



## Draft Determinations

### Viterra Operations Pty Ltd

Exemption assessments of port terminal services provided at the following port terminal facilities:

- Port Adelaide Inner Harbour
- Port Adelaide Outer Harbor
- Port Lincoln
- Wallaroo
- Port Giles
- Thevenard

6 October 2020



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## Executive Summary

Under subclause 5(2) of the *Port Terminal Access (Bulk Wheat) Code of Conduct (the Code)*, the Australian Competition and Consumer Commission (**ACCC**) has made Draft Determinations that Viterra Operations Pty Ltd (**Viterra**) should be an exempt service provider of port terminal services provided by means of its port terminal facilities at:

- Port Adelaide Inner Harbour (**IHB**); and
- Port Adelaide Outer Harbor (**OHB**).

The ACCC has also made Draft Determinations that Viterra should not be an exempt service provider of port terminal services provided by means of its port terminal facilities at:

- Port Lincoln;
- Wallaroo;
- Port Giles; and
- Thevenard.

If the ACCC makes Final Determinations consistent with these Draft Determinations, Viterra's Port Adelaide IHB and OHB facilities will be subject to a lower level of regulation, as Parts 3 to 6 of the Code will not apply to Viterra in relation to these port terminal services.

However, if the ACCC makes Final Determinations consistent with these Draft Determinations, Viterra will remain subject to Parts 3 to 6 of the Code in relation to its Port Giles, Port Lincoln, Thevenard and Wallaroo facilities.

In making its Draft Determinations the ACCC has:

- considered each of Viterra's port terminal facilities individually; and
- carefully considered the matters listed at subclause 5(3) of the Code.

A summary of the ACCC's draft views in relation to each of Viterra's facilities is set out below. The ACCC notes that the exemptions proposed in relation to Viterra's IHB and OHB facilities are finely balanced, and are based on the information available to the ACCC at the time of making its Draft Determinations.

- **Port Adelaide IHB**
  - Viterra's Port Adelaide IHB facility likely faces sufficient competitive constraint from the combination of third party port terminal service providers (**PTSPs**), domestic markets, the Port Adelaide container market and Victorian markets (including domestic, container and PTSP markets) to incentivise Viterra to provide fair and transparent access to third party exporters.
  - Determining Viterra to be an exempt service provider in relation to its Port Adelaide IHB facility is unlikely to be detrimental to competition in port terminal services markets, or in upcountry grain storage and handling markets.
  - Determining Viterra to be an exempt service provider in relation to its Port Adelaide IHB facility will likely allow Viterra to provide more flexible services for its customers, as well as reducing regulatory burdens and any distortions which may result from differing regulatory arrangements applying to competing PTSPs.

- **Port Adelaide OHB**

- Viterra's Port Adelaide OHB facility likely faces sufficient competitive constraint from the combination of third party PTSPs, domestic markets, the Port Adelaide container market and Victorian markets (including domestic, container and PTSP markets) to incentivise Viterra to provide fair and transparent access to third party exporters.
- Determining Viterra to be an exempt service provider in relation to its Port Adelaide OHB facility is unlikely to be detrimental to competition in the port terminal services market, or the upcountry grain storage and handling market.
- Determining Viterra to be an exempt service provider in relation to its Port Adelaide OHB facility will likely allow Viterra to provide more flexible services for its customers, as well as reduce regulatory burdens and any distortion which may result from different regulatory arrangements applying to competing PTSPs.

- **Port Lincoln**

- Viterra's Port Lincoln facility likely faces an uncertain level of competitive constraint from T-Ports Pty Ltd's (**T-Ports**) Lucky Bay facility. T-Ports' facility is relatively unproven, having only commenced operations in March 2020, and also relies on a loading arrangement that is unproven in the context of the Australian grain market.<sup>1</sup>
- Viterra's Port Lincoln facility likely faces limited competition from domestic and container markets, meaning that grain grown on the Eyre Peninsula is largely reliant on access to export markets.
- Viterra has a dominant position upcountry on the Eyre Peninsula, where it owns the vast majority of storage.
- Determining Viterra to be an exempt service provider in relation to its Port Lincoln facility would likely be detrimental to exporters' interests and access to port terminal services, and to competition in upstream and downstream markets.

- **Wallaroo**

- Viterra's Wallaroo facility likely faces limited competition from third party PTSPs, and domestic and container markets, for the majority of grain that is likely to be exported from this facility.
- As such, determining Viterra to be an exempt service provider in relation to its Wallaroo facility would likely be detrimental to the interests of exporters, and to competition in upstream and downstream markets.

- **Port Giles**

- Viterra's Port Giles facility likely faces only limited competition from third party PTSPs at this time. In addition domestic and Port Adelaide container markets also likely place limited competitive constraint on Viterra's Port Giles facility.
- As such, determining Viterra to be an exempt service provider in relation to its Port Giles facility would likely be detrimental to the interests of exporters, and to competition in upstream and downstream markets.

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<sup>1</sup> T-Ports uses a transshipment vessel to move grain from the Lucky Bay harbour to deep water ocean going vessels. The ACCC understands that this type of operation, while likely reducing upfront capital investment requirements, requires the double handling of grain and may be subject to other constraints in practice (such as weather conditions). The ACCC also notes that transshipment operations have not been widely used in the context of the Australian bulk grain market. For further information see <https://tports.com/lucky-bay/>.

- **Thevenard**

- Viterra's Thevenard facility is in a relatively remote location and faces limited competition from domestic and container markets. As such grain grown on the Eyre Peninsula is largely reliant on access to export markets.
- There is likely limited overlap between the catchment area of Viterra's Thevenard facility and T-Ports' Lucky Bay facility. However the level of competitive constraint imposed by T-Ports' Lucky Bay facility is uncertain at this time.<sup>2</sup>
- Viterra has a dominant position upcountry on the Eyre Peninsula, where it owns the vast majority of storage.
- Given the above, determining Viterra to be an exempt service provider in relation to its Thevenard facility would likely be detrimental to the interests of exporters, and to competition in upstream and downstream markets.

The ACCC's draft views are based on the analysis of the capacity constraints and usage at Viterra's port terminal facilities, as well as the extent to which they compete with other port terminal facilities. The ACCC has also considered the extent of competitive constraint that may be imposed on Viterra's facilities by container exports and domestic markets.

The ACCC's full draft assessment of the matters listed at subclause 5(3) of the Code is set out in chapter 4 of this document.

In forming its draft views the ACCC notes that the level of competition in the SA market has increased in recent seasons, and that there is an inherent level of uncertainty associated with a dynamic environment. As previously noted, the exemptions proposed in relation to Viterra's IHB and OHB facilities are finely balanced and are based on the information available to the ACCC at the time of making its Draft Determinations.

Stakeholder submissions assist the ACCC to undertake its assessment of exemption applications. The ACCC encourages stakeholders to make submissions in response to these Draft Determinations. The process for making a submission is set out in section 1.4 of this document. Submissions must be received before **5:00pm (AEST), Tuesday 3 November 2020**.

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<sup>2</sup> As previously noted T-Ports' Lucky Bay facility only began operations in March 2020 The facility uses technology that is yet to be fully proven in the context of the Australian grain market.

# 1 Introduction

The Code was prescribed by the *Competition and Consumer (Industry Code – Port Terminal Access (Bulk Wheat)) Regulation 2014* under section 51AE of the *Competition and Consumer Act 2010* (Cth) (**the Act**). The Code commenced on 30 September 2014 and regulates the conduct of PTSPs to ensure that exporters of bulk wheat have fair and transparent access to port terminal services.

The Code provides that the ACCC or the Minister for Agriculture (**the Minister**)<sup>3</sup> may exempt a PTSP from the application of Parts 3 to 6 of the Code in relation to port terminal services provided by means of a specified port terminal facility. Exempt service providers face a lower level of regulation as they remain subject to only Parts 1 and 2 of the Code.

## 1.1. Exempt service providers

PTSPs that are not exempt are required to comply with Parts 1 to 6 of the Code (that is, the entire Code).

PTSPs that are determined by the ACCC or the Minister to be exempt service providers are:

- only required to comply with Parts 1 and 2 of the Code; and
- **not** required to comply with Parts 3 to 6 of the Code.

Part 1 of the Code contains general provisions about the Code.

Part 2 of the Code requires a PTSP to:

- deal with exporters in good faith;
- publish and make available a port loading statement;
- publish policies and procedures for managing demand for their services; and
- make current standard terms and reference prices for each port terminal facility that it owns and operates publically available on their website.

Part 3 of the Code requires a PTSP:

- not to discriminate in favour of itself or its trading business or hinder third party exporters' access to port terminal services;
- to enter into an access agreement or negotiate the terms of an access agreement with an exporter to provide services if an exporter has applied to enter into an access agreement and certain criteria are satisfied;
- to deal with disputes during negotiation via specified dispute resolution processes including mediation and arbitration; and
- to include a dispute resolution mechanism in its standard terms and to vary standard terms in accordance with a prescribed procedure.

Part 4 of the Code requires a PTSP to have, publish and comply with a port loading protocol (**PLP**), which includes an ACCC approved capacity allocation system.

Part 5 of the Code requires a PTSP to regularly publish its expected capacity, stock at port information and key performance indicators.

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<sup>3</sup> The Code specifically refers to '...The Minister administering section 1 of the *Farm Household Support Act 2014*...'.

Part 6 of the Code requires a PTSP to retain records such as access agreements and variations to those agreements.

Exempt service providers are still required to comply with the general competition law provisions in Part IV of the Act.

## 1.2. Viterra's exemption application

Currently, Parts 1 to 6 of the Code apply to Viterra's provision of port terminal services at the following bulk grain port terminal facilities:

- Port Adelaide IHB;
- Port Adelaide OHB;
- Port Lincoln;
- Wallaroo;
- Port Giles; and
- Thevenard.

On 2 July 2019 Viterra submitted an application to the ACCC seeking to be an exempt service provider of port terminal services in relation to six of its South Australian (**SA**) port terminal facilities.

Viterra also submitted a range of additional materials supporting its application for exemption. This included additional information on the characteristics and capacity of its port terminals, catchment areas, and operational considerations. Viterra also provided the ACCC with a number of consultant reports from Charles River Associates (**CRA**). The ACCC also sought further information from Viterra to assist with its analysis and met with stakeholders.

Further details of Viterra's exemption application and related materials are set out as relevant throughout this document.

The materials submitted by Viterra in support of its exemption application are available on the [ACCC website](#).

## 1.3. Public consultation undertaken to date

The ACCC released an Issues Paper on 9 August 2019 seeking submissions on Viterra's exemption application.

The ACCC received eight public submissions from stakeholders (other than Viterra) in response to the Issues Paper:

- Cargill;
- GrainGrowers;
- Grain Producers Australia (**GPA**);
- Grain Producers South Australia (**GPSA**);
- Gypsum Resources Australia Pty Limited (**GRA**);
- Pastoralists and Graziers Association of WA (**PGA of WA**);



- South Australian Freight Council (**SAFC**); and
- T-Ports.

Following the receipt of submissions to the August 2019 Issues Paper, Viterra provided a number of new documents, as well as updates to previously submitted information, and responses relating to ACCC information requests and ongoing discussions. This included:

- A revised exemption application, provided on 7 February 2020, containing corrected capacity figures for all six of Viterra's ports (all other elements of the exemption application remained the same).
- Two consultant reports by CRA, provided on behalf of Viterra (on 11 November 2019 and 7 February 2020). The reports include economic modelling which considers whether Viterra has an economic incentive to deny third party exporters' access to its facilities.
- Two supplementary submissions, one in response to stakeholder submissions regarding the ACCC Issues Paper, and the other in response to ongoing discussions with ACCC staff regarding the indirect costs of regulation. These submissions were provided on 11 November 2019 and 12 March 2020, respectively.
- Responses to ACCC information requests on features of Viterra's port terminal facilities (such as road and rail receival capabilities), port terminal capacity and catchment areas. This information was received in three tranches between December 2019 and February 2020.

A number of port developments in markets of potential relevance to the ACCC's exemption assessments have occurred since the Issues Paper consultation period which are relevant to the ACCC's Draft Determination. These included:

- T-Ports' Lucky Bay port terminal facility becoming operational and capable of handling bulk wheat;
- Archer-Daniels-Midland (**ADM**) facilitating a small number of coastal shipments from Port Pirie;
- Cargill Australia Limited (**Cargill**) entering the PTSP market at Port Adelaide Inner Harbour; and
- LINX Cargo Care Group (**LINX**) exiting the PTSP market at Port Adelaide Inner Harbour.

The completion of another production season also provided further relevant market data and industry observations, which were considered in the ACCC's Bulk Grain Ports Monitoring Report 2018-2019 (published in December 2019).

The ACCC therefore released a Supplementary Issues Paper on 25 May 2020 to allow stakeholders' to respond to these developments.

The ACCC received three responses from the following parties in response to the SIP:

- Mr Geoff Ryan;
- SAFC; and

- T-Ports.

Viterra also provided a further submission addressing the Supplementary Issues Paper and the submissions from stakeholders.

All public materials received from Viterra and stakeholders are available on the ACCC's [website](#).

## 1.4. Consultation on the Draft Determinations

The ACCC invites public submissions on the Draft Determinations set out in this document. The Draft Determinations highlight areas where the ACCC would particularly welcome stakeholder submissions, and the ACCC would appreciate feedback in relation to these, or any other matters.

in particular the ACCC welcomes views from stakeholders regarding the following matters:

- The upcountry storage and handling market in SA
- The interaction between container, domestic and bulk export markets
- The degree of competitive constraint that domestic consumption, in SA and interstate, places upon Viterra's operations
- The expected behaviours which would indicate that a PTSP is subject to sufficient competitive constraints
- Viterra's bundling of services – including the effect of this and any interaction with Viterra's position at port and upcountry
- The CRA materials
- The Draft Determinations more broadly

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

[transport@acc.gov.au](mailto:transport@acc.gov.au)

[katie.young@acc.gov.au](mailto:katie.young@acc.gov.au)

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Please address submissions to:

General Manager  
Infrastructure & Transport - Access & Pricing Branch  
ACCC  
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### ***Due date for submissions***

Submissions must be received before **5:00pm (AEST), Tuesday 3 November 2020**.

Given the COVID-19 pandemic and the relative size and complexity of the Draft Determinations, stakeholders who are interested in making a submission, but are unable to meet the deadline should contact the ACCC ahead of the due date

## **Confidentiality of information provided to the ACCC**

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

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

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

## **Further information**

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

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## **1.5. Outline of this document**

The Draft Determinations document is set out as below:

- Chapter 2 considers the characteristics of Viterra's respective port terminal facilities, including their capacity and the demand for their services.
  - The analysis of capacity and demand indicates whether there is spare capacity, or capacity constraints, at the port terminals and to what extent this would impact a PTSP's incentive to provide fair and transparent access if Parts 3 to 6 of the Code did not apply.
- Chapter 3 considers the level of competition in upcountry storage and handling markets. This chapter also examines the degree of competitive constraint imposed by container exports and domestic demand.
  - The analysis of these issues informs the ACCC of whether a port terminal facility faces a sufficient degree of competitive constraint to promote fair and transparent access to port terminal services should Parts 3 to 6 of the Code not apply in respect of that facility.
- Chapter 4 uses the analysis and draft findings from chapters 2 and 3 to set out the ACCC's draft assessment of the matters listed at subclause 5(3) of the Code in relation to each of Viterra's port terminal facilities.

## 1.6. Terminology used in the Draft Determinations

For the readers' convenience a glossary of key acronyms used in the Draft Determinations has been included at section 1.7.

As noted, the Code's purpose is to regulate the conduct of PTSPs to ensure that exporters of bulk wheat have fair and transparent access to port terminal services. The ACCC notes that the terminology used by the bulk grain industry does not typically distinguish between bulk wheat and other bulk grains. For example, available capacity at a port terminal facility is not typically recorded or referred to with respect to a particular type of grain and a bulk grain port terminal facility (or a bulk grain loader) is rarely, if ever, exclusively used in relation to bulk wheat (though is almost always capable of handling bulk wheat).

The ACCC notes that, in making submissions to exemption application assessments, stakeholders have therefore typically taken the approach of referring to 'grain' rather than 'wheat'. Consistent with this, and for readability, the ACCC has also used the term 'grain'. Where this has occurred in the context of the ACCC's draft assessment of the matters referred to in clause 5 of the Code, it should be taken to relate to 'bulk wheat' for the purposes of the Code.<sup>4</sup>

## 1.7. Glossary/Definitions

<b>ABARES</b>	Australian Bureau of Agricultural and Resource Economics and Sciences
<b>ACCC</b>	Australian Competition and Consumer Commission
<b>ACF</b>	Australian Crop Forecasters
<b>ADM</b>	Archer-Daniels-Midland Trading Australia Pty Ltd
<b>AEGIC</b>	Australian Export Grains Innovation Centre
<b>Berth</b>	A location at a port or harbour used for mooring vessels
<b>Bulk grain exports</b>	Grain loaded onto a ship for export. Does not include grain to be exported in a bag or container that is not capable of holding more than 50 tonnes of grain
<b>Bulk shipments</b>	Grain loaded onto a ship for either export or coastal shipment
<b>Cargill</b>	Cargill Australia Limited (a subsidiary of multinational agribusiness Cargill Inc.)
<b>CBH</b>	CBH Ltd
<b>Capacity</b>	The amount of grain in tonnes that can be loaded onto a ship during a shipping window, as determined by the port terminal service provider that owns or operates the port

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<sup>4</sup> The ACCC notes that 66 per cent of all bulk grain exported from SA between the 2011-12 and 2018-19 seasons was wheat.

	terminal facility <sup>5</sup>
<b>CCA</b>	<i>Competition and Consumer Act 2010</i> (Cth)
<b>Coastal shipments</b>	Shipments of bulk grain made between Australian ports
<b>CRA</b>	Charles River Associates
<b>Department</b>	Department of Agriculture and Water Resources
<b>East coast</b>	NSW, Queensland and/or Victoria
<b>Eastern South Australia</b>	The portion of South Australia to the east of the Spencer Gulf
<b>ESCOSA</b>	Essential Services Commission of South Australia
<b>Exporter</b>	An entity seeking access to, or using, port terminal services for the purpose of exporting bulk grain
<b>Glencore</b>	Glencore Agriculture Pty Ltd (associated entity to Viterra Operations Pty Ltd)
<b>GPA</b>	Grain Producers Australia
<b>GPSA</b>	Grain Producers South Australia
<b>GRA</b>	Gypsum Resources Australia Pty. Limited
<b>GrainCorp</b>	GrainCorp Operations Limited
<b>Grain usage</b>	Refers to how a state's grain production supplies various markets. Grain can be consumed domestically, exported in bulk or by container, or transferred to other states
<b>GWA</b>	Genesee and Wyoming Australia Pty Ltd.
<b>IHB</b>	Viterra's Inner Harbour Port terminal facility located at Port Adelaide
<b>Just-In-Time</b>	A process for managing inventory where a commodity (such as wheat) is loaded onto a vessel as it is delivered to the port terminal facility
<b>LINX</b>	LINX Cargo Care Group
<b>Long-term agreement</b>	An agreement entered into for long-term capacity between a port terminal service provider and an exporter

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<sup>5</sup> The definitions of specific types of capacity and allocation process terminology used by Viterra and referred to in this document are defined in Viterra's protocols (see: <http://viterra.com.au/wp-content/uploads/Viterra-Port-Loading-Protocols-Effective-24-December-2015.pdf> for further information).

