



Australian
Competition &
Consumer
Commission

Final determination Semaphore Container Services Pty Ltd, Port Adelaide

Exemption assessment of a bulk wheat port terminal facility under the Port Terminal Access (Bulk Wheat) Code of Conduct

28 July 2017

1. Introduction

The Australian Competition and Consumer Commission (ACCC) has made a final determination that Semaphore Container Services Pty Ltd (Semaphore) should be an exempt service provider of port terminal services at Osborne Berth 1, Inner Harbour, Port Adelaide.

This final determination is consistent with the ACCC's draft determination regarding the Semaphore facility published on 22 June 2017, and relates to an exemption under the Port Terminal Access (Bulk Wheat) Code of Conduct (the Code). The Code was made under section 51AE of the *Competition and Consumer Act 2010* (Cth) (CCA). It commenced on 30 September 2014 and regulates the conduct of bulk wheat port terminal service providers (PTSPs). For PTSPs that were not required to have access undertakings under the previous regime (including Semaphore), the obligations in the Code applied from 1 October 2015.¹

The final determination means that Semaphore is an exempt service provider at Osborne Berth 1, Port Adelaide and will only be subject to Parts 1 and 2 of the Code. Exempt service providers face a lower level of regulation as they are not required to comply with Parts 3 to 6 of the Code.

The ACCC's reasons for making this final determination are set out at section 2 of this document.

1.1. Existing exempt service provider within the grain catchment area

In deciding whether to exempt a PTSP, subclause 5(3)(i) of the Code requires the ACCC to have regard to whether there is already an exempt service provider within the grain catchment area.

On 1 April 2016 the ACCC determined Patrick Stevedoring Pty Ltd to be an exempt service provider of port terminal services at its Port Adelaide facility. In accordance with the Code the exemption was provided to the PTSP.

This facility is now owned by LINX Cargo Care (LINX). The ACCC will shortly commence an assessment of whether it is appropriate to provide exempt service provider status to LINX at Port Adelaide.

The ACCC notes there are currently no exempt service providers within the grain catchment area. However, the ACCC acknowledges that the presence of LINX (and Viterra) in the same catchment area does impose competitive constraint on Semaphore's operation

1.2. Exempt service providers

Exempt service providers are still obliged to comply with Parts 1 and 2 of the Code. These parts of the Code place a number of obligations on PTSPs including requirements to deal with exporters in good faith and publish information about how demand for capacity is managed and the current shipping stem. Exempt service providers must also comply with general competition law.

Exempt service providers are not required to comply with Parts 3 to 6 of the Code which means they are not required to, among other things:

¹ See subclause 4(6) of the Code.

- provide access according to the non-discrimination and no hindering obligations contained in the Code
- resolve access agreement negotiation disputes through the Code-prescribed dispute resolution process, which includes arbitration
- have their capacity allocation system approved by the ACCC if it allocates capacity more than 6 months into the future
- publish information about expected port capacity, performance indicators and stocks as required under Part 5 of the Code.

The ACCC can determine a PTSP to be an exempt service provider under subclause 5(2) of the Code. In deciding whether or not to determine that a PTSP is an exempt service provider, the ACCC must have regard to the matters listed at subclause 5(3) of the Code:

- (a) the legitimate business interests of the port terminal service provider;
- (b) the public interest, including the public interest in having competition in markets;
- (c) the interests of exporters who may require access to port terminal services;
- (d) the likelihood that exporters of bulk wheat will have fair and transparent access to port terminal services;
- (e) the promotion of the economically efficient operation and use of the port terminal facility;
- (f) the promotion of efficient investment in port terminal facilities;
- (g) the promotion of competition in upstream and downstream markets;
- (h) whether the port terminal service provider is an exporter or an associated entity of an exporter;
- (i) whether there is already an exempt service provider within the grain catchment area for the port concerned;
- (j) any other matters the ACCC considers relevant.

The ACCC's assessment of Semaphore's Osborne Berth 1, Inner Harbour, Port Adelaide facility against each of these matters is set out in section 2 of this document.²

1.3. Exemption application by Semaphore

On 16 May 2017, Semaphore wrote to the ACCC seeking to be determined an exempt service provider of port terminal services for bulk wheat exports at Osborne Berth 1, Port Adelaide, a common user bulk out-loading vessel service operation.

