by about 3%.

However, if rather than simply maintaining the switching percentage at 60%, one assumes that the volume that switches remains at 2 MT (out of the now 2.64 MT of exporter volume), then with the ACCC's data adjustment, the change in Viterra's profit is again negative. In fact, the change now results in a reduction in profit of 10%, rather than CRA's initial 1.3% reduction.

[14] Furthermore, even if one maintains the 60% switching assumption with the ACCC's revisions to exporter volumes, if we instead also assume that Viterra's terminal margin is $30/tonne (as indicated in the CRA Supplemental Report), then Viterra's profit from denial falls by more than 20%. If one assumes the terminal margin is $17.50, with the ACCC's volume adjustment and assuming 60% switching, Viterra's profit falls by 12%.

[15] ACCC, Final Determination Lucky Bay T-Ports Pty Ltd, 1 April 2020 ("ACCC Lucky Bay Final Determination"), page 2.

[16] ACCC Lucky Bay Final Determination, page 2.

$15-20/tonne 'domestic haulage' advantage over other ports.[17] It would also have a freight cost advantage over virtually all growing areas in Eastern Eyre and, in most of Eastern Eyre, its freight cost advantage is at least $5/tonne.[18] This appears to imply that the T-Ports terminal is in a similar position to Viterra's Port Lincoln terminal, in that they both have a freight cost advantage over a large growing area.

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

The distinction for the ACCC may be that, as it acknowledges in its assessment of Lucky Bay:

- "*granting T-Ports an exemption will lower T-Ports' Code compliance costs and provide it with greater operational flexibility. This will likely promote the efficient operation of T-Ports facility at Lucky Bay*";[19] and
- "*the removal of unnecessary regulation may demonstrate to potential new entrants that they will likely be provided with the flexibility to compete with dominant existing service providers*". [20]

The ACCC also notes that "*one of the Code's objectives is to 'reduce unnecessary regulatory burden on port terminal service providers*".[21] However, again, it is unclear why these same considerations do not apply equally to Port Lincoln.

In fact, although the ACCC briefly considers the potential adverse effects of continued regulation on the incentives for Viterra to invest efficiently in Port Lincoln (see part (e), pp. 149-151 of the Draft Determination), it does not provide a comprehensive analysis, or any kind of quantitative analysis, of the impacts of continued regulation on investment incentives or Viterra's ability to maximize efficiencies at Port Lincoln. It simply appears to discount these benefits of exemption in relation to Port Lincoln, apparently because it perceives that competitive constraints faced by Viterra at Port Lincoln are "*likely insufficient at this time to ensure that Viterra would not have an incentive to provide favourable access to certain exporters (in particular its associated entity exporter) at its facility*".[22] It summarizes its draft findings in relation to Port Lincoln as follows:

> *Consequently while there is the potential for flexible use of the facility by Viterra if an exemption is granted, the absence of sufficient competition means that an exemption has the potential to lead to inefficient market outcomes more broadly (including in relation to the operational and investment decisions of PTSPs within Port Lincoln's catchment area). Given the factors discussed above, the ACCC considers that the effect of a decision to exempt or not to exempt Viterra in relation to its Port Lincoln facility on the investment in port terminal facilities is unclear.*[23]

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

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[17] ACCC, Final position T-Ports Pty Ltd, Lucky Bay, 23 August 2019 ("ACCC Lucky Bay Final Position"), Figure 2.

[18] ACCC Lucky Bay Final Position, Figure 2.

[19] ACCC Lucky Bay Final Position, page 14.

[20] ACCC Lucky Bay Final Position, page 14.

[21] ACCC Lucky Bay Final Position, page 4.

[22] ACCC Draft Determination, page 151.