<b>Mobile ship loader</b>	A ship loader which is able to be transported between port terminals and can be used on general purpose wharves to load bulk grain (or other commodities)
<b>OHB</b>	Viterra's Outer Harbor port terminal facility located at Port Adelaide
<b>Panamax</b>	A class of large (high-capacity) vessel that is typically unable to load grain at shallow (i.e. non-deep water) port terminal facilities.
<b>Peak period</b>	The period where demand for bulk grain shipment port terminal services is highest. In SA this is typically from 1 December until 31 May
<b>PGA of WA</b>	Pastoralists and Graziers Association of Western Australia
<b>PIRSA</b>	Department of Primary Industries and Regions in South Australia
<b>PLP</b>	A Port Loading Protocol is a statement of a port terminal service provider that sets out the port terminal service provider's policies and procedures for managing demand for its port terminal services.
<b>Port terminal facility</b>	A ship loader that is at a port and capable of handling bulk wheat, including an intake/receival facility, a grain storage facility, a weighing facility and a shipping belt
<b>PTSP</b>	Port terminal service provider – the owner or operator of a port terminal facility that is used, or is to be used, to provide a port terminal service
<b>SA</b>	South Australia
<b>SAFC</b>	South Australian Freight Council
<b>Semaphore</b>	Semaphore Container Services Pty Ltd
<b>Shipping year</b>	The period from 1 October to 30 September the following year
<b>Supply chain</b>	A network between companies and their suppliers to produce and distribute grain. This includes upcountry grain storage and handling services, transportation of grain and port terminal services
<b>The Code</b>	<i>The Port Terminal Access (Bulk Wheat) Code of Conduct</i>
<b>T-Ports</b>	T-Ports Pty Ltd

<b>Transshipment Vessel</b>	A shallow draft vessel used to move grain from a port terminal facility to an ocean going vessel stationed offshore
<b>Vertically integrated</b>	A company that operates at more than one stage of the supply chain
<b>Viterra</b>	Viterra Operations Pty Ltd (associated entity to Glencore Agriculture Pty Ltd)

## 2. Bulk grain port terminal services

This chapter discusses the ACCC's analysis of the market for port terminal services and sets out the ACCC's draft views on the availability of, and demand for, bulk grain port terminal services at each of Viterra's port terminal facilities.

The ACCC's consideration of the availability of, and demand for, port terminal services at Viterra's facilities is relevant to the ACCC's assessment of the exemption application, having regard to the matters specified in subclause 5(3) of the Code.

The ACCC notes Viterra was the sole provider of port terminal services in SA prior to 2015-16. Since then, LINX (formerly Patrick) and Semaphore established mobile loading facilities at Port Adelaide in the 2015-16 and 2016-17 seasons respectively.<sup>6</sup> Furthermore, T-Ports recently commenced operations at its Lucky Bay facility (in March 2020). Viterra has facilitated 92 per cent of all SA bulk exports since 2016-17.

This chapter begins by considering the supply of port terminal services in SA, including:

- the particular characteristics of each SA port terminal facility (in sections 2.1.1 to 2.1.4) including the ability to store and receive grain at port, and the overall port terminal capacity available at each SA facility;
- the level of competitive constraint alternative PTSPs impose upon Viterra's facilities (section 2.1.4); and
- the level of competitive constraint imposed by proposed port terminal facilities on Viterra's facilities (section 2.1.5); and
- the constraint international markets place upon Viterra's operations (section 2.1.6).

In terms of the supply of port terminal services, the ACCC notes that recent entry from competing port terminals has increased the supply of alternate capacity outside of Viterra's system, and has placed a level of competitive constraint upon Viterra. However, this competitive constraint differs by region, and is somewhat unproven given the relatively recent entry of some PTSPs.

The chapter then considers the demand for port terminal services, including:

- the capacity utilisation of each of Viterra's port terminal facilities on an annual and peak period basis (sections 2.2.2 to 2.2.3); and
- whether exporters have historically been able to obtain fair and transparent access to Viterra's port terminal facilities in both peak and off-peak periods (section 2.2.4).

The ACCC considers that, in terms of the demand for port terminal facilities, third party exporters will likely continue to be reliant on gaining access to Viterra's port terminal facilities. Historically third party exporters have been able to access some level of capacity at Viterra's port terminal facilities. However, in the absence of sufficient competitive constraint, the ACCC's draft view is that if an exemption (or exemptions) were granted so that Parts 3 to 6 of the Code did not apply, there is a risk that Viterra would favour certain exporters, particularly during peak periods.

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<sup>6</sup> On 8 April 2020 LINX Cargo Care Group formally notified the ACCC that it has ceased providing port terminal services to bulk grain exporters through its Port Adelaide facility. However, LINX's only export customer, Cargill, has since established its own mobile ship loading services at Port Adelaide Inner Harbour.



The ACCC considers the level of capacity constraint faced by each of the ports to be a key factor in assessing the level of competition for port terminal services on a port-by-port basis. As a general proposition, where demand for port terminal services exceeds supply (i.e. capacity is constrained), the ACCC considers that vertically integrated PTSPs have stronger incentives to favour their own exporting businesses.

Conversely, where demand for port terminal services is lower than supply a PTSP will have some level of incentive to provide access on fair and transparent commercial terms, to drive utilisation of its infrastructure. In general the ACCC considers that, in the presence of sufficient competition (i.e. from other PTSPs and the domestic and container markets), greater oversupply of capacity at a facility will increase the incentive for a PTSP to provide access on fair and transparent terms.

In particular, during periods of constrained capacity, the ACCC considers it unlikely that a PTSP will have an incentive to completely deny access to third party exporters. Rather, the ACCC considers that a PTSP will more likely have an incentive to favour certain exporters, such as associated entities, for example by providing them with first choice access to shipping slots, with the remaining slots than being offered to third party exporters.

Chapter 2 also considers the competitive constraint imposed by international markets. As discussed in section 2.1.6 the ACCC's draft view is that Viterra has some incentive to minimise supply chain costs as a result of competition in international markets, however efficiencies will not necessarily be passed on to other SA market participants in circumstances where Viterra retains significant market power at port.

The chapter also provides the ACCC's draft view on the reports provided by Viterra's consultant CRA (including their economic modelling and views on vertical integration). In doing so, the ACCC notes that CRA's modelling focusses on the complete denial of access, however the ACCC considers favourable access to be a more relevant consideration. The ACCC also notes that the results of CRA's modelling appear highly sensitive to the input assumptions, therefore reducing the strength of the conclusion that Viterra does not have an incentive to deny access. The CRA box also sets out the ACCC's view on issues associated with vertical integration in the context of the SA bulk grain export market.

The ACCC notes that a range of the matters raised during the consideration of Viterra's exemption application may directly relate to only one, or a small number of facilities (such as a nearby competing port terminal facility), while other matters may be broader in nature and potentially of relevance to most, or all, of the Viterra's facilities (such as competition in the international market).

The information and discussion in this chapter (and in chapter 3) is generally presented with respect to its relevance to each, any or all of Viterra's facilities. More detailed and specific consideration is given to how these matters specifically relate to each individual facility, as well as to the ACCC's draft view as to whether or not that facility should be exempt, in chapter 4.

## 2.1. Port terminal facilities and capacity

There are currently nine operational bulk grain export port terminal facilities in SA. Six of these facilities are operated by Viterra, and one each operated by Cargill, Semaphore and T-Ports. A map showing the locations of each of the nine terminals is presented below in figure 2.1.

Table 2.1 below provides an overview of the features of bulk grain export port terminal facilities that are currently operational.

The ACCC is also aware of proposals to build additional port terminals in SA. These are discussed further in section 2.1.5.

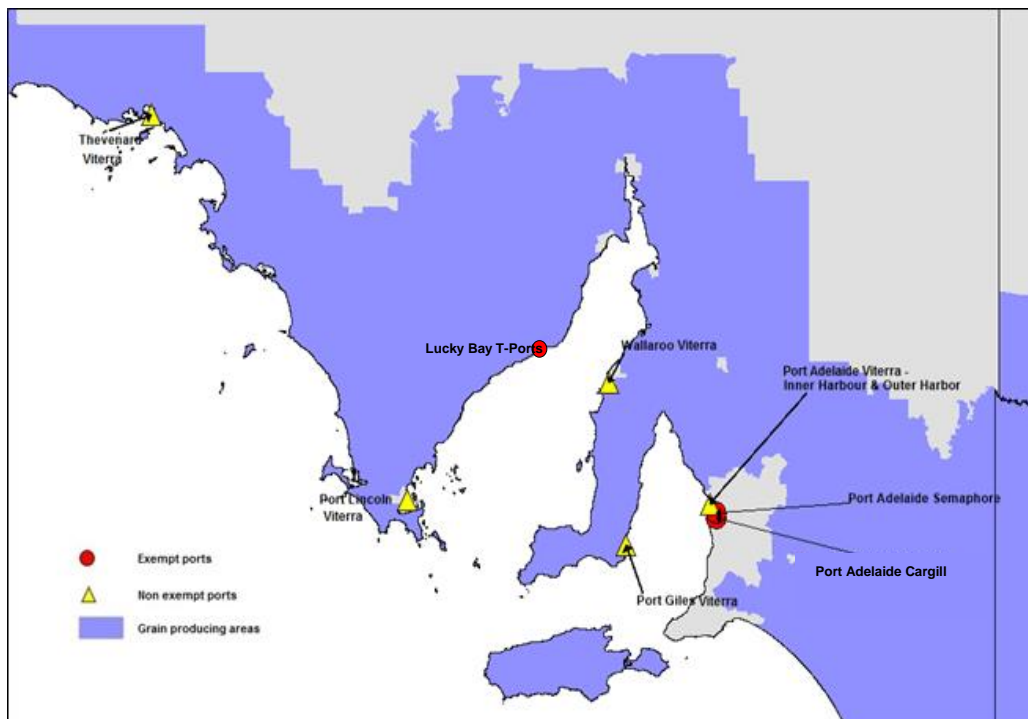
The amount of grain a port terminal facility is able to load in a given year (i.e. its capacity) is related to a variety of 'at port' characteristics, in particular:

- **road and/or rail receival facilities:** road/rail receival facilities determine how quickly grain received at port can be processed into storage or onto a vessel;
- **at-port storage:** at port storage provides a PTSP with greater flexibility to coordinate the receival and loading of grain; and
- **ship loading rate:** how quickly a PTSP can load grain onto a vessel is a significant factor in how much grain a port terminal can facilitate.

The level of capacity available at each port terminal facility is relevant to assessing the relationship between the supply and demand of port terminal services. It is also relevant to the identification of capacity constraints (i.e. circumstances in which demand for capacity exceeds supply) which, in the absence of viable competitive alternatives, could lead to the PTSP exercising market power in the provision of port terminal services.

The supply of port terminal services is discussed throughout the rest of section 2.1. Exporter demand for port terminal capacity in SA is discussed in section 2.2.

**Figure 2.1: Map of SA port terminal facilities and grain growing regions**



Source: ABS, 7121.0—Agricultural Commodities, Australia, 2015–16 SA2 data, and company websites.

**Table 2.1: Overview of port terminal facilities in SA**

Port terminal facility	Rail Receival	Road Receival	Storage Capacity (tonnes)*	Ship loader (tonnes per hour)	Port of Anchorage declared depth
<b>Port Adelaide – Inner Harbour (Viterra)</b>	Standard gauge 1 600 t/hr 1 hopper	800 t/hr 2 hoppers	366 500 tonnes	1 000 t/hr	10.9m
<b>Port Adelaide – Outer Harbor (Viterra)</b>	Standard gauge 2 400 t/hr 1 hopper	800 t/hr 1 hopper	65 000 tonnes	2 200 t/hr	16.2m
<b>Port Adelaide – Inner Harbour (Cargill)</b>	N/A	1 000 t/hr 2 hoppers	None	1 000 t/hr**	10m
<b>Port Adelaide - Osborne (Semaphore)</b>	N/A	375 t/hr 3 hoppers	16 500 tonnes	300 t/hr	10m
<b>Port Giles (Viterra)</b>	N/A	3 600 t/hr 10 hoppers	514 100 tonnes	1 000 t/hr	14.7m
<b>Port Lincoln (Viterra)</b>	N/A	4 000 t/hr 14 hoppers	395 600 tonnes	3 000 t/hr	15.2m
<b>Lucky Bay (T-Ports)</b>	N/A	1 000 t/hr 2 hoppers	360 000 tonnes	1 800 t/hr	15-17m
<b>Thevenard (Viterra)</b>	N/A	1 400 t/hr 6 hoppers	335 925 tonnes	1 000 t/hr	9.8m
<b>Wallaroo (Viterra)</b>	N/A	2 150 t/hr 6 hoppers	757 500 tonnes	800 t/hr	9.5m

Source: Flinders Ports website (<https://www.flindersports.com.au/ports-facilities/port-adelaide/>); Viterra, *Attachment 1 – Response to 14/11/19 information request 2020, Questions 1 and 2 – Viterra port terminal facility features*, 13 February 2020.; Viterra website (<http://viterra.com.au/index.php/ports-and-terminals/>); T-Ports Code exemption application; Cargill Code exemption application; Cargill and Semaphore responses to ACCC information requests.

Note: \* This includes storage which is directly connected to ship loading facilities at port, as well as nearby storage which is not located directly at port and therefore may need to be transported a short distance by road freight services to the shipping bins for loading onto conveyors.

\*\* Cargill submits that while its loading rate is designed to intake at 1 000 tonnes per hour, due to operational reasons (truck availability and the absence of at-port storage) it expects to load grain to vessels at 400 tonnes per hour.

### 2.1.1. Receivals

Table 2.1 (above) shows the road and rail receival facilities for each SA port terminal facility. As can be seen Viterra's Port Adelaide IHB and OHB facilities are the only facilities in SA currently able to receive grain via both road and rail transport: all other facilities in SA are only able to receive grain via road transport.

As shown there is significant variation across the combined rail and road receival rates of SA's port terminal facilities, with Port Lincoln having the highest capability to facilitate grain intake (4 000 tonnes per hour), and T-Ports' Lucky Bay facility having the lowest (1 000 tonnes per hour).

The ACCC notes that the rate at which Cargill and Semaphore state they are able to facilitate grain intake from road transport is at 1 000 tonnes per hour and 375 tonnes per hour respectively. However Cargill submitted that while they can receive grain at 1 000 tonnes per hour operationally they expect to load grain at 400 tonnes per hour, due to factors such as truck availability and the absence of at-port storage. Viterra's Port Adelaide port terminal facilities both have a road intake of 800 tonnes per hour, and in addition, as noted above, are also able to receive grain via rail (at rates of 1 600 and 2 400 tonnes per hour respectively). As such, and in particular given neither Cargill and Semaphore have rail grain receival capability, Viterra's IHB and OHB port terminal services are likely able to facilitate the receival of grain more efficiently than Cargill and Semaphore's facilities.

In addition, the ACCC considers that rail receival capability at Viterra's IHB and OHB facilities likely gives these port terminals a competitive advantage over Cargill's and Semaphore's port terminal facilities with respect to the grain they are able to source from within the Port Adelaide catchment area.

The ACCC also notes that Viterra's Port Lincoln facility previously received grain via rail, however Viterra and Genesee & Wyoming Australia (**GWA**) did not renew their rail contract when it expired on 31 May 2019.<sup>7</sup> Consequently, Port Lincoln currently only receives grain via road freight services.

Upcountry transport network links for each port terminal facility are discussed further in section 3.1.2.

### 2.1.2. Storage at SA port terminal facilities

Table 2.1 shows that all of Viterra's port terminal facilities, with the exception of OHB, are able to store significant amounts of grain at port.

While Viterra's OHB facility only has 65 000 tonnes of storage available, Viterra's IHB facility has 366 500 tonnes. Given the close proximity of the two ports, the ACCC notes there appears to be potential for IHB to be used as a storage and accumulation facility for OHB (however Viterra did not expressly state this in its exemption application).<sup>8</sup>

The two competing Port Adelaide facilities, Cargill and Semaphore, both (largely) operate on a Just-In-Time (**JIT**) process and, as a result, have little to no storage available at their port terminal facilities (as per table 2.1 Cargill does not have any at-port storage and Semaphore has only 16 500 tonnes).

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<sup>7</sup> See: <http://viterra.com.au/index.php/2019/02/26/viterra-decision-provides-competitive-supply-chain-to-eyre-peninsula-growers/>.

<sup>8</sup> The ACCC notes that in 2013 Viterra submitted that IHB and OHB are best managed as a single port terminal facility. See: ACCC, *Draft Decision Viterra Operations Limited Application to Extend and Vary 2011 Port Terminal Services Access Undertaking*, p. 28.

The ACCC considers that Viterra's ability to store grain at its Port Adelaide terminal facilities, and in particular at IHB, provides a further competitive advantage over both Cargill and Semaphore.

On the Eyre Peninsula, T-Ports' Lucky Bay facility has 360 000 tonnes of storage available at-port, which is comparable to the at-port storage available at Viterra's Port Lincoln and Thevenard facilities (395 600 tonnes and 335 925 tonnes respectively).

The two ports on the Yorke Peninsula, Viterra's Port Giles and Wallaroo facilities, have a combined 1.27 million tonnes of at-port storage. As discussed in section 3.1.1 there is little upcountry storage available on the Yorke Peninsula and it is expected that a relatively large amount of storage (either at-port or otherwise) would be required to facilitate shipments or for a new entrant to compete.

### 2.1.3. Ship loading capacity

Viterra's Port Lincoln and OHB facilities have the highest ship loading (or elevation) capacity of all SA ports, capable of achieving up to 3 000 and 2 200 tonnes per hour respectively (see table 2.1). Ship loading capacity at the remaining SA port terminal facilities ranges from 300 to 1 800 tonnes per hour.