The exemption application is available on the ACCC's website at <https://www.accc.gov.au/regulated-infrastructure/wheat-export/wheat-export-projects/semaphore-port-adelaide-wheat-port-exemption-assesment>.

1.4. Public consultation process

On 22 June 2017 the ACCC released a draft determination on Semaphore's Port Adelaide facility and invited public submission in response. The ACCC received submissions from the following parties:

² Further details about the ACCC's process for making and revoking exemption determinations under the Code are in the ACCC's guidelines, available at <http://www.accc.gov.au/regulated-infrastructure/wheat-export/accc-role-in-wheat-export>.

- Grain Producers SA (GPSA)
- Grain Producers Australia (GPA).

These submissions supported the ACCC's draft determination to exempt Semaphore's Port Adelaide facility. The submissions are available on the ACCC's website.

1.5. Further information

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

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2. ACCC assessment having regard to the matters in subclause 5(3) of the Code

This section sets out the ACCC's assessment, having regard to the matters at subclause 5(3) of the Code, of whether it should determine Semaphore to be an exempt service provider at the Osborne Berth 1, Inner Harbour, Port Adelaide facility.

Semaphore submits that:

An exemption from Parts 3 to 6 of the Code are especially important for its operations in order to:

- Allow SCS to offer a competitive service to Australian Grain Industry participants
- Ensure the absence of negative implications for any considerable administrative costs when SCS is striving to compete in the monopolised market place
- Support SCS initiative to further its efforts to develop a competitive and efficient service for the industry.³

In addition, Semaphore submits that:

SCS aims to provide an independent and effective port terminal operation in the Adelaide port zone. The appeal of the organisation will be the efficiencies it can bring to the existing supply chain in South Australia which will likewise encourage potential users to utilise its services. Whilst limited in scale compared to the historical monopolised structures in the State, the organisation is not deterred by the challenges which present in such an environment. It is sincerely requested that the ACCC allow SCS to continue its initiatives and its efforts not be curtailed by any regulatory burden.⁴

³ Semaphore, *Semaphore Container Services Pty Ltd Application for Exemption from the Port Terminal (Bulk Wheat) Code of Conduct*, p. 7.

⁴ *ibid*, p. 10.

2.1. Legitimate business interests of Semaphore

Subclause 5(3)(a) of the Code requires the ACCC to have regard to the PTSP's legitimate business interests in deciding whether to grant an exemption.

Semaphore submits that:

The grain supply chain in South Australia has been dominated by a monopolised structure for many years. As a new entrant and albeit significantly smaller in size than existing alternatives, the SCS initiative is designed to provide opportunities for the participants of the grain supply chain by offering a dynamic and competitive structure which is focussed on customer service.

It would be detrimental to the SCS business initiative to be burdened by significant regulatory controls and the related costs.⁵

The ACCC accepts that exempting Semaphore at Inner Harbour, Port Adelaide would:

- increase its operational flexibility, and
- reduce its Code compliance costs, particularly noting that Semaphore is currently not regulated under the Code and would otherwise be required to develop an entirely new compliance program.

The ACCC considers it is generally in a PTSP's legitimate business interests to reduce (or not impose additional) regulatory compliance costs and maintain operational flexibility.

As such the ACCC's final view is that exempting Semaphore at Inner Harbour, Port Adelaide would be in its legitimate business interests. The ACCC considers that the legitimate business interests of Semaphore should be considered against the reasons for having regulation in place and the level of competitive constraint faced by Semaphore.

The purpose of the Code is to regulate the conduct of port terminal service providers to ensure that exporters of bulk wheat have fair and transparent access to port terminal services. The Code promotes the operation of an efficient and profitable bulk wheat export industry, and where appropriate the reduction of unnecessary regulatory burden on PTSPs.

The level of competitive constraint faced by Semaphore and other matters relevant to an exemption are considered below at sections 2.2-2.5.

2.2. The public interest and competition in markets

In deciding whether to grant an exemption, subclauses 5(3)(b) and (g) of the Code require the ACCC to have regard to the public interest, including the public interest in having competition in markets, and the promotion of competition in upstream and downstream markets. Subclause 5(3)(i) also requires the ACCC to have regard to whether there is already an exempt service provider within the grain catchment area for the port concerned.