[23] ACCC Draft Determination, pages 151-152.

for Lucky Bay. The ACCC has attempted to notionally balance the costs and benefits of exemption for Port Lincoln but has not attempted to quantify, even by approximation, either costs or benefits. Without some sense of the magnitudes of the costs and benefits, it is impossible to make a proper balancing decision. If substantial costs are likely to result from the exemption of Port Lincoln—in terms of harms to producers or competing exporters—the ACCC should attempt to quantify these, at least approximately. It should then compare these costs against the benefits of exemption in a transparent way. Instead, what the ACCC has done is identify the possibility of harm from exemption at Port Lincoln, primarily as a result of Viterra's relationship with Glencore Agriculture, and then simply concluded—without any empirical analysis—that the risk of these unquantified harms outweighs any benefits. This approach is unsound from an economic perspective.

IV.2 The ACCC's Assessment of the Implications of Viterra's Upcountry Market Share

Section 3 of the ACCC's Draft Determination contains a detailed discussion of the supply chain in South Australia. With regard to upcountry storage and handling, the ACCC concludes that, in the absence of sufficient competition upcountry, "*there is the potential for a vertically integrated PTSP to use its position upcountry to limit the ability of third party exporters to access port terminal services on fair and transparent terms*."[24] The precise nature of the ACCC's concerns are unclear. The Draft Determination states that Viterra is the largest provider of upcountry storage in South Australia, but notes that Viterra has rationalized its network, reducing the number of upcountry sites from 114 in 2010 to 103 in 2017.[25]

Viterra has noted—and the ACCC has acknowledged—that Viterra competes with thirteen alternative upcountry storage providers.[26] The ACCC also finds that the recent or impending establishment of the integrated supply chains by T-Ports and Cargill provide greater competitive pressure on Viterra's supply chain. Another important competitive constraint is the fact that many producers and exporters can bypass Viterra's upcountry supply chain through the use of on-farm storage. Viterra has indicated that about 9 to 14 percent of South Australia's harvest could be stored on existing on-farm storage capacity. This capacity is increasing, which both AEGIC and ESCOSA have acknowledged.[27] In addition, many producers have built on-farm storage as an alternative to Viterra's upcountry storage. It is also likely that the T-Ports' Lucky Bay facility will encourage more investment in on-farm storage, as this facility is focused on a direct-to-port model.

Notwithstanding the existence of the these alternatives, and an apparent lack of detailed information about the capacity of competing upcountry storage, the ACCC's view in the Draft Determinations is that Viterra is likely to continue to have a degree of market power in the Lower, Mid, and Upper North regions in relation to storage, and "*it is possible*" that Viterra could leverage this market power "*to restrict the ability of third party exporters to secure fair and transparent access at port*."[28] Furthermore, the ACCC's preliminary view is that Viterra "*is the dominant upcountry storage provider*" on the Eyre Peninsula, the Yorke Peninsula, and in the south eastern regions of South Australia.[29] With respect to these regions, the ACCC again concludes that "*there is the potential for Viterra's dominant position upcountry to affect competition and impact the ability of third party exporters to gain fair and transparent access at port*."[30]

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[24] ACCC Draft Determination, page 62.

[25] ACCC Draft Determination, pages 65-66.

[26] ACCC Draft Determination, page 68.

[27] ACCC Draft Determination, page 70.

[28] ACCC Draft Determination, page 72.

[29] ACCC Draft Determination, page 72.

[30] ACCC Draft Determination, page 73.

The ACCC arrives at these draft findings even though it acknowledges that "*barriers to small scale entry into the upcountry storage market are likely relatively low*."[31] However, the ACCC appears to discount this highly relevant finding by simply stating that Viterra's "*upcountry network is extensive and well-established*."[32] The Draft Determination does not clearly explain why this is relevant given that barriers to small scale entry are relatively low.