As shown in table 2.1, T-Ports' Lucky Bay facility, the closest port to Viterra's Port Lincoln facility geographically, has a ship loading rate of 1 800 tonnes/hr which is 1 200 tonnes per hour lower than Port Lincoln's (though Lucky Bay's ship loading rate is the third highest loading rate across SA).

The ACCC also notes that T-Ports' Lucky Bay facility uses a relatively unique ship loading approach that involves a transshipment vessel. As a result of this operating method, grain is first loaded onto the transshipment vessel; before being shipped out to deeper water, where the grain is then transferred from the transshipment vessel to the exporting vessel. As such, the facility 'double handles' grain during its loading process, which may further disadvantage it to Port Lincoln in terms of the rate at which grain can be loaded in practice. T-Ports' use of this type of ship loading approach relatively unproven in the context of the Australian grain market and may be subject to other constraints in practice, such as weather conditions.<sup>9</sup>

Viterra's Port Lincoln, Port Adelaide OHB and Port Giles facilities are the only fixed deep water ports in SA capable of loading Panamax class vessels. However, T-Ports' Lucky Bay facility also has the ability to accommodate panamax vessels via its transshipment operation. As such, exporters must be able to gain some level of access to one of these four facilities in order to fully load larger vessels (i.e. those that exceed certain tonnages) in SA.

As Cargill noted in its submission:

*...Viterra's current monopoly extends to all of the deep water ports in the state, i.e. Port Adelaide, Port Giles and Port Lincoln. The principal effect of this monopoly is that exporters have no other options for loading of vessels exceeding certain tonnages. Fair and transparent access to these ports is crucial in order to ensure the commercial viability of larger vessels and loads.<sup>10</sup>*

The ACCC notes that T-Ports' Lucky Bay facility was not yet in operation at the time of Cargill's initial submission.

The ACCC considers that the ability to load Panamax vessels provides a competitive advantage for deep water ports over shallower ports due to their ability to facilitate the use of

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<sup>9</sup> The ACCC notes that T-Port's PLPs for Lucky Bay suggest that certain weather conditions may limit loading operations.

<sup>10</sup> Cargill Submission, 6 September 2019, p .2.

larger, more economically efficient, vessels. Consequently, the ACCC's draft view is that Viterra's Port Adelaide OHB, Port Giles, and Port Lincoln facilities, as well as T-Ports' Lucky Bay facility, are advantaged over those SA port terminal facilities that do not have the ability to load Panamax vessels.

#### 2.1.4. Elevation capacity

Table 2.2 below shows capacity estimates for each PTSP that are expected to be operational during the 2020-21 shipping year. Table 2.2 compares Viterra's maximum published available capacity, maximum seasonal exports and the annualised historic monthly throughput at each of Viterra's facilities, to various capacity estimates of third party port terminal facilities.

The ACCC notes that the capacity estimates used in each column of table 2.2 are not directly analogous between Viterra and third party exporters, and as such the figures in table 2.2 should be considered alongside the proceeding discussion in this section.

Further, the ACCC notes that there is inherent uncertainty in estimating a port terminal facility's capacity, and that capacity estimates are based on a variety of factors that may not be possible to fully reflect in a single figure. As submitted by Viterra:

*Shipping capacity varies year to year as a result of logistics including scheduled shut-downs (e.g. for maintenance), loading rates, working hours and available stock.<sup>11</sup>*

In addition Viterra also submitted that it has made infrastructure upgrades between seasons, and that such upgrades can be expected to increase the capacity of its port terminal facilities:

*Viterra has made significant investments in its supply chain, including port terminal infrastructure, to ensure and enhance the long-term sustainability, reliability and capacity of the supply chain. Over the past 5 years, Viterra has made investments in capital and maintenance of over \$200 million in port terminal and supply chain infrastructure.<sup>12</sup>*

The ACCC acknowledges that a facility's capacity can be increased across seasons due to infrastructure upgrades, or improved operational practices, and that historical capacity estimates may not necessarily be representative of the current, or future, capacity of a port terminal if the infrastructure at that facility has been upgraded, or operational practices have improved, over time.

For reasons discussed below, the ACCC considers, on balance, Viterra's maximum published available capacity figures to be the best capacity estimate of Viterra's facilities.

The ACCC also notes that Viterra provided updated capacity figures to the ACCC for each of their port terminal facilities during the course of this assessment, as set out in their revised exemption application.<sup>13</sup>

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<sup>11</sup> Viterra, *Application under clause 5(2) of the Port Terminal Access (Bulk Wheat) Code of Conduct for exemption from Parts 3 to 6 of the Code in respect of the following port terminals in South Australia: Port Lincoln - Port Adelaide Outer Harbor - Port Adelaide Inner Harbour - Wallaroo - Port Giles - Thevenard (Exemption Application 2019)*, 2 July 2019, p. 30.

<sup>12</sup> Viterra, *Exemption Application 2019*, 2 July 2019, p. 11.

<sup>13</sup> The rest of Viterra's revised exemption application (*Revised Exemption Application 2020*) was the same as its initial exemption application.

**Table 2.2: Different capacity estimates at SA port terminal facilities (mt)**

Viterra - Port terminal facility	Maximum published available capacity	Maximum season	Annualised maximum historical monthly throughput
Port Adelaide – IHB*	0.92	0.87	1.83
Port Adelaide – OHB*	2.23	1.82	3.13
Port Giles	1.07	0.99	2.15
Port Lincoln	2.41	2.42	4.49
Thevenard	0.69	0.52	1.29
Wallaroo	0.77	0.90	1.53
<b>Viterra Total:</b>	<b>8.08</b>	<b>7.52</b>	<b>14.42</b>
Third Party - Port terminal facility	Nominal capacity	Maximum season**	Theoretical maximum***
Port Adelaide – Inner Harbour - Cargill	0.30	-	0.54
Port Adelaide – Osborne - Semaphore	0.40 <sup>14</sup>	0.37	0.79
Lucky Bay - T-Ports	0.60	-	3.60
<b>Third party Total:</b>	<b>1.30</b>	<b>1.51*</b>	<b>4.93</b>
<b>South Australia Total:</b>	<b>9.48</b>	<b>9.03*</b>	<b>19.34</b>

Source: Viterra, *Supplementary Information Provided by Viterra, Response to 14/11/19 information request – Attachment 2 – Question 3 – Published available capacity estimates*, 13 February 2020; PTSP loading statements; Cargill Code exemption application; Semaphore response to ACCC information request; and T-Ports Code exemption application.

Notes: \* Port Adelaide IHB and OHB only have shipment data available since the 2014-15 season (prior to 2014-15 the ACCC received the combined shipments of IHB and OHB as a single Port Adelaide facility). All other Viterra facilities have shipment data from the 2011-12 season.

\*\* Cargill has not yet begun operating at its Port Adelaide IHB facility, and T-Ports' Lucky Bay facility is a new port terminal service that has not yet operated for a full season (having commenced operations in March 2020). As such there are no figures for the maximum amount of grain loaded in a single season. The ACCC has used Cargill's 540 000 tonnes and T-Ports 600 000 tonnes estimate of capacity to estimate total third party capacity, and SA capacity, for the maximum year column.

\*\*\* The theoretical maximum for Cargill and T-Ports' facilities are taken from their exemption applications and discussed further below. The theoretical maximum for Semaphore's Port Adelaide facility is estimated by using the annualized maximum historical monthly throughput, as done for Viterra's port terminal facilities.

### Maximum published available capacity

Viterra has submitted capacity figures to the ACCC for each of its port terminal facilities since, and inclusive of, the 2013-14 season. These capacity figures represent the total

<sup>14</sup> Semaphore, Response to ACCC Information Request, 28 July 2020.

amount of long-term, short-term and additional short-term capacity that has been released by Viterra in each respective season.<sup>15</sup> To determine the 'maximum published available capacity', listed in table 2.2, the ACCC has used the maximum amount of capacity released in a season for each of Viterra's facilities.

The ACCC notes that Viterra submitted that the amount of long-term, short-term and additional short-term capacity released estimates maximum capacity in a given season, once a 10 per cent tolerance factor is accounted for.<sup>16</sup>

Importantly, the ACCC recognises that Viterra is not required to release all of its available capacity to exporters each shipping year, and so the capacity released in an individual shipping year is not necessarily representative of the total capacity Viterra has available at each of its port terminal facilities in any given season. The ACCC considers that using the maximum amount of released capacity at each facility over a number of seasons (i.e. as per table 2.2), ameliorates this problem and provides a more reasonable estimate of a facility's capacity in the future.

In addition, it is noted that even in circumstances where a PTSP has released all available capacity at a certain port terminal facility in previous seasons, this may not accurately reflect the facility's current or future capacity if infrastructure or operational improvements, have been undertaken since this time.

In considering the capacity of Viterra's facilities the ACCC notes that all six facilities appear to have released their maximum capacity either during, or since, the bumper 2016-17 season. Noting that export volumes have generally been low since this time (due to large quantities of SA grain being to the east coast to meet domestic demand due to the drought), it seems unlikely that the capacity of these facilities would have been significantly increased in recent years.

The ACCC also considers that the use of maximum released capacity as an estimate for capacity likely adequately accounts for the need for maintenance periods, which typically occur during off-peak periods. As a PTSP is unable to release capacity at a facility during these 'shutdown' periods, using the maximum amount of released capacity is expected to take this factor into account when used to determine a final capacity estimate.

While the ACCC acknowledges that a broad combination of factors (both at-port and elsewhere in the supply chain) can be expected to affect the capacity of a port terminal facility, the ACCC considers that the maximum amount of capacity released is likely to provide a reasonable indication of how much capacity is available at each of Viterra's facilities in practice. This is because this figure reflects the amount of capacity Viterra, as the operator of the facility, has been willing to commit to providing in a single season.

### Maximum seasonal shipments

The ACCC considers the maximum amount of grain shipped in a single season can provide an indication of the amount of grain a port terminal facility can load in a single season. However (similar to the maximum amount of released capacity discussed above) while maximum seasonal shipments can potentially serve as a useful indicator, it does not necessarily represent the maximum amount of grain a port terminal facility can facilitate. This is because a port terminal facility does not necessarily continuously operate at full capacity even in a high yield season.

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<sup>15</sup> Viterra, *Supplementary Information Provided by Viterra, Response to 14/11/19 information request – Questions 1 to 8 – Port terminal facility features, capacity and storage & handling 2020*, 13 February 2020, p. 2.

<sup>16</sup> Ibid, p. 2.



Furthermore, as shown in table 2.2, a PTSP does not necessarily use all the capacity it offers to exporters at port terminal facility in any given year and, as such, the published capacity likely provides a better indication of the capacity of the facility (as this reflects as the amount a PTSP has committed to being able to export).

#### Annualised maximum historic monthly throughput

In considering the maximum historic monthly throughput actually achieved at each facility, the ACCC notes that the theoretical maximum capacity at each of the port terminal facilities could be even higher than the maximum available capacity published by the service provider.<sup>17</sup> As shown in table 2.2, based on this approach the total capacity of Viterra's six port terminal facilities would be 14.42 million tonnes per annum (i.e. close to double the estimated total capacity compared to using the two previously discussed approaches).

However, the ACCC considers that the high throughput level achieved during the maximum historical month may not be achievable on an ongoing basis due to practical limitations: as such, this approach likely overestimates port terminal capacity. For example, while regular maintenance activities and unavoidable closures or delays due to externally-driven circumstances (e.g. vessels failing survey) may not have impacted the maximum throughput month, they could reasonably be expected to affect some months, and therefore a facility's total capacity over the course of an entire shipping year.

Furthermore, the ACCC also notes that grain is predominantly loaded within a peak period in order to obtain maximum benefit from advantageous conditions in international markets. As noted by the Essential Services Commission of South Australia (**ESCOSA**):

*South Australian grain production is counter-cyclical relative to the northern hemisphere. South Australian grain producers thus have a window of opportunity (December to May) to sell to international markets when there is less global supply. To maximise the value that can be obtained during that window, participants in the South Australian bulk grain export market need to move bulk tonnages quickly before northern hemisphere grain is available.<sup>18</sup>*

The ACCC notes that the majority (62 per cent on average) of SA grain is loaded within the December to May timeframe to take advantage of international conditions. It is generally not economically desirable to load grain at its maximum possible rate during the off-peak period, as international demand for Australian grain is lower during this time. This subsequently reduces demand for port terminal services in this period. The ACCC understands that, in order to take advantage of the cyclical nature of demand, PTSPs may use the off-peak period to perform maintenance or upgrade works to their facilities.

Further, the ACCC notes that a facility's maximum capacity may also be affected by the mix of commodities used at the port. For example, a port may be able to achieve higher throughput if it is dealing with only a few commodity types and/or grades as this will maximise use of the available storage space and reduce downtime for cleaning to ensure commodities and/or grades are appropriately separated.

In light of the above, the ACCC considers that in practice Viterra's current capacity in SA is likely to be significantly lower than the annualised historic monthly maximum estimates.

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<sup>17</sup> The annualised maximum monthly historic throughput estimate of capacity is calculated by multiplying the maximum amount of grain exported at a port terminal in a single month by twelve, thus providing an 'annualised' maximum estimate.

<sup>18</sup> ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report*, December 2018, p17.

### **Third party PTSPs in SA**

The capacity of third party PTSPs must also be considered when assessing the availability of port terminal capacity in SA. The amount of available third party port terminal capacity provides an indication of the extent to which these facilities are able to offer a viable competitive alternative to Viterra port terminal facilities. Each of Cargill's, Semaphore's and T-Ports' facilities' capacity estimates are discussed below.

#### **Cargill and Semaphore**

Table 2.2 indicates that Viterra has a total of 3.15 million tonnes of capacity (using maximum published available capacity) at Port Adelaide (via IHB and OHB).

In its exemption application Cargill state that its estimated nominal capacity is 300 000 tonnes per annum,<sup>19</sup> though Cargill also noted that:

*...the highest practical capacity that the proposed facility could possibly reach is 60,000 tonnes a month over a period of 9 months in a year, being 540,000 tonnes annually.<sup>20</sup>*

Semaphore has submitted to the ACCC that its facility has an annualised capacity of 396 000 tonnes per annum. However, due to Australia's export market only being competitive for eight to nine months per annum, in practice the amount of grain its facility is expected to load would be reduced between 264 000 and 297 000 tonnes per annum:

*Semaphore's estimated maximum capacity would be approximately 33,000mt per month or 2 x turns of the operational storage. This annualised capacity would be 396,000mt, however Australia is generally competitive for approximately 8 – 9 months per annum or which would then equate to 264,000mt – 297,000mt of bulk operational capacity per annum. In season 2016/2017 Australian grain on a record crop was competitive for a longer period of the season to drawdown old crop carry out and accordingly saw a more seasonalised volume target.<sup>21</sup>*

As set out in table 2.2 the ACCC has used Semaphore's 396 000 tonne per annum estimate in relation to its facility's nominal capacity. In doing so the ACCC notes that Semaphore's facility shipped 370 000 tonnes of grain in the 2016-17 shipping year. This demonstrates that, in certain market conditions, the facility is able to facilitate greater volumes of grain than the 297 000 tonnes per annum capacity estimate

The ACCC considers that, while the 396 000 tonnes per annum capacity estimate used in table 2.2 reflects the extrapolation of Semaphore's facility' monthly capacity over a full twelve months, it is not necessarily appropriate to apply the same approach in relation to the capacity of Cargill's facility. As noted above, Cargill has submitted that its facility's maximum practical monthly capacity (60 000 tonnes) is only achievable over nine months of the year. Absent higher historical shipment figures (i.e. as is the case in relation to Semaphore) or information that suggests otherwise, the ACCC considers it reasonable to use the nine month maximum figure (540 000 tonnes) as the maximum capacity for Cargill's facility.

The ACCC notes that Viterra has submitted that IHB and OHB most closely compete with alternative port terminal facilities at Port Adelaide:<sup>22</sup>

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<sup>19</sup> Cargill, *Application for exemption under the Port Terminal Access (Bulk Wheat) Code of Conduct*, 30 October 2019, p. 3.

<sup>20</sup> Ibid, p. 3.

<sup>21</sup> Information provided by Semaphore in response to a request for information from the ACCC.

<sup>22</sup> The ACCC notes that at the time of Viterra's (and other stakeholder's) initial submissions Cargill had not yet entered the port terminal service market at Adelaide, and LINX had not yet announced its exit. The Draft Determination uses the term LINX/Cargill where it aids ease of reading.

*Semaphore's Berth 29 and LINX's Osborne port terminals are situated at Port Adelaide and export grain that is grown in the same region as grain exported from Viterra's Port Adelaide terminals.<sup>23</sup>*

### Port Adelaide Inner Harbour – Exit of LINX and Entry of Cargill

The ACCC notes that while LINX has exited the bulk grain export market, Cargill will be commencing operations at a different port terminal at Port Adelaide Inner Harbour.<sup>24</sup>

Cargill is the only exporter which made use of LINX's port terminal facility since the operation began in the 2015-16 season, exporting 210 000 tonnes of grain per annum on average. During this time Cargill also operated its own upcountry system that was used to transport grain to LINX's port terminal facility.

In light of the above, the ACCC does not expect the exit of LINX and entry of Cargill to affect market conditions to a significant extent i.e. Cargill will likely place a similar (if not slightly greater) level of competitive constraint on Viterra's port terminal facilities as LINX previously did.

The ACCC notes that Cargill was exempted from the application of Parts 3 to 6 of the Code on 2 July 2020 in respect of its Port Adelaide Inner Harbour port terminal facility. In making this determination, the ACCC considered that Cargill's facility faces significant competition from Viterra's port terminal services at Port Adelaide and in SA more broadly, as well as from Semaphore's exempt Port Adelaide, Osborne facility. Consequently, the ACCC considered that Cargill has an incentive to provide exporters with fair and transparent access at its Port Adelaide facility.<sup>25</sup>

While generally accepting that IHB and OHB most closely compete with alternate facilities at Port Adelaide, the ACCC views the combined capacity of Cargill's and Semaphore's facilities (696 000-936 000 tonnes) to be relatively small compared to that of Viterra's IHB and OHB facilities, which have a combined capacity of 3.15 million tonnes.

The ACCC notes that some stakeholders have submitted that LINX/Cargill and Semaphore only provide limited competition to Viterra's IHB and OHB facilities.

### GPSA

*Both LINX and Semaphore are limited by their physical geography and are incapable of fully loading 'Panamax' sized vessels, effectively operating on an opportunistic basis in response to high production years and as 'mobile port loading facilities' with little or no port storage capacity. The limited extent of competition arising from these alternate bulk grain terminals is shown in Table 1 (9% of South Australia's throughput for in 2017-18).<sup>26</sup>*

<sup>23</sup> Viterra, *Exemption Application 2019*, 2 July 2019, p. 52.