The ACCC considers these matters all relate to the degree of competitive constraint faced by the PTSP in the provision of port terminal services, and the likely effect of an exemption on competition in bulk wheat port terminal services and related markets.

Semaphore submits an exemption will clearly be in the public interest because it will allow:

SCS to focus on reducing supply chain costs and associated difficulties prevalent in the alternative options in South Australia.⁶

⁵ *ibid*, p. 7.

Semaphore also submits:

as the business develops, this will encourage and support growth across all sectors and participants of the Agribusiness industry.⁷

In relation to competition in upstream and downstream markets, Semaphore submits that:

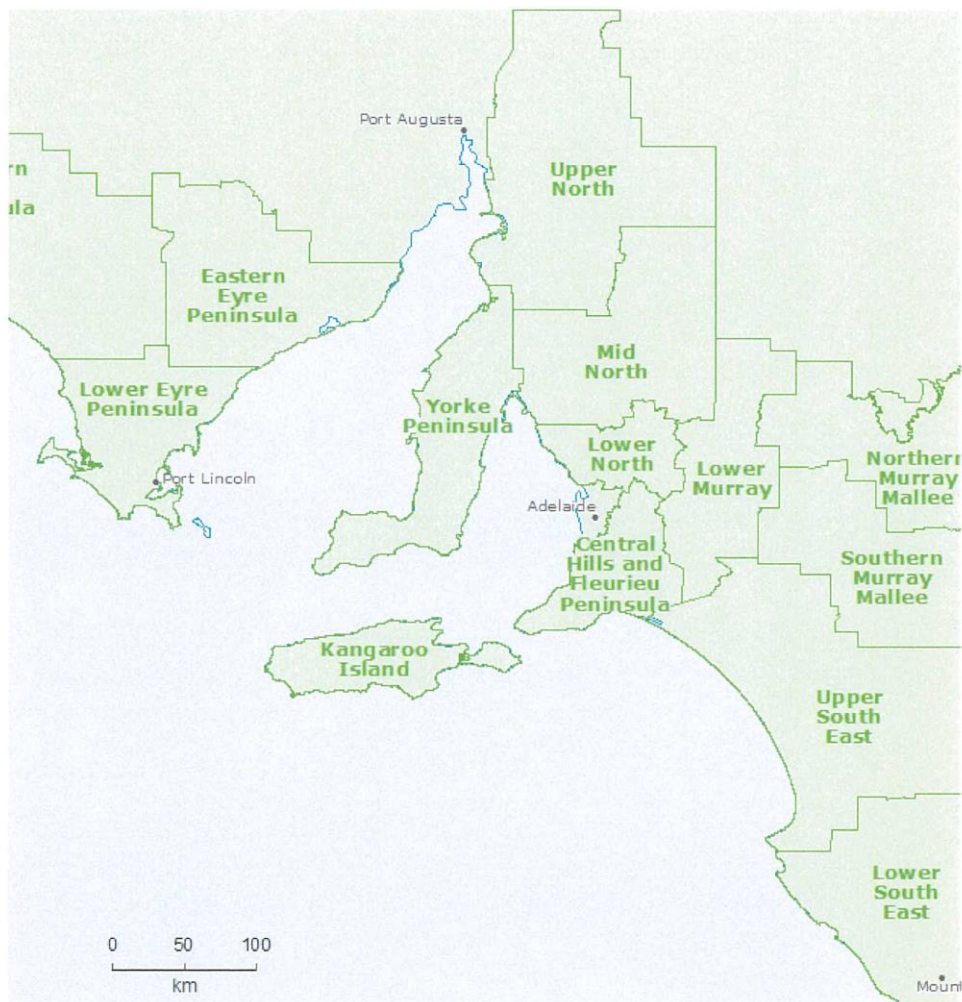
it is striving to provide an alternative option for port terminal services in South Australia which promotes an important outcome of promoting competition and may be evident in both upstream and downstream markets.⁸

In addition Semaphore submits:

As South Australia has the shortest distance to port than any other Australian State, the catchment area for the grain for exporters to utilise the SCS operations can be potentially drawn from a considerable growing region.⁹

Semaphore provides the following diagram of the potential catchment areas.