In fact, far from explaining the relevance of this to whether Viterra's terminals should be exempted from the Code, the ACCC concludes that "*the specific extent to which Viterra could use its dominant position in upcountry markets to support its position at port (and the reverse) is* ***generally unclear***" and it is "***reasonable to expect*** *that Viterra's dominant presence both at port and in upcountry markets likely interact with one another, given the interconnected nature of these markets within the supply chain*"[33] (emphasis added). In support of these conclusions, the Draft Determination makes some reference to 'possible' network effects, the possibility that bundling Viterra's Export Select serves to reinforce upcountry barriers to entry, and even appears to conclude that the efficiencies that Viterra achieves from operating a larger network can contribute to barriers to upcountry entry.

However, it is CRA's view that the ACCC's analysis of upcountry competition—specifically its conclusion that Viterra has upcountry market power—is inconsistent with its view that barriers to entry upcountry are low. Furthermore, it is unclear why, if entrants can construct upcountry storage at low cost, Viterra's high upcountry share is relevant to an analysis as to whether its port terminals should be exempted from the Code (especially when the growth in on-farm storage is also considered). The precise reasons behind the ACCC's theory as to why Viterra's alleged upcountry dominance supports its alleged ability to deny access or provide unfavourable access at port terminals is also very unclear (and the ACCC has cited no empirical analysis supporting either past incidents or the likelihood of future problems). As a result, it is difficult for us to provide any commentary on the merits of this theory. CRA suggests that, to the extent that the ACCC intends to rely on Viterra's alleged upcountry dominance in its decision not to grant its port terminals an exemption from the Code, the ACCC should clearly articulate this theory and support this with cogent evidence and analysis.

V. The ACCC Ignores the Fact that Alleged Fairness Comes at the Cost of Efficiency and Producer Benefits

The ACCC emphasizes that the purpose of the Code is to regulate the conduct of PTSPs to ensure that exporters of bulk wheat have fair and transparent access to port terminal services. As CRA has demonstrated with our 'profit and loss' model, exemption for Viterra's port terminals is highly unlikely to result in Viterra denying, or limiting, access to its terminals for the purpose of reducing competition in the purchase of grain in South Australia. The terminal profit losses to Viterra are highly unlikely to be exceeded by the gains to Glencore Agriculture from paying lower prices to producers. In light of the unprofitability of denial of (or limiting) access to its terminals, if Viterra does revise its protocols for access to its terminals for exporters, this would occur because it is efficient to do so – in other words, it is cost-reducing and benefit-enhancing for Viterra and other supply chain participants.

Section 4 in the Initial CRA Report explained the many benefits of exemption, including those arising from contractual and pricing flexibility. CRA also explained that current capacity protocols limit Viterra's ability to use more efficient contracts—including longer-term capacity contracts—and allowing Viterra the flexibility to revise these protocols would enable it to allocate more terminal capacity to long term capacity. The Code prevents Viterra from achieving these economic benefits. At the same time, the Code serves to maintain the fragmentation of the exporting segment by artificially supporting inefficient

[31] ACCC Draft Determination, page 75.

[32] ACCC Draft Determination, page 75.

[33] ACCC Draft Determination, page 75.

exporters in South Australia and by preventing the realisation of economies of scale in exporting (see Section 4.6 of the Initial CRA Report).

In its assessment of the benefits and costs of exemption, the ACCC must have regard to the costs imposed by the Code, and the inefficiencies that it creates in the supply chain. Importantly, in considering the potential benefits from deregulation, it would be misguided to conclude that the objective of promoting competition should simply involve maximising the number of competitors. Rather, it implies an objective of promoting efficient competition that reduces costs and maximizes benefits to participants throughout the supply chain.

This issue is highlighted in relation to the inconsistent treatment of Lucky Bay and Port Lincoln. CRA has noted that the ACCC has not quantified, even approximately, the costs or benefits of exemption. Rather, it has simply identified some possible risks of exemption if Viterra was to favour Glencore Agriculture in the provision of terminal access, and arbitrarily decided that these risks outweigh the benefits of exemption. CRA has noted that this arbitrary, non-empirically based, approach to regulation is unsound as a matter of economics.