<sup>24</sup> The ACCC granted an exemption for Cargill's upcoming facility at Port Adelaide, Inner Harbour on 24 June 2020 (<https://www.accc.gov.au/system/files/ACCC%20final%20determination%20%20Port%20Adelaide%20wheat%20code%20exemption%20assessment%20%20Cargill%20Australia%20Limited.pdf>). On 8 April 2020 LINX notified the ACCC that it has ceased providing port terminal services to bulk wheat exporters through its Port Adelaide facility (<https://www.accc.gov.au/regulated-infrastructure/wheat-export/wheat-export-projects/linx-port-adelaide-exemption/linx-suspends-bulk-grain-export-services>).

<sup>25</sup> ACCC, *Final determination – Cargill Australia Limited, Port Adelaide*, 24 June 2020, p. 1.

<sup>26</sup> GPSA Submission, 27 September 2019, p. 3.

## Cargill

*The limited extent to which LINX and Semaphore imposes competitive constraint on Viterra is apparent from the numbers. Each of LINX and Semaphore accounted for just 240k and 270k tonnes of bulk exports in 2017-18 respectively, as against Viterra's 2.35 million tonnes in Port Adelaide.<sup>27</sup>*

However the ACCC also notes that, in contrast, a number of other stakeholders have submitted that IHB and OHB are subject to a significant competitive constraint due to the LINX/Cargill and Semaphore facilities:

## SAFC

*There are already two exempt providers in the Port of Adelaide catchment region (Semaphore and LINX). These providers exported over half a million tonnes in 17/18, compared to 2.35m from Viterra's Pt Adelaide facilities and a total state crop of 6.94m tonnes – a significant proportion.<sup>28</sup>*

## PGA of WA

*Viterra is already subject to competition at Port Adelaide from containerised exports and a bulk ship-loader, but also to domestic grain movements from competitors' sites and directly from on-farm storages.<sup>29</sup>*

The ACCC acknowledges that Cargill's and Semaphore's facilities can reasonably be expected to impose a level of competitive constraint on Viterra's port terminal facilities, particularly in relation to its IHB and OHB facilities. However, as shown below in table 2.3, since 2016-17 LINX and Semaphore have accounted for just 20 per cent of all bulk grain exports out of Port Adelaide.<sup>30</sup> The ACCC also notes that facilities that make use of mobile ship loader arrangements can be expected to be more temporary in nature than more conventional facilities. A range of factors, including the ability to easily relocate the loader, as well as the reduced capital investment and lower fixed costs, mean that the level of competition provided by a mobile ship loader is likely to be less consistent and may fluctuate significantly in response to market conditions. For example, lower fixed costs likely make it easier for the operators of mobile ship loaders to choose not to participate in the market during less favourable seasons.

As such, the ACCC considers that Cargill and Semaphore are likely to place only a limited competitive constraint on IHB and OHB. However, more generally, the ACCC also acknowledges that the existence of viable, though limited, alternative capacity may be sufficient to provide an incentive for a dominant PTSP to provide fair and transparent access to third party exporters.

On balance, the ACCC considers Cargill's and Semaphore's facilities' relatively small capacity, and their less efficient port infrastructure (as seen in table 2.3), including the absence of rail access, likely limits the amount of competitive constraint they place on IHB and OHB. However, the ACCC notes that a range of other factors, including the upcountry, domestic and container markets (all of which are discussed in chapter 3), must be considered when determining if a PTSP has an incentive to provide fair and transparent access to a port terminal facility.

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<sup>27</sup> Cargill, *Application for exemption under the Port Terminal Access (Bulk Wheat) Code of Conduct*, 30 October 2019, p. 2.

<sup>28</sup> SAFC Submission, 6 September 2019, p. 3.

<sup>29</sup> PGA of WA Submission, 3 September 2019, p. 1.

<sup>30</sup> LINX began bulk export operations out of Port Adelaide in the 2015-16 season, while Semaphore began operations in the 2016-17 season.

**Table 2.3: Bulk grain exports at Port Adelaide (million tonnes), 2016-17 to 2018-19**

Port Terminal Facility	2016-17	2017-18	2018-19	Total
Inner Harbour	0.87	0.73	0.07	1.66
Outer Harbor	1.82	1.64	0.17	3.63
Port Adelaide LINX	0.42	0.24	0.00	0.66
Port Adelaide Semaphore	0.37	0.27	0.03	0.67
<b>Port Adelaide Total</b>	<b>3.48</b>	<b>2.87</b>	<b>0.27</b>	<b>6.62</b>
<b>Viterra export portion:</b>	77%	82%	88%	80%
<b>Third party export portion:</b>	23%	18%	12%	20%

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

Notes: Table 2.3 presents bulk shipment data from 2016-17 to 2018-19 as this is the period since both LINX and Semaphore entered the PTSP market (in 2015-16 and 2016-17 respectively).

The ACCC has also considered the level of competitive constraint imposed by Cargill's and Semaphore's facilities on Viterra's other port terminal services.

As discussed in section 3.2 (which sets out the ACCC's views on catchment areas) the ACCC's draft view is that Cargill's and Semaphore's facilities are likely to place little to no competitive constraint on Viterra's Thevenard, Port Lincoln and Port Giles facilities. However, the ACCC's draft view is that there is a degree of overlap between the Wallaroo and Port Adelaide catchment areas. The ACCC also notes that T-Ports has submitted that LINX's and Semaphore's facilities potentially compete with Wallaroo:

*These services provide an alternative to Viterra Port Adelaide (Inner harbour and Outer Harbor) and potentially to Wallaroo.<sup>31</sup>*

As such the ACCC's draft view is that Cargill's and Semaphore's facilities likely place some level of competitive constraint on Viterra's Wallaroo facility, though to a lesser extent than the constraint they place on Viterra's IHB and OHB facilities.

### **T-Ports**

The ACCC notes that T-Ports recently began operations at its port terminal facility at Lucky Bay (in March 2020). As of 18 September 2020 T-Ports has completed seven shipments totalling 119 000 tonnes of grain.<sup>32</sup>

In its exemption application Viterra submitted that T-Ports' Lucky Bay facility will place significant competitive constraint on its operations, particularly in relation to its Port Lincoln and Thevenard facilities:

*On the Eyre Peninsula (the grain growing region that Port Lincoln has traditionally served), there is a strong new competitor, T-Ports. Its new facility at Lucky Bay will be a strong competitor to Port Lincoln on the Eyre Peninsula.<sup>33</sup>*

*Thevenard has traditionally sourced grain from regions including the Eyre Peninsula in South Australia. Along with Thevenard and Port Lincoln, the Lucky Bay port terminal will also export grain from the Eyre Peninsula.<sup>34</sup>*

<sup>31</sup> T-Ports Submission, 26 August 2019, p. 4.

<sup>32</sup> T-Ports Shipping Stem.

<sup>33</sup> Viterra, *Exemption Application 2019*, 2 July 2019, p. 28.

<sup>34</sup> *Ibid*, p. 46.

While the ACCC acknowledges the potential for T-Ports' Lucky Bay facility to provide an increase in competition for some Viterra facilities, the ACCC notes that T-Ports is a new market entrant and that its Lucky Bay facility only recently commenced operation (in March 2020). The ACCC also notes that the extent of the competitive constraint that T-Ports' Lucky Bay facility will place on Viterra's Port Lincoln and Thevenard facilities remains somewhat uncertain at this time.<sup>35</sup>

T-Ports provided two capacity estimates in its application for exemption under the Code:

*...based on a nominal load and unload rate of 1,800 tonnes per hour... At this rate, it will be able to load deep water ocean going vessels at a rate of 13,250 tonnes per day. Assuming a 55,000 tonne Panamax, and the load operations working at the maximum design capacity of the TSV and port load out facilities, the vessel can be completely loaded in four days. In practice, maximum load capacity is rarely reached in any port due to a multitude of reasons. As such, it is anticipated that a mean operational rate of 10,800 tonnes per day, equating to 5.1 days loading time, is achievable. Extrapolating this across 7 day operations for a full year equates to a loading capacity of 3.6Mill tonnes, however T-Ports commercial estimates are based on securing up to 600,000mt per annum.<sup>36</sup>*

The ACCC notes that the two capacity estimates are distinctly different: while T-Ports state the theoretical maximum capacity of its Lucky Bay facility as 3.6 million tonnes per annum, its commercial estimates are based on securing up to 600 000 tonnes per annum of grain.

Given that T-Ports is a new entrant and that the Lucky Bay facility, which is the first bulk grain port terminal service in Australia to use a transshipment vessel approach (and has only been operational since March 2020), the ACCC recognises that there is uncertainty regarding how much grain the facility will be able to load within a shipping year in practice. However, on balance, the ACCC considers the 3.6 million tonnes per annum capacity estimate likely overstates the capacity of T-Ports' Lucky Bay facility in practice.

The ACCC notes that if, for example, the same methodology T-Ports used to calculate the theoretical maximum capacity of its Lucky Bay facility was applied in respect of Viterra's facilities this would result in Viterra having a total capacity of 18.0 million tonnes per annum across all its ports in SA.<sup>37</sup> However, as shown in table 2.2 above, the maximum released capacity at each of Viterra's ports, which occurred across several seasons, amounts to a total of 8.08 million tonnes per annum. This suggests that a theoretical maximum capacity figure of 3.6 million tonnes per annum is unlikely to be a reasonable estimate of the Lucky Bay facility's practical operational capacity.

Consequently, the ACCC considers that T-Ports' commercial estimate of securing up to 600 000 tonnes per annum is likely a more reasonable estimate of the amount of capacity that its Lucky Bay facility is able to deliver to the market at this time. However, the ACCC acknowledges there is considerable uncertainty around how much capacity Lucky Bay can deliver in practice (given its limited operations to date), and the ACCC will therefore closely monitor the capacity and throughput of the facility over forthcoming seasons.

In considering the impact of T-Ports' Lucky Bay facility, the ACCC notes that several stakeholders have submitted that they expect the facility's capacity to materially increase competition, particularly on the Eyre Peninsula.

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<sup>35</sup> Unlike Cargill, T-Ports did not previously exclusively export grain through another port terminal facility, which in the case of Cargill likely gives an indication of the volumes of grain they may facilitate.

<sup>36</sup> T-Ports, *Application for exemption form the Competition and Consumer (Industry Code – Port Terminal Access (Bulk Wheat)) Regulation 2014*, 28 March 2019, p. 2.

<sup>37</sup> T-Ports assume 10 800 tonnes a day is loaded from a 1,800 tonnes per hour loader; this equates to the loader being operated at maximum capacity for 6 hours a day. Using Viterra's ship loaders this methodology equates to Viterra (across all six ports) being able to load 54 000 tonnes a day. Extrapolating this across the course of a year results in a total capacity of 18.0 million tonnes.

The ACCC also notes that some stakeholders submitted that the competitive effects from T-Ports can be expected to vary according to where grain is produced within the Eyre Peninsula (see section 3.2 for a discussion of grain catchment areas):

#### PGA of WA

*There will be an increase in competition in South Australia from the construction of a bulk grain facility at Lucky Bay on the Eyre Peninsula by the T Ports consortium...*<sup>38</sup>

#### SAFC

*SAFC notes that T-Ports facility at Lucky Bay is likely to significantly change/restrict the catchment area for Viterra's Port Lincoln facility. There will be significant new competition for EP grain, particularly on the eastern side of the peninsula.*<sup>39</sup>

#### T-Ports

*Future service offering (i.e. T-Ports Lucky Bay) will represent a viable competitive alternative to a portion of the Eyre Peninsula (EP) catchment zone. As identified in T-Ports application for exemption, this area comprises mainly the North Eastern parts of the EP, with the western and southern zones retaining their freight advantage to Viterra facilities at Thevenard and Port Lincoln.*<sup>40</sup>

Stakeholders submitted mixed views as to whether the expected level of added competition was sufficient to support granting Viterra an exemption in relation to either its Port Lincoln or Thevenard facilities. In particular, both Cargill and T-Ports suggested the added competition was insufficient to justify exemptions at Viterra's facilities on the Eyre Peninsula:

#### Cargill

*Viterra therefore continues to operate in all of the ports that are the subject of its application relatively unrestrained by competition. The available level of competitive constraint is not sufficient to ensure that Viterra does not have the potential to exert its considerable market power.*<sup>41</sup>

#### T-Ports

*If Viterra were to deny or limit access to its port terminal services, it is T-Ports view there is not sufficient alternate third party port terminal capacity economically available to third parties. The T-Ports facility could handle a large portion of the Eyre Peninsula (EP) region, but grain grown in the lower EP would be economically disadvantaged if it had to be transported to Luck [sic] Bay.*<sup>42</sup>

In contrast, PGA of WA submitted that all of Viterra's facilities, including Port Lincoln and Thevenard, should be exempted:

*...PGA supports Viterra in its application for exemption from Parts 3 to 6 of the Wheat Port Access Code. The PGA does not distinguish between Viterra's individual ports.*<sup>43</sup>

SAFC submitted that an exemption from Port Lincoln is critical given the recent exemption of T-Ports' Lucky Bay facility, and likely entry of further competition in the future (see section 2.1.5):

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<sup>38</sup> PGA of WA Submission, 3 September 2019, p. 1.

<sup>39</sup> SAFC Submission, 6 September 2019, p. 2.

<sup>40</sup> T-Ports Submission, 26 August 2019, p. 4.

<sup>41</sup> Cargill Submission, 6 September 2019, p. 2.

<sup>42</sup> T-Ports Supplementary submission, 19 June 2020, p. 2.

<sup>43</sup> PGA of WA Submission, 3 September 2019, p. 2.

*...irrespective of the ACCC's position on other terminals, SAFC believes it is critical that Pt Lincoln is provided an exemption so as to compete on even regulatory terms with T-Ports and (likely) Peninsula Ports.<sup>44</sup>*

In considering stakeholder submissions, the ACCC is inclined to agree that T-Ports' Lucky Bay facility has the potential to impose some level of competitive constraint on Viterra, particularly in relation to Viterra's Port Lincoln and Thevenard facilities.<sup>45</sup>

However, the ACCC's draft view is that the extent of competitive constraint remains uncertain at this time. As previously noted, Lucky Bay is a new port terminal facility that has yet to operate in the market for an extended period of time and its capacity is not yet clear in practice.

The ACCC notes that CRA has submitted on behalf of Viterra that T-Ports could theoretically double the capacity at its Lucky Bay facility by acquiring another transshipment vessel:

*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.<sup>46</sup>*

While the ACCC notes it is likely that the capacity of most port terminal facilities could be increased with sufficient capital investment,<sup>47</sup> the ACCC also notes that the Lucky Bay facility uses an operating approach that has not been used in the Australian bulk grain market context, and that its capacity and ongoing viability has not yet been fully demonstrated.

The ACCC will monitor the practical operational capacity, and therefore level of competitive constraint, that T-Ports' Lucky Bay facility is able to place upon Viterra's facilities (in particular Port Lincoln and Thevenard) with interest.

### **2.1.5. Proposed port terminal facilities**

In addition to those port terminal facilities currently in operation, the ACCC is aware of a number of proposed port developments in SA of potential relevance to the assessment of Viterra's exemption application.

This includes proposals for port terminals at Wallaroo (T-Ports), Port Spencer (Free Eyre Limited) and Cape Hardy (multiple partners). In the event that any of these parties enter the port terminal market this would likely increase the competitive constraint placed upon existing PTSPs.

The ACCC also notes that, in the time since Viterra submitted its exemption application, ADM has performed a small number of coastal shipments (i.e. shipments of bulk grain made between Australian ports) out of Port Pirie: however the ACCC understands that ADM does not have appropriate exporter accreditation to perform export services at this time.<sup>48</sup> Therefore, it is not clear at this time if, or when, ADM will commence bulk export

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<sup>44</sup> SAFC Supplementary Submission, 19 June 2020 p. 2.

<sup>45</sup> The ACCC notes that as of September 2020 T-Ports' Lucky Bay facility has performed seven shipments, totalling 119 000 tonnes. The facility began operations in March 2020.

<sup>46</sup> Charles River Associates, *Charles River Associates Report on the Benefits of Code Exemption on Viterra Grain Export Terminals*, 7 November 2019, p. 18.

<sup>47</sup> Subject to range of other considerations.

<sup>48</sup> The ACCC understands exporter accreditation is not needed to perform coastal shipments.



operations.<sup>49</sup> The ACCC actively monitors developments in the PTSP market and will take into account relevant changes in the PTSP market prior to making its final determination.

Viterra has submitted that it is subject to significant competitive constraint as a result of existing third party PTSPs and proposed port terminal facility projects:

*Competition within South Australia is intensifying, with new entrants at Port Adelaide and on the Eyre Peninsula, and proposed projects at Wallaroo and on the Eyre Peninsula. Viterra is therefore subject to increasing and significant competitive constraints.<sup>50</sup>*

Similarly, CRA has submitted that the threat of entry from prospective PTSPs removes any incentive for Viterra to deny access:

*...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.<sup>51</sup>*

Viterra has also submitted that the proposed port terminal facility developments are an indication that the barriers to enter into the port terminal services market are low.<sup>52</sup>

In both of its submissions SAFC also submitted that there are low barriers to enter into the port terminal services market (in particular due to the availability and use of mobile ship loaders), and that this provides an incentive for Viterra to provide fair and transparent access:

*...Viterra has a strong incentive to negotiate attractive commercial terms that do not spur further entry into this market. It is worth noting that several of these proposals are for 'barging' operations, which are low capex, high(er) opex and thus have lower barriers to entry. It is not just current competition, but also the advanced nature of future competitive service provider proposals that will deter anti-competitive conduct.<sup>53</sup>*

*Indeed, the addition of several competitors with significant additional capacity into the system (T-Ports, ADM, Cargill) plus the rapid and advanced progression of plans for further entrants (i.e. Peninsula Ports/Port Spencer) strongly indicates that competition in this sector is growing and there are few barriers to entry, reducing the need for such strong controls in this market.<sup>54</sup>*

However, as noted by the Australian Export Grains Innovation Centre (**AEGIC**), mobile ship loaders face a range of challenges:

*These services provide flexibility to small operators to bypass long-term ownership and use of costly port infrastructure. These operations are more exposed to grain hygiene risk and delays associated with out-of-specification truckloads. The logistics associated with these just-in-time deliveries are also more exposed to quality fluctuations between loads, where there is insufficient flexibility to blend.<sup>55</sup>*

The ACCC also previously highlighted similar concerns from stakeholders in its 2017-18 bulk grain ports monitoring report:

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<sup>49</sup> The ACCC notes there has been some media reporting that suggests ADM could commence export operations from its Port Pirie facility: <https://www.graincentral.com/logistics/port-pirie-south-to-open-as-first-australian-adm-bulk-grain-site/>.