Figure 1: Potential catchment areas for Semaphore's operations



⁶ *ibid.*

⁷ *ibid.*

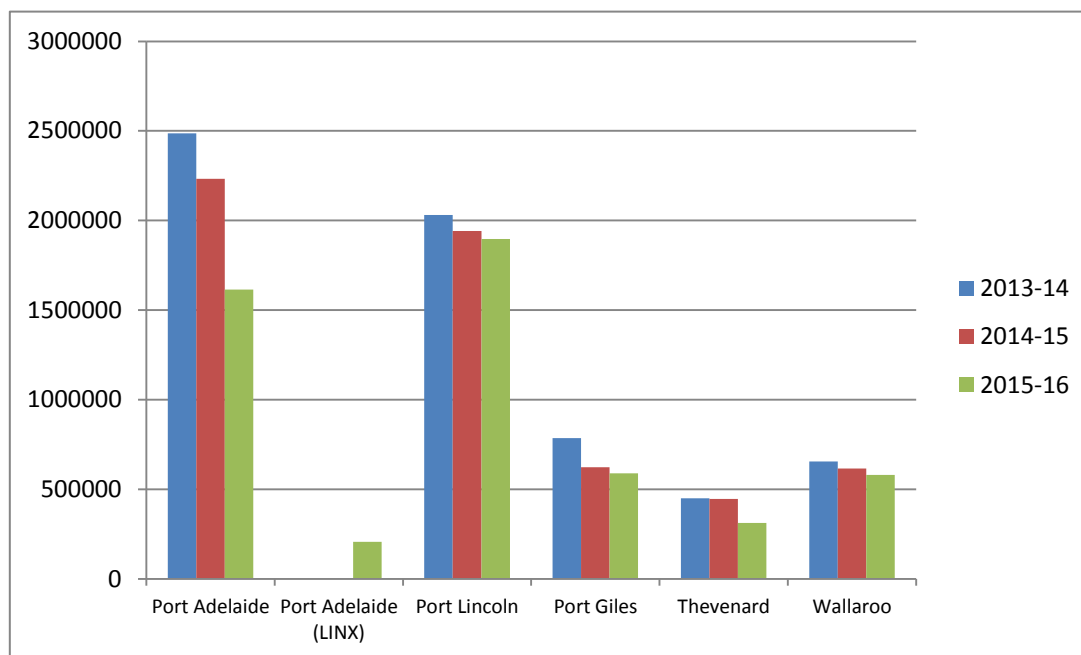
⁸ *ibid* p, 9.

⁹ *ibid*, p. 5.

Prior to Semaphore commencing operations at Port Adelaide, Viterra and LINX (previously Bulk and Automotive Ports Services and before that Patrick Stevedoring Pty Ltd) were the only other providers of export grain port terminal services in South Australia. As noted by Semaphore, Patrick was granted an exemption by the ACCC of its operations at Port Adelaide in April 2016.¹⁰

In 2015/16, 1 822 233 million tonnes of bulk grain was exported from Port Adelaide and over 1 897 699 million tonnes of bulk grain was exported from Port Lincoln.

Chart 1: Total grain exported by SA port terminal, 2013/14 to 2015/16



Source: loading statement data provided under section 7 of the Port Terminal Access (Bulk Wheat) Code of Conduct; Australian Crop Forecaster, Shipping stem report.

Semaphore submits that its facility will provide an additional pathway for SA exporters:

As the company is still in its infancy in terms of development, the operations are to a degree limited in scale by machinery limitations. It is difficult as such to detail annual capacity however the organisation is striving to develop and create a considerable servicing ability which will be customer oriented. It is expected the facility can cater for approximately 220,000 metric tonnes per marketing season.¹¹

Overall, Viterra will remain the dominant PTSP and exporters seeking to export bulk grain from South Australia will for the most part continue to have limited choice when deciding where to ship bulk grain from.

The ACCC considers that the Semaphore operation will provide some growers increased trading opportunities through exposure to a competing supply chain in South Australia.

The ACCC notes, however, that the overall amount of grain expected to be exported via Semaphore’s facility is small relative to the amount of grain exported through the adjacent

¹⁰ See ACCC, Final determination – Patrick (Port Adelaide) wheat port exemption assessment, 1 April 2016. Accessible at <https://www.accc.gov.au/regulated-infrastructure/wheat-export/patrick-port-adelaide-wheat-port-exemption-assesment/final-determination>.