<sup>50</sup> Viterra, *Exemption Application 2019*, 2 July 2019, p. 14.

<sup>51</sup> Charles River Associates, *Charles River Associates Report on the Benefits of Code Exemption on Viterra Grain Export Terminals*, 7 November 2019, p. 17.

<sup>52</sup> Viterra, *Exemption Application 2019*, 2 July 2019, p. 1.

<sup>53</sup> SAFC Submission, 6 September 2019, p. 2.

<sup>54</sup> SAFC Supplementary Submission, 19 June 2020, p. 2.

<sup>55</sup> AEGIC, *Australia's grain supply chains – costs, risks and opportunities*, October 2018, p. 70.

*The general concern was that mobile ship loading operations do not have the same level of quality controls that larger scale, fixed loader operations do. Some stakeholders noted reports of contaminated shipments originating from mobile loaders.*

*An equal number of stakeholders do not see any basis for concerns about mobile ship loading operations.<sup>56</sup>*

The ACCC also notes that GPSA has submitted that SA's two mobile ship loaders (at the time of submission) LINX and Semaphore, effectively operate "...on an opportunistic basis in response to high production years..."<sup>57</sup>

The ACCC acknowledges that the use of mobile ship loaders can reasonably be expected to lower capital costs, and therefore barriers to entry, for prospective PTSPs. However, as noted by AEGIC and GPSA, these facilities can also face a range of operational challenges, which may restrict the level of competition they place on PTSPs operating conventional (i.e. more capital intensive) loading facilities.

The ACCC also received several submissions from stakeholders suggesting that Viterra likely has a substantial amount of market power at port, and that third party PTSPs only impose limited competitive constraint on Viterra:

### T-Ports

*Service (sic) currently offered by PTSPs at other facilities outside of South Australia have minimal competitive alternative to the services provided in SA by Viterra.<sup>58</sup>*

### Cargill

*...Viterra is the dominant port terminal service provider in South Australia, many times over. Cargill is concerned that an absence of adequate regulation may incentivise discriminatory behaviour.<sup>59</sup>*

*Viterra therefore continues to operate in all of the ports that are the subject of its application relatively unrestrained by competition.<sup>60</sup>*

### GPSA

*Both LINX and Semaphore are limited by their physical geography and are incapable of fully loading 'Panamax' sized vessels, effectively operating on an opportunistic basis in response to high production years and as 'mobile port loading facilities' with little or no port storage capacity. The limited extent of competition arising from these alternate bulk grain terminals is shown in Table 1 (9% of South Australia's throughput for in 2017-18).<sup>61</sup>*

In contrast, submissions from SAFC and PGA of WA suggested that Viterra's port terminal services are subjected to a significant amount of competition:

### SAFC

*SAFC notes that competition in the grain ports sector has considerably increased in SA since the establishment of the Code...*

*...Viterra's share of the grain bulk export market in SA, while still significant, is declining (from 97% on average over the last 7 years, to 91% in 2017/18)...*

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<sup>56</sup> ACCC, *Bulk grain ports monitoring report 2017-18*, December 2019, p. 33.

<sup>57</sup> GPSA Submission, 27 September 2019, p. 2.

<sup>58</sup> T-ports Submission, 26 August 2019, p. 4.

<sup>59</sup> Cargill Submission, 6 September 2019, p. 1.

<sup>60</sup> Ibid, p. 2.

<sup>61</sup> GPSA Submission, 4 October 2019, p. 3.

*As such, Viterra has a strong incentive to negotiate attractive commercial terms that do not spur further entry into this market.<sup>62</sup>*

### PGA of WA

*Viterra is already subject to competition at Port Adelaide from containerised exports and a bulk ship-loader, but also to domestic grain movements from competitors' sites and directly from on-farm storages.*

*There will be an increase in competition in South Australia from the construction of a bulk grain facility at Lucky Bay on the Eyre Peninsula by the T Ports consortium, and their planned bulk grain facility at Wallaroo on the Yorke Peninsula.<sup>63</sup>*

In its response to stakeholder submissions, Viterra disagreed with the implication that its facilities represented a natural monopoly:

*...both Viterra and the CRA Report disagree with the characterisation, in certain submissions, of Viterra's port terminals as natural monopoly infrastructure facilities.<sup>64</sup>*

The ACCC acknowledges that the third party port terminal facilities currently operating in the market likely impose some level of competitive constraint on Viterra. Furthermore, the ACCC considers that the commencement of operations at T-Ports' Lucky Bay facility will increase the general level of competition across SA, and in particular on the Eyre Peninsula. However, the ACCC's draft view is that the competitive constraint from third party operators is likely to be either relatively small or, in the case of T-Ports' Lucky Bay facility, remains somewhat uncertain.

In considering future market entrants as a potential source of competitive constraint, the ACCC notes SAFC's views regarding the proposed Port Spencer facility:

*We also note that since our first submission, there has been significant progress in the Peninsula Ports (Pt Spencer) proposal, including further capital raisings and early site works. This site sits between Lucky Bay and Port Lincoln, competing with both for grain, and is working towards a 2021 harvest opening target.*

*SAFC considers it a virtual certainty that Peninsula Ports will apply for an exemption from the Port Wheat Code; and judging by the success of similar new entrant T-Ports it seems likely that they will receive one. This places Port Lincoln in the position of competing with 2 new exempt grain ports; while having a very significantly reduced catchment area.*

*Therefore, irrespective of the ACCC's position on other terminals, SAFC believes it is critical that Pt Lincoln is provided an exemption so as to compete on even regulatory terms with T-Ports and (likely) Peninsula Ports.<sup>65</sup>*

The ACCC acknowledges that should the currently proposed facilities proceed it would likely result in significant additional competition amongst port terminal services within SA. However, the ACCC understands that the proposed facilities generally still have several important stages to progress through before they commence operations. For example, it appears that the Port Spencer proposal, a panamax vessel capable facility slated to commence operations in the 2021-22 season, has a number of steps to finalise before construction can begin and/or be completed.<sup>66</sup> As such, the ACCC considers that significant

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<sup>62</sup> SAFC Submission, 6 September 2019, p. 2.

<sup>63</sup> PGA of WA Submission, 3 September 2019, p. 1.

<sup>64</sup> Viterra, *Exemption Application 2019 – Supplementary Submission*, 11 November 2019, p. 4.

<sup>65</sup> SAFC Supplementary Submission, 19 June 2020, p. 2.

<sup>66</sup> See: <https://www.premier.sa.gov.au/news/media-releases/news/port-spencer-grain-facility-approved>, accessed 23 September 2020.

uncertainty remains around when, and to what extent, the capacity of these facilities will be realised in the market.

Nonetheless, the ACCC acknowledges that the threat of entry of proposed facilities will impose a level competitive constraint on Viterra, particularly to the extent that the threat of entry is credible and has the potential to impose a level of competitive constraint on particular Viterra facilities. While the ACCC does not consider the threat of competition as effective as actual competition, the ACCC's draft view is that Viterra is increasingly competitively constrained, particularly with respect to its Port Lincoln facility. Any further increase in competition (such as the realisation of significant additional capacity by third party PTSPs or the entry of additional facilities into the market) has the potential to affect the balance of the ACCC's draft views.

### **2.1.6. The constraint international markets place upon Viterra's operations**

In its exemption application Viterra submitted that SA is a price taker in the global grain market and that, as a result, Viterra has a strong incentive to maintain a "...cost effective and efficient supply chain."<sup>67</sup>

In particular, Viterra submitted that:

*The acquisition and trading of grain is undertaken globally, and South Australia, which accounts for less than 3% of global volume, is a price taker. South Australia face vigorous competition from other Australian states, Canada, the United States of America, France, Germany, Russia, Ukraine and Argentina to supply grain.*<sup>68</sup>

*The global bulk grain export market is highly competitive and South Australia's share is less than 3% by volume. As a result, Viterra is a price taker. If Viterra is not efficient in outturning bulk wheat to vessels and keeping fees as low as possible, it will lose business to competitors in South Australia, other states and overseas.*<sup>69</sup>

Viterra also referenced ESCOSA's report which states that SA is a price taker in the global market, and that Viterra has an incentive to minimise the costs of their supply chain in response to competition internationally:

*The South Australian bulk grain industry is a price taker within the global market. 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.*<sup>70</sup>

The ACCC acknowledges that, given its relative size, SA is a price-taker in international grain markets. However it is noted that while SA (and by extension Viterra) may have little to no market power in international markets, this does not necessarily mean that Viterra does not have substantial market power at the port terminal service level in the SA supply chain (which could be used to increase its profitability at the expense of other market participants). That is, although Viterra may have an incentive to minimise its supply chain costs as a result of competition in international markets, the absence of sufficient competitive constraints in SA may also result in Viterra: not having an incentive to pass cost savings through to other

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<sup>67</sup> Viterra, *Exemption Application 2019*, 2 July 2019, p. 17.

<sup>68</sup> *Ibid*, p. 4.

<sup>69</sup> *Ibid*, p. 13.

<sup>70</sup> *Ibid*, p. 16. Note: This excerpt quoted from: ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report*, December 2018, p. 42.

participants in the SA bulk grain export supply chain; or, increasing its charges for port services, which may ultimately affect the prices paid for grain in SA.<sup>71</sup>

In considering the effect of international competition the ACCC notes that ESCOSA, in its review of the SA bulk grain export supply chain, found that Viterra were “*choosing not to share efficiencies made with the industry through lower fees.*”<sup>72</sup> It is also noted that ESCOSA found that “*Viterra is earning returns, on average, towards the upper end of what might be expected for a firm with Viterra’s level of risk.*”<sup>73</sup> ESCOSA, however, concluded that there is:

*...no evidence that Viterra’s fees are excessive compared with the total fees charged by its Australian counterparts, as shown by AEGIC’s latest study of Australian supply chain costs.*<sup>74</sup>

Furthermore, the ACCC also notes ESCOSA’s finding that:

*[ESCOSA] has not found or been presented with any conclusive evidence of Viterra exercising market power to the detriment of competition.*<sup>75</sup>

The ACCC is not in a position to comment on the efficiency of Viterra’s supply chain in the context of this exemption assessment, however the ACCC’s considers that Viterra likely has an incentive to minimise supply chain costs as a result of competition in international markets. While the broad costs of business for exporters have not been considered in detail as part of this assessment process, the ACCC’s draft view is that efficiencies will not be necessarily passed on to other SA market participants in circumstances where Viterra retains significant market power at port.

## 2.2. Exports and exporters

This section considers the demand for port terminal services in SA. In particular, the ACCC has considered: stakeholder comments on the potential for future droughts across Australia, and whether this will have an impact on future SA shipping seasons; capacity utilisation at Viterra’s port terminal facilities, both annually and in the peak period; and the level of access that third party exporters have historically been able to secure.

The supply of port terminal services in SA is discussed above in section 2.1.

### 2.2.1. Exports and drought related conditions

Since 2011-12 SA has exported 5.8 million tonnes of grain per season on average, with Viterra port terminals facilitating 92 per cent of these exports since 2016-17 (the first season that both LINX and Semaphore were in operation).

Port Adelaide and Port Lincoln are the two largest exporting regions in SA, with Port Lincoln and all four Port Adelaide port terminals accounting for 33 per cent and 36 per cent of SA shipments respectively since 2011-12.

In this section the ACCC first considers the capacity utilisation of each of Viterra’s port terminal facilities throughout the whole year and during the peak period, before then considering third party exporter utilisation.

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<sup>71</sup> As submitted by T-Ports: “Without the existence of a competing PTSP serving the catchment zone, any unreasonable fees would simply be passed straight on to the growers in that catchment zone.” See T-Ports Submission, 26 August 2019, p. 3.

<sup>72</sup> ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report*, December 2018, p. 82.

<sup>73</sup> *Ibid*, p. 83.

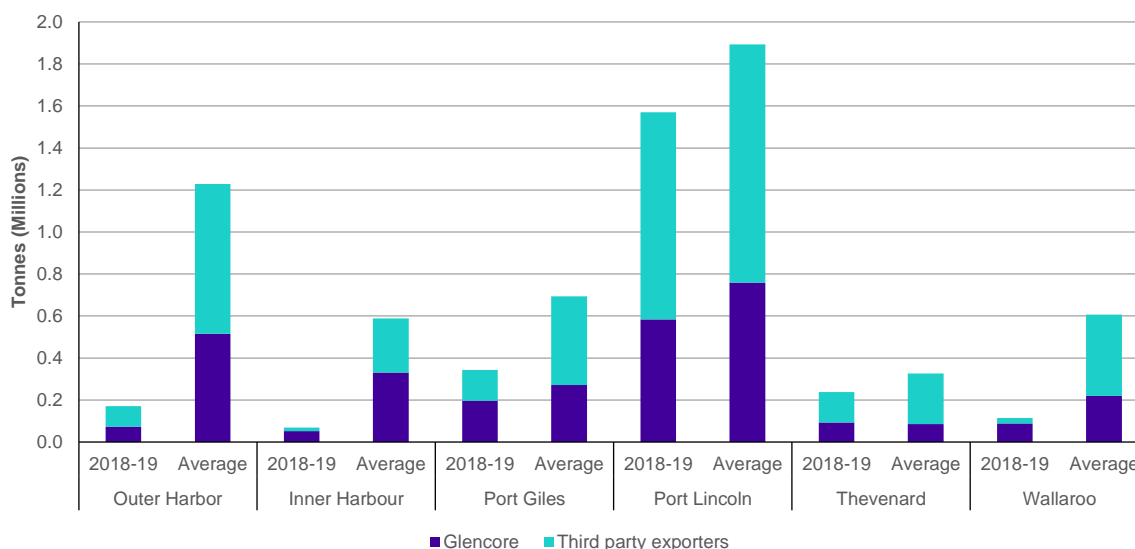
<sup>74</sup> *Ibid*, p. 62.

<sup>75</sup> *Ibid*, p. 35.

When considering Viterra’s capacity on a port-by-port basis it is important to note that the 2018-19 shipping season was marred by a severe drought along the east coast of Australia, which also extended into parts of SA. In 2018-19 production in SA was just 5.3 million tonnes, 27 per cent below the eight year average of 7.2 million tonnes.

The low production levels (both in SA and on the east coast) in 2018-19 subsequently resulted in low 2018-19 shipment volumes: only 2.5 million tonnes of grain was shipped from SA, 99 per cent of which was performed by Viterra.<sup>76</sup> This was 56 per cent below the eight year average of 5.8 million tonnes.<sup>77</sup> The extent of the low shipment levels from SA is shown below in figure 2.2.

**Figure 2.2: Viterra bulk shipments by port and exporter, 2018–19 and eight year average**



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

Notes: (1) All averages are from 2011-12 to 2018-19, except for IHB and OHB which use averages from 2014-15 to 2018-19. Prior to 2014-15 Viterra reported IHB and OHB exports together.

(2) Low export levels were impacted by both low SA production levels from SA (27 per cent below average) and low production levels in NSW and Qld (69 and 41 per cent below average respectively). As discussed below the low production levels in NSW and Qld resulted in SA grain being moved to NSW and Qld domestic markets, therefore resulting in less grain being exported out of SA port terminal facilities.

The intensification of east coast drought conditions in the 2018–19 shipping year led to 440 000 tonnes of grain being sent to NSW and Qld from SA via coastal shipments in response to domestic demand in those states. In addition to coastal shipments from SA, the east coast drought also resulted in significant tonnages of SA grain moving east via inland rail transfers. The ACCC understands that, by September 2019, Viterra had moved its 100th train of grain to the east coast in the 2018-19 season.<sup>78</sup>

With respect to the impact of drought-related grain movements Viterra submitted that:

*Droughts and climate-related events are becoming increasingly regular in Australia and it is likely that the domestic market will continue to be affected by these in the coming years.*

*In addition, grain will more readily be able to be moved towards the East Coast from both South Australia and Canada than prior to 2018-19. This is because of the development of new logistics*

<sup>76</sup> Semaphore completed two shipments totalling 33 413 tonnes during the 2018-19 season.

<sup>77</sup> The 2.5 million tonnes of SA shipments in 2018-19 includes 400 000 tonnes of coastal shipment.

<sup>78</sup> <http://viterra.com.au/index.php/2019/09/11/viterra-loads-100th-east-coast-bound-train/>.

*knowhow and relationships to move grain to the East Coast from these areas. This includes the fact that exporters have been able to meet the phytosanitary requirements for importing grain into Australia and will retain the knowhow and logistical requirements to do so...*

*...Accordingly, we consider that grain will easily be able to be redirected to the East Coast of Australia—from South Australia and overseas—in response to any changing climate or economic conditions in future.<sup>79</sup>*

SAFC has submitted that:

*It is difficult to determine how current drought related interstate grain transfers should be considered. Droughts are reasonably frequent occurrences in Australia, and may be more prevalent in the future due to climate change. They are also not uniform – while large parts of SA have not been unreasonably affected this time, that is unlikely to always be the case.*

*As such, **some** interstate transfers will occur in **some** years, but predicting their long term competitive impacts are virtually impossible other than to say there will be **some** effect.<sup>80</sup>*

The ACCC notes that matters relating to future growing conditions and climate change are highly complex. The ACCC's draft view is that there is insufficient evidence that the 2018-19 season reflects a longer term trend in domestic grain movements. While noting droughts are not uncommon in Australia, at this time the ACCC is inclined to view recent east coast drought conditions, while undoubtedly significant for those affected, to be a temporary event in the context of the SA grain market. As such, the related grain movements may not reflect a long-term trend in domestic grain flows, and rather reflect the poor growing conditions along the east coast.

Notwithstanding the above, the ACCC acknowledges that the drought has likely had some effect in relation to establishing and/or reinforcing supply chains between these markets. As such the ACCC considers that, in the event future droughts impact the east coast's ability to satisfy its own domestic demand, these supply chains will likely enable grain to move more easily between WA, SA and east coast markets than prior to the 2018-19 season.

The ACCC, where possible, will monitor growing conditions and interstate grain movements as part of its ongoing monitoring of access to bulk grain port terminal facilities. The ACCC notes that it does not receive data relating to interstate grain movements that have occurred via road and rail services, and therefore is not aware of the exact extent of recent interstate grain movements in response to the east coast drought. However the ACCC receives data on coastal shipments, and therefore is able to monitor those interstate grain movements which occur via coastal shipment.

### **2.2.2. Annual capacity utilisation**

As set out in a number of the ACCC's previous exemption determinations, the ACCC considers that when there is spare export capacity at a port terminal facility, a vertically integrated PTSP likely has an incentive to provide access to exporters in order to increase throughput at its facility.

However, in circumstances where capacity is constrained relative to demand, the ACCC considers that a vertically integrated PTSP may have an incentive to favour certain exporters, such as an associated entity exporter or particular third party exporters, ahead of others. A vertically integrated PTSP may also have an incentive to outright exclude certain third party exporters particularly if, for example, they are close competitors for grain.

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<sup>79</sup> Viterra, *Further Supplementary Submission on Exemption Application 2020*, 11 March 2020, p. 10.

<sup>80</sup> SAFC Submission, 6 September 2019, p. 3. Note: SAFC's emphasis.

As such, the ACCC considers that the level of capacity utilisation at a port terminal facility provides an indication of whether a PTSP has an incentive to provide preferential treatment to its associated entity exporter or limit access to third party exporters, in the absence of regulation.

Periods of increased demand for shipping capacity (i.e. the Australian peak bulk grain shipping period when international prices for grain are higher) are therefore particularly relevant to the ACCC's consideration, as capacity constraints during these periods are typically more acute, and therefore a PTSP's incentive to favour, or limit access, for certain exporters increases.

The ACCC notes that shipment levels can exceed a port terminal facility's stated capacity (such as in table 2.4, and figures 2.4 to 2.9 below) for a variety of reasons, including that:

- economic conditions may make it profitable for a PTSP to extend the normal operating hours of a facility;
- unavoidable closures or delays due to external circumstances (e.g. vessels failing survey) may reduce throughput (and may or may not have been taken into account to a greater or lesser degree in a PTSP's capacity estimates for its facility); and
- capacity can be affected by the mix of commodities loaded. For example, a port may be able to achieve higher throughput when shipping a small number of commodities/grades than assumed in its capacity estimates (as this streamlines operations and improves the efficiency of the facility).

Capacity utilisation for each of Viterra's port terminal facilities in the context of the peak period is discussed below (in section 2.2.3). The ACCC also considers annual capacity utilisation to be relevant to the assessment of a PTSP's incentive to provide favourable access and/or deny access to certain exporters.

Table 2.4 below shows annual capacity utilisation rates at each of Viterra's port terminal services since 2013-14.<sup>81</sup> When considered on an annual basis Viterra's facilities generally appear to have spare capacity in most seasons (although this differs between facilities). However Port Lincoln is a notable exception, with an average capacity utilisation of 82 per cent.

Table 2.4 also shows that:

- capacity utilisation at all Viterra's facilities was higher in the bumper 2016-17 season, with exports from Port Lincoln exceeding the facility's stated capacity;
- Port Lincoln was the only facility which exceeded an annual capacity utilisation of 80 per cent across multiple seasons; and
- low shipment levels during the drought-affected 2018-19 season led to low utilisation rates at all port terminal facilities.

In relation to the average capacity utilisation rates set out in table 2.4, it should be noted that these rates increase significantly across each of Viterra's ports if the drought-affected 2018-19 season is excluded (IHB, 71 per cent; OHB, 64 per cent; Port Giles, 60 per cent; Port Lincoln, 85 per cent; Thevenard, 48 per cent; and Wallaroo, 76 per cent).

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<sup>81</sup> Table 2.4 uses the amount of capacity released via long, short, and additional short-term capacity in each season for each port.



**Table 2.4: Annual capacity utilisation for Viterra’s port terminal facilities, 2013-14 to 2018-19**

	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19	Average
<b>Inner Harbour*</b>	-	77%	50%	86%	72%	7%	58%
<b>Outer Harbor*</b>	-	61%	47%	78%	70%	7%	53%
<b>Port Giles</b>	67%	51%	50%	72%	61%	29%	55%
<b>Port Lincoln</b>	87%	84%	81%	103%	69%	67%	82%
<b>Thevenard</b>	59%	55%	39%	69%	17%	31%	45%
<b>Wallaroo</b>	78%	73%	66%	95%	67%	13%	65%

**Source:** Viterra, Attachment 2 - published available capacity estimates; PTSP loading statements; and ACF Shipping stem and market share report.

**Notes:** \* Viterra started reporting IHB and OHB as separate facilities in the 2014-15 season. Prior to that time they were jointly reported as 'Port Adelaide' and had utilisation rates of 110, 88 and 95 per cent in 2011-12, 2012-13 and 2013-14 respectively.

### 2.2.3. Capacity utilisation in peak periods

The ACCC considers that the peak period in the shipping year occurs when exporters can receive the best prices internationally. During this period there is more demand from exporters for shipping capacity at port terminal facilities and shipping slots are highly sought after. As noted by ESCOSA:

*Another advantage (for the other Australian states too) is that South Australian grain production is counter-cyclical relative to the northern hemisphere. South Australian grain producers thus have a window of opportunity (December to May) to sell to international markets when there is less global supply. To maximise the value that can be obtained during that window, participants in the South Australian bulk grain export market need to move bulk tonnages quickly before northern hemisphere grain is available. The task of the supply chain is to maintain quality and facilitate efficient grain movement, which is why it is important to South Australia.<sup>82</sup>*

When considering capacity and utilisation, the ACCC notes that it may not be economically efficient to have sufficient port terminal infrastructure to accommodate the entire export task within a three to six month window that is otherwise largely under-utilised for the remainder of the year. While the ACCC notes exporters’ preferences may be to export the majority of grain within the peak period, it is possible that spreading the export task across peak and non-peak periods may be an efficient outcome for the industry.

Given the above, the ACCC considers that a key concern is the extent to which a vertically integrated PTSP can provide favourable access to its associated entity exporter in the peak period. Such discrimination will enable the associated entity to obtain premium international prices for their grain, at the expense of third party exporters.

Given that the provision of port terminal services typically involves a high proportion of fixed infrastructure costs, which do not vary based on throughput, a PTSP that faces sufficient competitive constraints has an incentive to maximise throughput during non-peak periods (subject to spare capacity). However in peak periods, when capacity is likely to be constrained and international grain prices higher, a PTSP is more likely to have an incentive

<sup>82</sup> ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report*, December 2018, p. 17.

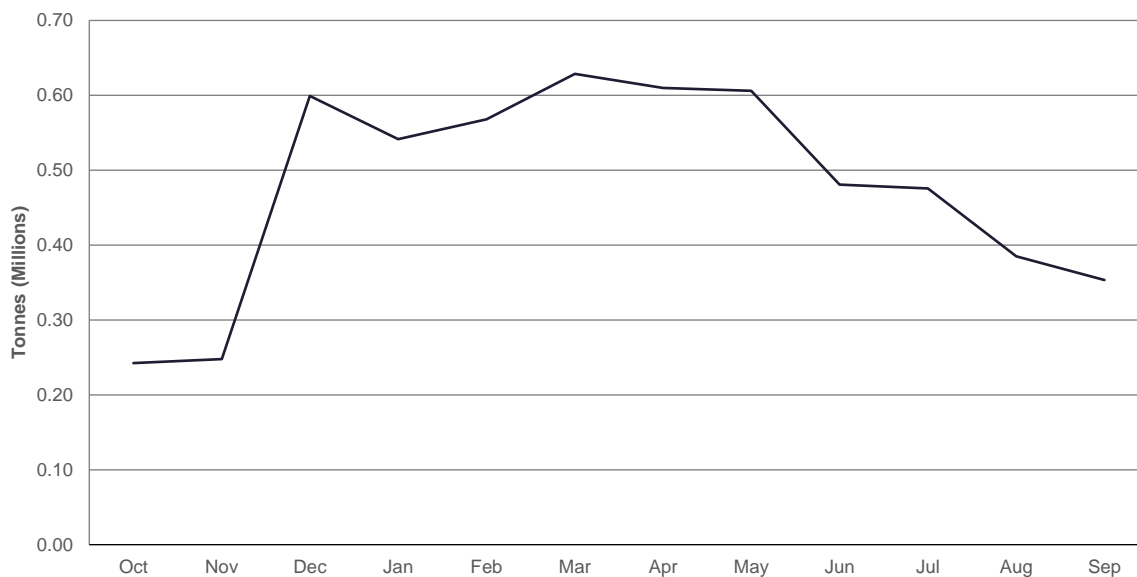
to deny or favour access to certain exporters. Alternatively, or in addition, a PTSP could increase its fees for port terminal services during periods of high demand and constrained capacity. The ACCC notes that the vertical integration (or otherwise) of a PTSP with an exporter is likely to influence the strength of the incentive a PTSP faces to provide favourable access to certain exporters ahead of others (notably associated entities) and/or increase its service fees. This is because the profitability of a vertically integrated entity reflects the costs and benefits to both the PTSP and its associated entity exporter.

When effective competition is present and exporters have the option of shipping from more than one PTSP, a PTSP's behaviour in relation to providing favourable access to certain exporters may be constrained by the need to attract exporters to use its facility during non-peak periods. High levels of competition may result in outcomes such as reduced fees or changes to terms, increased levels of negotiation between exporters and PTSPs, as well as exporters switching between PTSPs. The extent to which capacity constraints in peak periods are a concern also depends on the presence of competing port terminal facilities and the overall level of spare capacity throughout the rest of the year.

In its annual bulk grain monitoring reports the ACCC has generally regarded the peak period to occur, on a national level, between the months of February and May (inclusive). However, as noted above by ESCOSA and shown below in figure 2.3, the SA peak export period generally spans a six month period between December and May (inclusive). Consequently, this section will consider December to May as the peak period in SA, as opposed to the February to May period used when considering the national market.

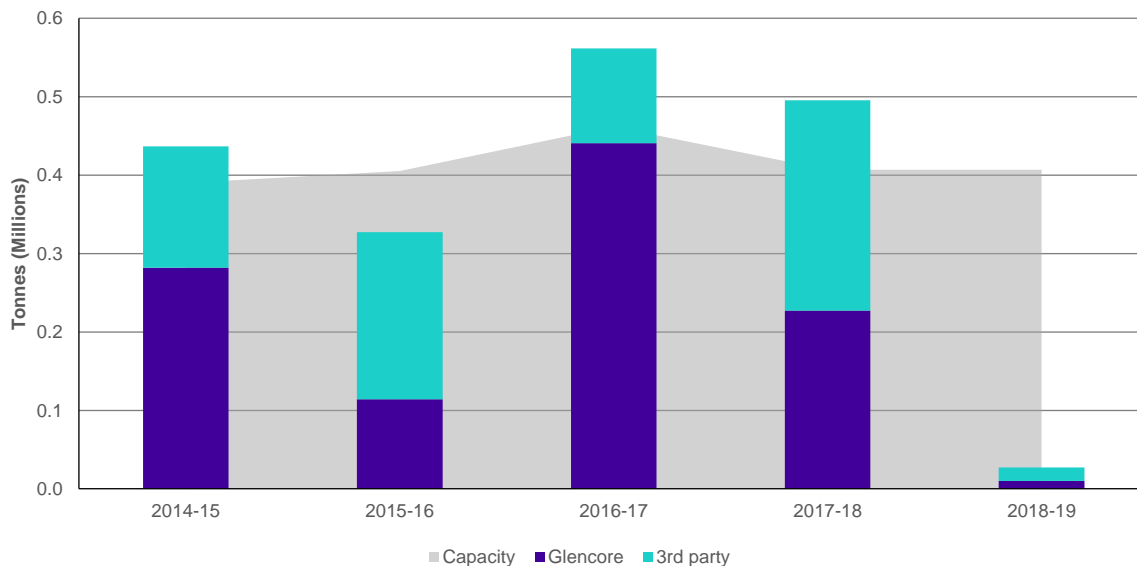
Figures 2.4 to 2.9 below compare available capacity to bulk grain shipments, during the peak period from December to May across numerous seasons, and at each of Viterria's port terminal facilities. Figures 2.4 to 2.9 also show the proportion of grain shipped via Glencore and third party exporters across each season. This is discussed in further detail in section 2.2.4.

**Figure 2.3: SA average monthly bulk exports, 2011-12 to 2018-19**



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

**Figure 2.4: Capacity utilisation across the peak period by exporter at Port Adelaide Inner Harbour, 2014-15 to 2018-19**

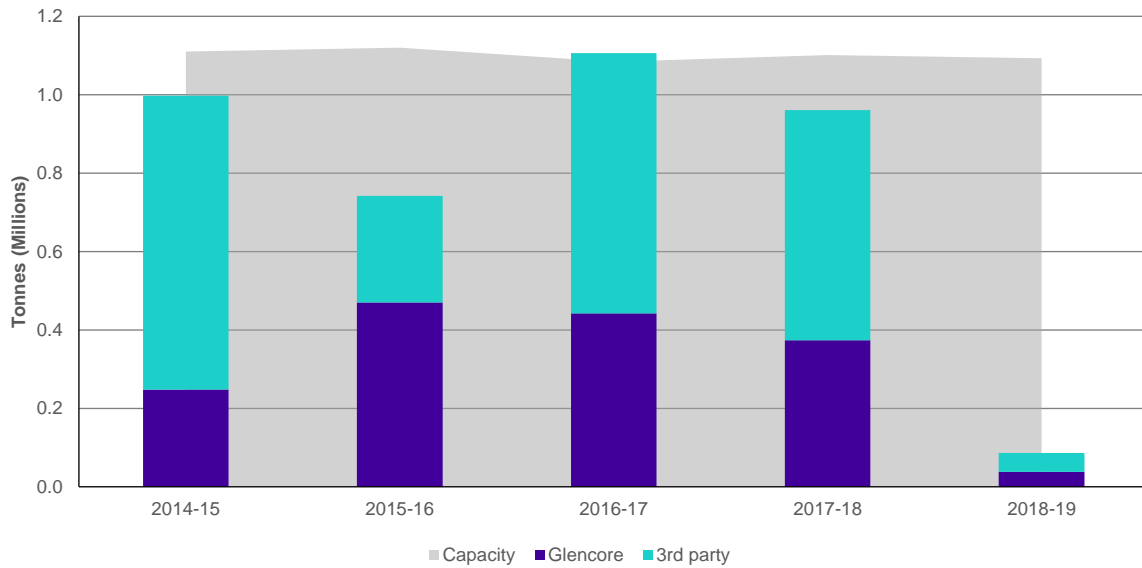


Source: PTSP loading statements; ACF Shipping stem and market share report; and Viterra Attachment 2 - published available capacity estimates.

Notes: (1) Shipments can exceed capacity in any given year due to a variety of factors (see section 2.2.2), including: PTSPs operating facilities for extended hours due to favourable economic conditions; port delays; and the mix of commodities loaded. These factors (and others) may have been factored into PTSPs' capacity estimates to a greater or lesser degree (or not at all).

(2) Viterra released 407 000 tonnes of capacity at IHB during the peak period in the 2019-20 season.

**Figure 2.5: Capacity utilisation across the peak period by exporter at Port Adelaide Outer Harbor, 2014-15 to 2018-19**

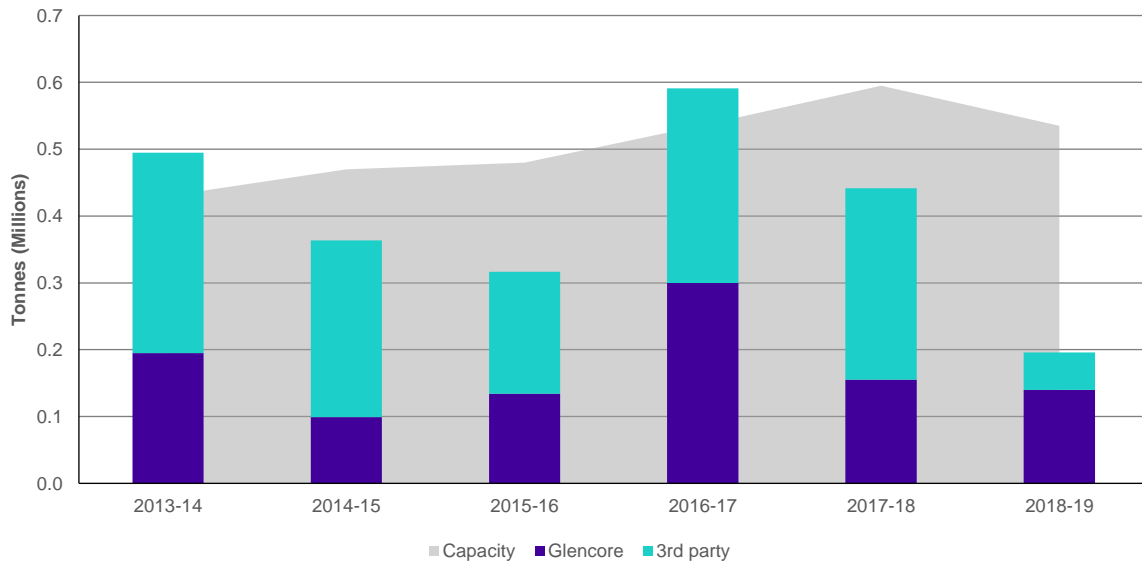


Source: PTSP loading statements; ACF Shipping stem and market share report; and Viterra Attachment 2 - published available capacity estimates.

Notes: (1) Refer to note (1) from figure 2.4.

(2) Viterra released 1.22 million tonnes of capacity at OHB during the peak period in the 2019-20 season.

**Figure 2.6: Capacity utilisation across the peak period by exporter at Port Giles, 2013-14 to 2018-19**

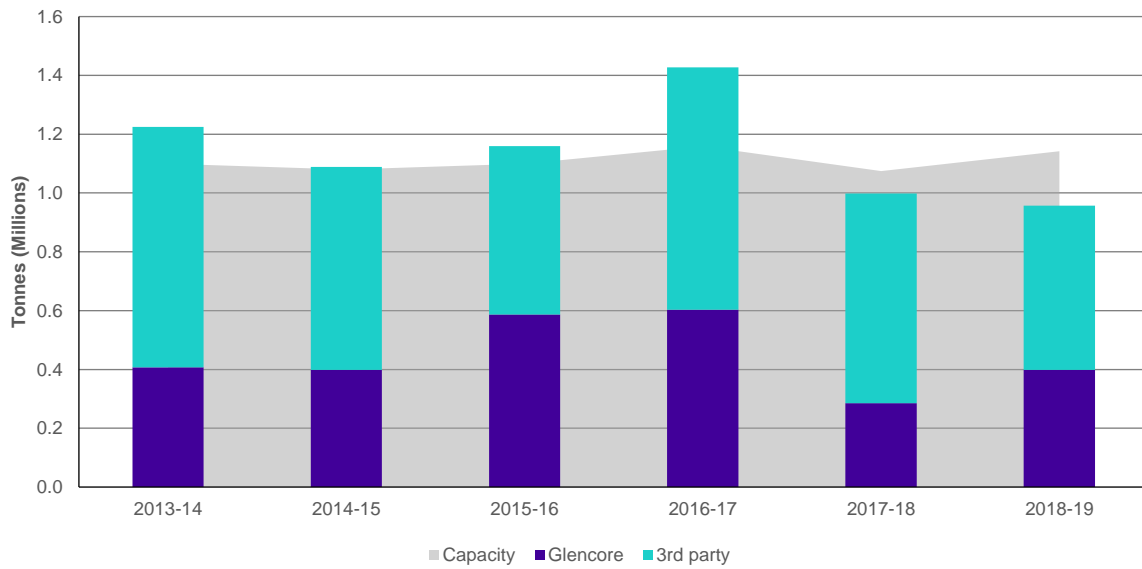


Source: PTSP loading statements; ACF Shipping stem and market share report; and Viterra Attachment 2 - published available capacity estimates.