¹¹ Semaphore, *Application for Exemption*, p. 6.

Viterra and LINX facilities. As noted above, Semaphore expects to load 220 000 tonnes per year.

GPSA noted the relatively small scale of the Semaphore operation in submitting its support for Semaphore's Port Adelaide exemption:

GPSA believes that the proposed export of 220,000 metric tonnes per marketing season is small relative to the amount of grain exported through nearby facilities.¹²

GPA also commented on scale in submitting its support for exemption, noting that Semaphore conducts a 'substantially smaller' operation than its main port zone competitor and that Semaphore already faces 'substantial competitive pressure'.¹³

The ACCC's view is that exempting Semaphore at Inner Harbour, Port Adelaide is in the public interest and may promote competition in markets because:

- Viterra is currently the dominant provider of port terminal services in South Australia. The Semaphore operation should promote competition in a market (and related markets) where Viterra is dominant.
- In the absence of full regulation under the Code, Semaphore will continue to face a significant competitive constraint from Viterra's facilities, especially from the port terminals at Port Adelaide. Similarly, Semaphore may also face competition from LINX's operations. Semaphore is therefore very unlikely to be able to exert market power in the provision of port terminal services.
- There is currently little competition in upstream markets, but granting an exemption to Semaphore may promote competition in both grain trading and grain storage in the future, particularly where an exporter who uses Semaphore's facility operates its own storage facility or facilities.

The ACCC's consideration of these matters supports granting an exemption to Semaphore at Osborne Berth 1, Inner Harbour, Port Adelaide.

2.3. Interests of exporters, access to port terminal services and whether PTSP is an exporter

In deciding whether to exempt a PTSP, subclauses 5(3)(c) and (d) of the Code require the ACCC to have regard to the interests of exporters who may require access to port terminal services and the likelihood that exporters of bulk wheat will have fair and transparent access to port terminal services.

In relation to the interests of exporters, Semaphore submits:

The commercial flexibility provided by the SCS operations serves to promote and develop the interests of exporters who require access to port terminal services. The opportunity for consideration of an alternative in the State is paramount to develop a competitive framework for exporters.

It is important that SCS be spared the cost implications and regulatory burdens, in order to continue its path of attracting and serving the interests of exporters.¹⁴

¹² Grain Producers SA, *Re: Semaphore Container Services Pty Ltd Application for Exemption from Parts 3 to 6 of the Port Terminal Access (Bulk Wheat) Code of Conduct*, July 2017, p. 1.

¹³ Grain Producers Australia, *Grain Producers Australia response to the ACCC draft determinations*, July 2017, p. 1.

¹⁴ *ibid*, p. 8.

Semaphore also submits that:

The SCS initiative is designed to promote flexibility and transparent services which benefit the interests of bulk wheat exporters. This results in fair access to the port terminal services.¹⁵

This is also related to subclause 5(3)(h) of the Code, which requires the ACCC to have regard to whether the PTSP is an exporter or an associated entity of an exporter. If a PTSP is vertically integrated in the export market it may favour its own trading division to the detriment of other exporters seeking access to port terminal services.

Semaphore submits that it is not an exporter or an associated entity of an exporter. Semaphore notes that it is a port terminal service provider that also offers container packing services to exporters.

Further, Semaphore submits that it currently has no formal commitments for its expected annual capacity of 220 000 tonnes, noting:

SCS welcomes any prospective user of the port terminal facility and works with such users to suit their requirements for shipping. SCS has no formal arrangements with any exporters.¹⁶

Given that Semaphore is not vertically integrated, it is unlikely to have incentives to discriminate or hinder access when providing ship loading services if third party exporters are able to obtain the requisite access to Viterra's or other receipt and storage services. In these circumstances, requiring Semaphore to provide access to third party exporters in accordance with the full obligations in the Code is likely to be of limited practical benefit.

Semaphore provides third party exporters additional choice in the bulk grain export market. Therefore, the ACCC considers that granting an exemption to Semaphore at Inner Harbour, Port Adelaide is likely to be in the interests of exporters. The ACCC also considers that deciding not to grant an exemption and applying the full level of regulation under the Code to Semaphore would likely provide little practical benefit to other potential access seekers.