Notes: (1) Refer to note (1) from figure 2.4.

(2) Viterra released 535 000 tonnes of capacity at Port Giles during the peak period in the 2019-20 season.

**Figure 2.7: Capacity utilisation across the peak period by exporter at Port Lincoln, 2013-14 to 2018-19**

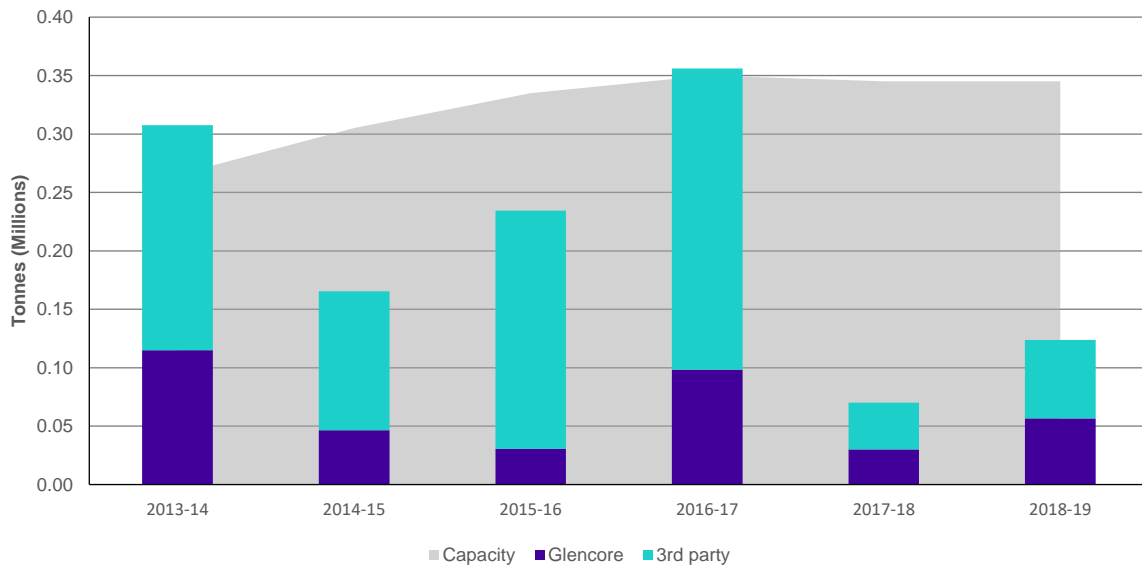


Source: PTSP loading statements; ACF Shipping stem and market share report; and Viterra Attachment 2 - published available capacity estimates.

Notes: (1) Refer to note (1) from figure 2.4.

(2) Viterra released 1.33 million tonnes of capacity at Port Lincoln during the peak period in the 2019-20 season.

**Figure 2.8: Capacity utilisation across the peak period by exporter at Thevenard, 2013-14 to 2018-19**

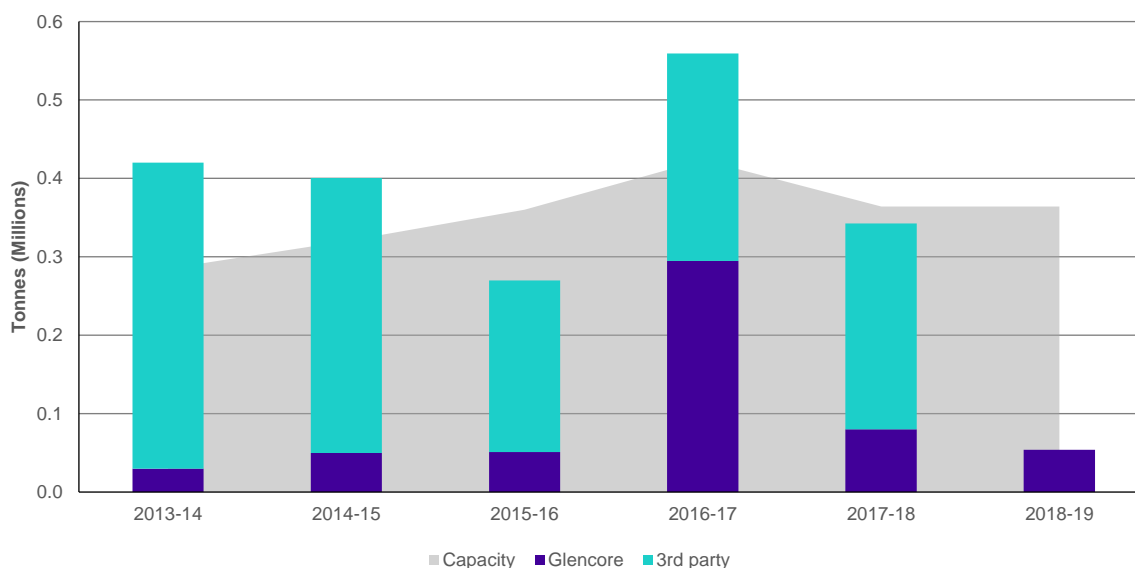


Source: PTSP loading statements; ACF Shipping stem and market share report; and Viterra Attachment 2 - published available capacity estimates.

Notes: (1) Refer to note (1) from figure 2.4.

(2) Viterra released 288 000 tonnes of capacity at Thevenard during the peak period in the 2019-20 season.

**Figure 2.9: Capacity utilisation across the peak period by exporter at Wallaroo, 2013-14 to 2018-19**



Source: PTSP loading statements; ACF Shipping stem and market share report; and Viterra Attachment 2 - published available capacity estimates.

Notes: (1) Refer to note (1) from figure 2.4.

(2) Viterra released 364 000 tonnes of capacity at Wallaroo during the peak period in the 2019-20 season.

As shown in figures 2.4 to 2.9 all of Viterra’s port terminal facilities have approached and/or exceeded maximum released capacity over the peak shipping period at least once since the 2013-14 shipping season. This suggests that significant capacity constraints have been present at all of Viterra’s port terminal facilities at least once during the peak period since the 2013-14 season.

Figures 2.4 to 2.9 also indicates that Thevenard is the only port terminal facility that routinely appears to have excess capacity available during the peak period. However as shown by the bumper 2016-17 season, large harvests still have the potential to result in capacity constraints at this facility.

Figure 2.7 suggests that Viterra’s Port Lincoln facility has likely experienced significant capacity constraints in each season since 2013-14 (inclusive). However the ACCC considers that it can reasonably be expected that the introduction of T-Ports’ Lucky Bay facility will draw grain away from Port Lincoln as well as Thevenard to a lesser extent. While this is expected to reduce the potential for capacity constraints at these facilities in future seasons, the extent of this effect is unclear at this time.

Figures 2.4 to 2.9 also indicates that all port terminal facilities, with the exception of Port Lincoln, had significant port terminal spare capacity available during the 2018-19 season. The ACCC’s draft view is that this reflects lower SA production and, more importantly, the large quantities of grain moving via rail to the east coast in response to drought conditions.<sup>83</sup>

<sup>83</sup> As stated previously, the ACCC does not receive data relating to interstate grain movements that have occurred via road and rail services. The ACCC is therefore is not aware of the exact extent of interstate grain movements. In contrast, the ACCC does receive data on coastal shipments, and notes that SA sent 440 000 tonnes of grain to the east coast via coastal shipment in the 2018-19 season.

## 2.2.4. Exporters and bargaining power

The ACCC has considered whether exporters have historically been able to obtain fair and transparent access to Viterra's port terminal facilities. This is relevant to the ACCC's assessment of the exemption application, having regard to the matters under subclause 5(3) of the Code.

Viterra has historically operated an annual first-in-first-served capacity allocation model at its SA port terminal facilities, with an auction system introduced for 2012-13. Viterra has also operated a longer-term capacity allocation model since 2016. Under this arrangement exporters can sign long-term 'take or pay' agreements for port capacity (long-term agreements).

Viterra currently publishes port loading protocols (**PLPs**) setting out its policies and procedures for managing demand, as required by the Code. The Code requirement to publish these policies and procedures will continue to apply regardless of whether or not an exemption is granted in relation to a facility.<sup>84</sup> However Viterra will not be required to submit changes to the capacity allocation systems in its protocols for approval by the ACCC at any port terminal facilities which they are granted an exemption (see section 4.1 (IHB) subclause (a)).

Viterra is vertically integrated and provides export services to its associated entity Glencore, which competes with third party exporters for port terminal facility access.

Glencore is the largest exporter in SA, and is Viterra's single largest customer: Glencore has accounted for 41 per cent of all exports from Viterra facilities (and 39 per cent state-wide) since 2011-12.

Glencore has exported 2.29 million tonnes per annum of bulk grain on average from Viterra's SA port terminals since the 2011-12 season, compared to an average of 3.32 million tonnes per annum from all third party exporters over the same time period.

The largest other exporters from Viterra's facilities since 2011-12 have been:

- CBH (12 per cent);
- Cargill (9 per cent);
- ADM (9 per cent); and
- Bunge (6 per cent).

Table 2.5 provides a season-by-season breakdown of exporters' market shares at Viterra's port terminal facilities.

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<sup>84</sup> Part 2 of the Code requires all PTSPs deal with exporters in good faith, publish and make available a port loading statement, publish policies and procedures for managing demand for their services, and make current standard terms and reference prices for each port terminal facility publically available on their website.

**Table 2.5: SA bulk shipment market share from Viterra port terminal facilities, 2011-12 to 2018-19**

	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19
Glencore	44%	45%	36%	30%	43%	46%	39%	43%
CBH	6%	13%	13%	13%	14%	14%	13%	18%
Cargill	20%	10%	12%	16%	3%	3%	3%	2%
ADM	13%	11%	12%	6%	7%	9%	7%	5%
Bunge	3%	5%	5%	3%	9%	7%	11%	8%
Others	14%	15%	21%	30%	23%	21%	27%	24%
Number of exporters	12	13	16	18	12	10	13	10

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

The ACCC notes that Viterra has submitted that, since the introduction of the Code in 2014, exporters have entered the market in significant numbers. Viterra also submitted that many changes have occurred since the Code's introduction, such as new PTSPs and exporters (many of which have substantial bargaining power) entering the market, supporting the case for exempting Viterra from Parts 3 to 6 of the Code in respect of all of its SA port terminal facilities.<sup>85</sup>

The ACCC notes that there has been an increase in the total SA market share of smaller exporters since the end of the 2013-14 season across SA (from 17 to 25 per cent).<sup>86</sup> Glencore's total SA market share has also marginally declined across the same period (from 41 per to 40 percent).

Table 2.6 below compares average exporter access statistics between CBH, GrainCorp and Viterra port terminal facilities (since 2011-12). This provides a comparison of the use of these services by the trading arms of different vertically integrated PTSPs. While the ACCC recognises that different states have different market characteristics, table 2.6 indicates that historically exporters have been able to gain access to Viterra's port terminal facilities at rates similar to, or better than, CBH's and GrainCorp's facilities.

Specifically table 2.6 shows that, on average:

- 13.3 exporters gain access to Viterra's port terminal facilities each season. This is marginally lower than CBH, who provide services to an average of 13.4 exporters a season, and slightly higher than GrainCorp at 11.6;
- Glencore secures 41 per cent of Viterra's services, nine percentage points below that secured by CBH's exporting arm at CBH's facilities, and three percentage points above the services secured by GrainCorp's exporting arm;
- Viterra's port terminal facilities are the least concentrated among the top three and top five exporters, suggesting that smaller exporters have historically been able to secure access to Viterra's facilities.

<sup>85</sup> Viterra, *Exemption Application 2019*, 2 July 2019, pp. 4-5

<sup>86</sup> The ACCC notes table 2.5 displays the market share of bulk shipments from Viterra's port terminals, whereas the figures in this paragraph refer to bulk shipments across SA.



**Table 2.6: Average exporter market share at CBH, GrainCorp and Viterra port terminal facilities**

	<b>CBH</b>	<b>GrainCorp</b>	<b>Viterra</b>
<b>Average number of exporters per year</b>	13.4	11.6	13.3
<b>Market share of vertically integrated trading arm</b>	50%	38%	41%
<b>Combined market share of top three exporters</b>	71%	73%	63%
<b>Combined market share of top five exporters</b>	82%	88%	78%

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

**Peak vs off-peak period**

As discussed in section 2.2.3, an important consideration in the assessment of third party exporter access to Viterra’s port terminal facilities is the level of access available during the peak period. During this period shipping slots are in higher demand and a vertically integrated PTSP will likely have a greater incentive to favour its associated entity exporter, or to raise its port terminal charges.

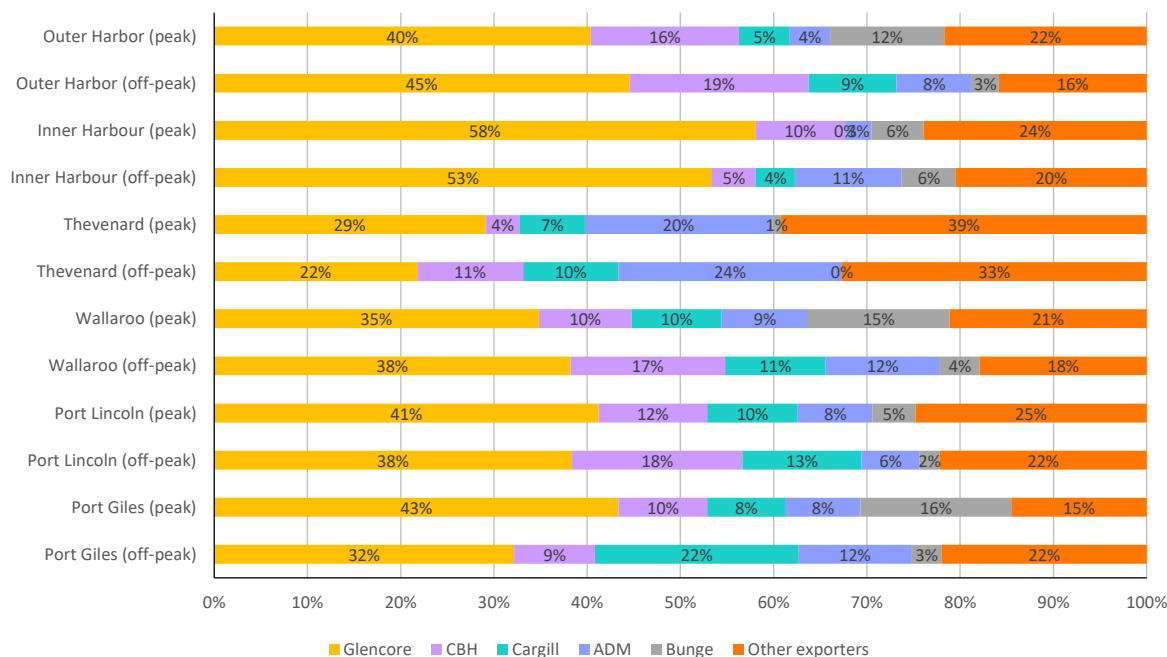
Figure 2.10 below compares the market share of exporters at each of Viterra’s port terminal facilities, across peak and off-peak periods (as discussed in section 2.2.3 the peak period refers to shipments performed in December through May). Figure 2.10 shows that Glencore has similar market shares during peak and off-peak periods at Viterra’s Wallaroo and Port Lincoln facilities. In addition at Viterra’s OHB facility there is a notably lower proportion of exports facilitated by Glencore during peak periods when compared to off-peak periods.

At Viterra’s three other port terminal facilities, IHB, Port Giles and Thevenard, there is a notably higher proportion of exports facilitated by Glencore during peak periods compared to off-peak periods. However, at Thevenard Glencore still only accounts for 28 per cent of peak period bulk export shipments, which is Glencore’s lowest peak (or off-peak) period market share at any of Viterra’s facilities. At Port Giles Glencore accounts for 43 per cent of all shipments during the peak period, a similar proportion to that at Viterra’s two largest port terminals, OHB and Port Lincoln (where Glencore accounts for 40 and 41 per cent of peak period shipments respectively). Glencore accounts for 58 per cent of all shipments during in the peak period (compared to 53 per cent in the off-peak period) at IHB. As noted above exporters have been able to secure greater access at the more efficient OHB facility in the peak period.

Consequently, figure 2.10 suggests that third party exporters have been able to access similar, or greater, shares of total capacity at Viterra’s OHB, Port Lincoln and Wallaroo port terminal facilities during peak periods compared to non-peak periods. At those port terminal facilities where Glencore has accessed greater levels of peak period capacity compared to the off-peak period, the ACCC notes that third party exporters have had either greater (Thevenard) or similar (Port Giles) peak period access compared to Viterra’s other port terminal facilities or, in the case of IHB have had greater access to a nearby (and more efficient) facility.

Exporters’ ability to access capacity in relation to each of Viterra’s individual port terminal facilities is discussed in relation to subclauses 5(3)(c) and (d) in chapter 4.

**Figure 2.10: Share of exports annually and during peak periods at Viterra’s port terminal facilities, 2011-12 to 2018-19**



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

### **Contractual arrangements**

The ACCC notes that contractual arrangements have the potential to affect exporters’ access and bargaining power.

Under the current ACCC-approved arrangements Viterra was able to offer three year long-term agreements from 1 October 2016 (to 30 September 2019), as well as offer subsequent long-term agreements for two year periods. A minimum of 25 000 tonnes per annum applies to exporters’ initial applications for long-term capacity. The current PLPs also contain caps which prevent any one exporter from applying for more than 40 per cent of the available initial long-term capacity at OHB and Port Lincoln (between 1 January and 30 June), or 50 per cent at Viterra’s other facilities. In addition at least 500 000 tonnes of capacity (across Viterra’s six facilities) each quarter must be reserved for short-term capacity which is allocated on a first-in-first-served basis when the Shipping Stem for each year opens.<sup>87</sup>

As explained in section 4.1 (IHB) in relation to subclauses (a), (e) and (f) Viterra will not be required to seek the ACCC’s approval for changes to its capacity allocation systems (which include the above noted arrangements) in relation to any of the port terminal facilities for which they receive an exemption.