2.4. Economically efficient operation and efficient investment

In deciding whether to exempt a PTSP, subclauses 5(3)(e) and (f) of the Code require the ACCC to have regard to the promotion of the economically efficient operation and use of the port terminal facility and efficient investment in port terminal facilities.

Semaphore submits:

Due to the existing monopolised operations in South Australia, SCS will only prosper if it is able to be promoted within the industry as an economically efficient operation. Achieving economic efficiencies is a fundamental objective likewise for the SCS operations.

As such it is imperative that SCS can continue its path of enhancing the economic efficiencies in the supply chain in South Australia and be spared the enormous impact of regulatory compliance and associated costs.¹⁷

¹⁵ *ibid.*

¹⁶ *ibid.*, p. 6.

¹⁷ *ibid.*

Further, Semaphore submits that:

The ability of SCS to offer the industry a flexible and innovative port terminal service will promote efficiencies of SCS and in addition, promote the efficiencies of associated supply chain assets and services in South Australia.

SCS will be severely hampered by the regulatory requirements which have the potential to disturb SCS efforts to promote efficiencies in the supply chain.¹⁸

Granting Semaphore an exemption will lower Semaphore's compliance related operating costs and provide it with greater operational flexibility. This will likely promote the efficient operation of the Osborne Berth 1 facility for bulk wheat exports.

The ACCC also recognises that unnecessary regulation may discourage investment in port terminal facilities. The ACCC considers that the competitive discipline provided by Viterra and LINX will be sufficient to encourage Semaphore to make efficient investments, and deter inefficient investment, in its facility.

An exemption may also create incentives for Viterra and LINX to make efficient investments in their port terminal facilities, in order to compete with Semaphore (to the extent that the Semaphore operation will provide competitive tension), at port or in related markets.

The ACCC's view is that exempting Semaphore at Osborne Berth 1, Inner Harbour, Port Adelaide will promote the economically efficient operation of and use of its facility, and efficient investment in port terminal facilities.

2.5. Other matters

The ACCC does not consider that there are any other matters relevant to its assessment of an exemption for Semaphore at Port Adelaide in accordance with subclause 5(3)(j) of the Code.

3. Monitoring

Having considered the matters under subclause 5(3) of the Code, including the level of competition Semaphore currently faces, the ACCC has formed the view that Semaphore should be exempt from Parts 3 to 6 of the Code. However, the ACCC recognises that it is not possible to ensure particular market outcomes following an exemption decision. Similar to the ACCC's approach to monitoring the level of competition following exemption determinations regarding port terminals in other port zones, the ACCC also considers it appropriate for it to continue to monitor the bulk wheat terminals in South Australia.

The ACCC intends to pursue two main monitoring activities:

- *Industry analysis* – this may include examining the shipping activity at each South Australian port terminal. All PTSPs publish and provide to the ACCC ship loading statements under Part 2 of the Code.
- *Industry consultation* – this may include periodically approaching industry participants, such as exporters and farmer groups, to gauge the effect of the exemptions. Industry participants are also encouraged to approach the ACCC directly with any concerns they may have about securing fair and transparent access to South Australian bulk wheat port terminals.

¹⁸ *ibid.*

The ACCC would be concerned if its monitoring revealed a reduction in the level of competition either across South Australia or within specific grain catchment areas. This may include significant increases in market concentration in the grain export market that may reduce the level of competition for grain grown by Australian farmers.

Under subclause 5(6) of the Code, the ACCC can revoke an exemption determination it has made if, after having regard to the matters in subclause 5(3), it is satisfied that the reasons for granting the exemption no longer apply.

The ACCC notes that it has released its inaugural bulk wheat ports monitoring report in December 2016, which considered the impacts of the ACCC's previous exemption decisions in 2015.

The report found that port terminal owners did not appear to be obstructing access or receiving a disproportionate share of port terminal capacity, following the exemptions.

The report noted however that 2015/16 was not a particularly high production or export year. Accordingly, the report stated that the ACCC was reserving judgement on the impact of the exemptions until a higher export year.

The ACCC will consult on the 2016/17 harvest year ahead of the release of its next report in December 2017.

4. Final determination

The ACCC's final determination is that Semaphore should be an exempt service provider of port terminal services provided by means of its port terminal facility located at Osborne Berth 1, Inner Harbour, Port Adelaide.