The ACCC notes that CRA submitted on behalf of Viterra that not needing to seek ACCC approval of changes to Viterra’s capacity allocation system could be expected to result in a more commercially flexible system better able to respond to market conditions. CRA indicated that they expect an exemption:

*...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*

<sup>87</sup> <http://viterra.com.au/wp-content/uploads/Viterra-Port-Loading-Protocols-Effective-24-December-2015.pdf>

*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.*<sup>88</sup>

While acknowledging the potential benefits of long-term arrangements (long-term agreements or otherwise)<sup>89</sup> for all parties, the ACCC also notes the potential for such arrangements to formalise existing imbalances between different parties, as well as forestall change (by virtue of their duration).

In particular, the ACCC notes that third party exporters, and exporters that are vertically integrated with a PTSP, are likely exposed to different levels of risk under these types of arrangements. While either exporter is likely to face a forfeiture fee in the event they are unable to fulfil a shipping slot, such fees are unlikely to affect the profitability of the vertically integrated exporter (to the extent they simply constitute an internal transfer between the related entities) in comparison to the impact on the third party exporters' profitability.

The ACCC generally expects that contractual arrangements between parties will reflect the relevant commercial interests, market dynamics, and regulatory frameworks. Factors such as available capacity (particularly during the peak period), exporter bargaining power, competition at port (and elsewhere in the supply chain and related markets), and the requirements under the Code are likely of particular relevance in relation to the contractual arrangements established between PTSPs and third party exporters.

In the context of increasing competition in SA, the ACCC notes that arrangements of sufficient duration, as well as those which reflect existing and/or significant asymmetries in the bargaining power of the different parties have the potential to affect the development of competition at port (as well as in the supply chain and in related markets).

Given the above, the ACCC considers that while long-term arrangements have the potential to provide benefits for both PTSPs and exporters, in the absence of sufficient competitive constraints, there is the potential for these types of arrangements to be used to provide favourable access to certain exporters and affect the development of competition.

### **ACCC draft view on capacity utilisation and third party exporter access**

Based on the above analysis, the ACCC's draft view is that third party exporters have been able to access some level of capacity at Viterra's port terminal facilities.<sup>90</sup> This includes during the more desirable peak period.

However, the ACCC must also consider whether the current level of competition among exporters is likely to be maintained if an exemption were granted under the Code in relation to one or more of Viterra's port terminal facilities. This is likely to depend on a range of factors, including: capacity constraints, PLPs, contractual arrangements (such as long-term agreements), the presence of alternate port terminal service providers (discussed in section 2.1), upcountry supply chains and domestic and container markets (discussed in chapter 3).

The ACCC notes that the available capacity data (as discussed in sections 2.2.2 and 2.2.3) suggests that all of Viterra's port terminal facilities are likely to experience some level of capacity constraint during peak periods, with the possible exception of the Thevenard facility. As previously noted, the ACCC considers that in periods where the supply of port terminal

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<sup>88</sup> Charles River Associates, *Charles River Associates Report on the Benefits of Code Exemption on Viterra Grain Export Terminals*, 7 November 2019, p. 1.

<sup>89</sup> Note: the term 'long-term agreements' (which are specific agreements offered by Viterra) is used here as a subset (or type) of the broader term 'long-term arrangements' (which include Viterra's long-term agreements, or any other type of long-term arrangement which may be used to allocate access).

<sup>90</sup> Note: The above analysis is based on data between 2011-12 and 2018-19 for Port Lincoln, Port Giles, Thevenard and Wallaroo. For Port Adelaide OHB and IHB the analysis is based between 2014-15 and 2018-19 (due to IHB and OHB being jointly reported as Port Adelaide between 2011-12 and 2014-15).

services is constrained the incentive for a vertically integrated PTSP to deny, or provide discriminatory access, to certain exporters is increased.

As such, the ACCC's draft view is that if an exemption (or exemptions) were granted so that Parts 3 to 6 of the Code did not apply, there is a risk that Viterra would favour its associated entity, Glencore, particularly during peak periods.

Were this to occur Glencore would be able to gain greater access to port terminal services, while third party exporters' ability to negotiate terms of access would be reduced, particularly in the peak period. Concerns around the absence of adequate regulation and the potential for discriminatory behaviour, were noted by Cargill in its submission:

*Indeed, Viterra is the dominant port terminal service provider in South Australia, many times over. Cargill is concerned that an absence of adequate regulation may incentivise discriminatory behaviour.<sup>91</sup>*

While the ACCC acknowledges that third party exporters have been able to secure access to Viterra's facilities over recent years under the Code, the ACCC continues to hold concerns around Viterra's incentive to provide fair and transparent access absent the application of the full Code.

In addition, despite recent competitive developments in the grain export market (including related storage), there appears to be limited proven opportunity to export grain outside of Viterra's port terminal facilities at this time. While the ACCC acknowledges that both Cargill's and Semaphore's facilities provide (or will provide) a level of competition at Port Adelaide, both these port terminal facilities are significantly smaller in terms of the capacity of grain they are capable of exporting relative to Viterra's facilities (particularly with respect to IHB and OHB, but also with respect to Wallaroo to a lesser degree).

The ACCC also acknowledges that T-Ports' Lucky Bay facility will provide a level of competition among PTSPs on the Eyre Peninsula. However it is currently uncertain how much of a competitive constraint it will place on Viterra's facilities (in particular Port Lincoln and Thevenard) in practice given the Lucky Bay facility only commenced operations in March 2020.

Importantly, the ACCC notes that, in addition to competition from third party PTSPs, several other markets must be considered when considering the total level of competitive constraint a port terminal facility faces (such as upcountry, container and domestic markets, all of which are discussed in chapter 3). While a dominant PTSP may not face sufficient competition from third party PTSPs to constrain their incentive to provide favourable access to certain exporters, the availability of other markets may also impose a level of competitive constraint, which, in addition to the constraint imposed by third party PTSPs, may be sufficient to ensure fair and transparent access is provide to the relevant port terminal facility.

The extent to which each of the concerns discussed in this chapter, and any other relevant competitive constraints, apply to each of Viterra's individual port terminal facilities is discussed in detail in chapter 4.

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<sup>91</sup> Cargill Submission, 6 September 2019, p. 1.

## Charles River Associates profit and loss analysis

This section sets out a number of the matters of particular relevance to the profit and loss modelling presented by **CRA** as part of Viterra's exemption application.

The ACCC notes that these matters are relatively technical in nature and have been set out separately here for ease of reading by stakeholders. The ACCC also notes that the CRA reports were not available for review by stakeholders at the time of the ACCC's initial Issues Paper, and that stakeholders' capacity to respond to the ACCC's discussion regarding CRA's reports in the Supplementary Issues Paper may have been impacted by the COVID-19 pandemic.

As such, ***the ACCC welcomes views from stakeholders on the CRA materials and the Draft Determinations more broadly.***

The ACCC has considered the matters set out in this section as part of its assessment of Viterra's exemption application, to the extent relevant under subclause 5(3) of the Code. Other matters raised by CRA and Viterra have been considered elsewhere in the Draft Determinations as relevant.

### ***Charles River Associates modelling***

Viterra engaged economic consultants CRA to provide materials in support of its exemption application.

As part of this work CRA examined the economic impact of exempting all of Viterra's ports from the Code and provided the ACCC with two reports.<sup>92</sup> The reports contend that Viterra does not have an economic incentive to deny third party exporter's access, despite being vertically integrated with an associated entity that is an exporter, Glencore.<sup>93</sup>

The CRA reports have been made available to stakeholders as part of the consultation process through the [ACCC website](#). In addition to the CRA reports, the ACCC has also engaged directly with CRA in the course of its consideration of Viterra's exemption application. This includes requesting and receiving additional materials from CRA in support of its views.

In considering the CRA modelling, the ACCC notes the inherent challenges and uncertainties associated with economic modelling, particularly with regard to the reasonableness of the assumptions used. However, the ACCC also notes that these may have been increased by the model's use of assumed rather than actual values for Viterra's and Glencore's margins.

In addition, the ACCC notes that CRA has not considered the upcountry supply chain in its economic modelling and, as such, may have underestimated the profitability of the denial of access.

In considering the supporting materials provided by CRA, the ACCC considers it is particularly important to have regard to the express purpose of the Code i.e. 'to ensure that exporters of bulk wheat have *fair and transparent* access to port terminal services.'<sup>94</sup> Consistent with this, the ACCC notes that a number of stakeholders indicated in their submission(s) to the exemption assessment process that while third party exporters are provided access to Viterra's facilities, consideration must be given to whether they have *fair and transparent* access to Viterra's facilities:

#### T-Ports

*[T-Ports] accept that Viterra does not have an incentive to completely deny access to its port terminal services for third party exporters, but again, the important issue is how they provide access if/when multiple customers seek access at the same time. Without any oversight, Viterra would be commercially incentivised to give its related trading entity (Glencore) preferential access to capacity, minimising their idle time and optimising their despatch/demurrage at the expense of others.<sup>95</sup>*

#### Cargill

<sup>92</sup> The *Charles River Associates Report on the Benefits of Code Exemption for Viterra Grain Export Terminals* (Port Terminal Report for Viterra) and the *Supplement to CRA Report on the Benefits of Code Exemption for Viterra Grain Export Terminals*.

<sup>93</sup> Charles River Associates, *Charles River Associates Report on the Benefits of Code Exemption on Viterra Grain Export Terminals*, 7 November 2019, p. 15.

<sup>94</sup> *Port Terminal Access (Bulk Wheat) Code of Conduct*, s 2.

<sup>95</sup> T-Ports supplementary submission, 19 June 2020, p. 2.

*Removal of regulation under the full Code would create strong incentives for Viterra to exploit its market power to discriminate in favour of certain exporters, particularly Glencore, and [as] such would hinder fair and transparent access to necessary facility services for other exporters.<sup>96</sup> [emphasis added]*

In contrast SAFC submitted that Viterra has strong incentives to offer attractive commercial terms to access seekers due to current, and potential future competition:

*As such, Viterra has a strong incentive to negotiate attractive commercial terms that do not spur further entry into the market...it is not just current competition, but also the advanced nature of future competitive service provider proposals that will deter anti-competitive conduct.<sup>97</sup>*

This section first briefly discusses CRA's assertion that third party port terminal facilities in SA have sufficient capacity to handle all third party exports in the event Viterra was to completely deny access to its facilities. The ACCC's draft views on SA port terminal capacity are discussed in greater detail in section 2.1 (including its views on mobile ship loaders and transshipment).

This section then discusses CRA's modelling. The modelling indicates that Viterra does not have an economic incentive to deny access to third party exporters, and is based on the assumption that there is sufficient alternate port terminal capacity to handle any grain which is diverted from Viterra's port terminal facilities (in the event access is denied). As previously noted the margin values used in CRA's modelling in relation to Viterra and Glencore are assumptions, as opposed to actual values. While the ACCC acknowledges the potential commercial sensitivity of such information, as the ACCC has not been provided with this information (on a confidential basis or otherwise), the ACCC is not well placed to attest to the reasonableness of certain assumptions used in CRA's modelling. However the ACCC notes that the modelling appears sensitive to small changes in certain assumptions, which can result in it being profitable for Viterra to deny access.

This section considers other views presented by Viterra and CRA in relation to vertically integrated firms' incentives and the denial of access compared to less extreme forms of discrimination. Finally, this section discusses the possible implications of vertical integration. The ACCC notes that the question of vertical integration and incentives is integral to CRA's profit and loss modelling.

#### 1. Capacity of third party port terminal facilities to accommodate third party exports

The ACCC notes that CRA's report states that:

*...competing terminals have more than enough annual capacity to handle all the volume exported by competing exporters in 2016/2017 and 2017/2018.<sup>98</sup>*

The ACCC understands that this statement is based on the following (annual) capacity assumptions:

- 1.5 million tonnes of capacity at LINX's facility at Port Adelaide;<sup>99</sup>
- 800 000 tonnes of capacity at Semaphore's facility at Port Adelaide;<sup>100</sup> and
- 3.6 million tonnes of capacity at T-Ports' facility at Lucky Bay.<sup>101</sup>

Reflecting the above, CRA considers there to be a total of 5.9 million tonnes of capacity available at competing port terminal facilities annually.

CRA then notes that 4.6 and 3.8 million tonnes of grain were exported via non-Glencore (i.e. third party) exporters in SA in 2016-17 and 2017-18 respectively.<sup>102</sup> The figures used by CRA were

<sup>96</sup> Cargill submission, 6 September 2019, p. 2.

<sup>97</sup> SAFC submission, 6 September 2019, p. 2.

<sup>98</sup> Charles River Associates, *Charles River Associates Report on the Benefits of Code Exemption on Viterra Grain Export Terminals*, 7 November 2019, p. 17.

<sup>99</sup> Port Adelaide LINX's capacity figure is based off: AEGIC, *Australia's grain supply chains: Costs, risks and opportunities*, October 2018, p. 57.

<sup>100</sup> The 800 000 tonne figure is based on an annualised monthly maximum. That is, CRA state the maximum amount of grain Semaphore's has loaded in a month is 68 336 tonnes, which equates to a yearly maximum capacity of 820 000 tonnes. The ACCC has previously used annualised maximum figures as the upper bound of a facility's capacity. The ACCC discusses its views on this methodology to estimate capacity further in section 2.1.4.

<sup>101</sup> This capacity figure is based off the Code exemption application submitted by T-Ports in relation to its Lucky Bay facility. Different approaches to the estimation of the capacity of the Lucky Bay facility are discussed in section 2.1.4.

calculated from the ACCC Bulk Grain Ports Monitoring Report 2017-18.

The ACCC notes that since the submission of CRA's initial report LINX has announced it has exited the market, and Cargill is subsequently entering at Port Adelaide, Inner Harbour.<sup>103</sup> As noted in Cargill's exemption application (and referenced by CRA in its supplementary report) Cargill has stated that its facility has an estimated 'nominal capacity' of 300 000 tonnes per annum and that the 'highest practical capacity the facility could possibly reach' is 540 000 tonnes per annum.<sup>104</sup>

The ACCC notes that, using the same capacity estimates CRA used for Semaphore and T-Ports' facilities while taking into account the exit of LINX and entry of Cargill (using Cargill's advised maximum capacity figure of 540 000 tonnes per annum), there appears to be 4.94 million tonnes of alternate capacity available to exporters annually. This appears to be sufficient capacity to have handled all third party exports in either 2016-17 or 2017-18 (assuming it would have been economically, or practically, viable to transport this grain to these facilities rather than Viterra's).

In considering the above capacity estimates, the ACCC notes that the available estimates for alternate port terminal capacity vary significantly, and that this variation has the potential to significantly influence the total amount of third party capacity that is expected to be available in SA. As seen in table 2.2 in section 2.1.4 estimates of the total amount of alternate annual capacity vary from as low as 1.30 million tonnes, to as high as 4.94 million tonnes (as used in the CRA report), depending on which estimates are used for the different individual port terminal facilities.

In particular, the ACCC notes that the capacity estimate used for T-Ports' Lucky Bay facility (which ranges from 600 000 million tonnes to 3.60 million tonnes per annum) is one of the most significant variables in this respect.

The ACCC discusses its views on SA port terminal facility capacity, including the capacity of the Lucky Bay facility, in greater detail in chapter 2. While the ACCC acknowledges there is considerable uncertainty around capacity estimates, the ACCC considers that the 4.94 million tonnes per annum capacity estimate used by CRA likely overstates the amount of available alternative capacity in SA.

## 2. CRA's modelling

As discussed above, CRA's initial report asserts that Viterra has no incentive to deny access to competing exporters.<sup>105</sup> In addition CRA asserts:

*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.<sup>106</sup>*

The ACCC acknowledges that when there is spare export capacity at a port terminal facility, a PTSP (vertically integrated or otherwise) may have an incentive to provide access to exporters to increase throughput (as it likely faces significant fixed costs). However, in circumstances where supply is constrained, the ACCC considers that a vertically integrated PTSP will have an incentive to favour certain exporters (notably an exporter which is an associated entity), potentially to the detriment of the fairness and transparency of access for other exporters.

For example, absent appropriate regulation, a vertically integrated PTSP will have an incentive to offer capacity to an associated entity exporter in the first instance, thus providing its associated entity with the most sought after shipping capacity slots (before offering the remaining slots to the market more broadly). The incentive to favour its associated entity is likely strengthened in circumstances

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<sup>102</sup> Charles River Associates, *Charles River Associates Report on the Benefits of Code Exemption on Viterra Grain Export Terminals*, 7 November 2019, p. 17.

<sup>103</sup> See: <https://www.accc.gov.au/regulated-infrastructure/wheat-export/wheat-export-projects/linx-port-adelaide-exemption/linx-suspends-bulk-grain-export-services>.

<sup>104</sup> Cargill, *Application for exemption under the Port Terminal Access (Bulk Wheat) Code of Conduct*, 30 October 2019, p. 3.

<sup>105</sup> Charles River Associates, *Charles River Associates Report on the Benefits of Code Exemption on Viterra Grain Export Terminals*, 7 November 2019, p. 15.

<sup>106</sup> Ibid.

where capacity is constrained.

Notwithstanding the ACCC's view that favourable access is a more relevant consideration than the denial of access,<sup>107</sup> the ACCC notes that:

- the outcomes of the CRA modelling appears relatively sensitive to its assumptions; and
- CRA's model appears to be based on a SA market that does not reflect the opening of two competing facilities, and the closure of another facility.

These matters are discussed in detail below.

### 2.1. Sensitivity to the assumptions used in the modelling

In order to support its view that Viterra does not have an economic incentive to deny access to third party exporters CRA has presented modelling which finds that, in net, Viterra/Glencore Agriculture would experience a 1.3 per cent reduction in profit if it were to deny third party exporters access to all of its port terminal facilities.

That is, CRA's modelling finds that if were Viterra to deny access at port, the revenue lost as a result of the reduction in throughput at Viterra's facilities would outweigh the revenue gains earned by Glencore as a result of the increased volume of grain now needing to be exported through Glencore (which would be the only exporter with access to Viterra's port terminal facilities in a denial-of-access scenario) and the lower price paid growers as a result.

In doing so, CRA's modelling assumes that there is sufficient alternate (i.e. third party) port terminal capacity available to accommodate the grain which switches away from Viterra's port terminal facilities as a result of third party exporters being denied access (as discussed above).

The ACCC notes that a number of assumptions have necessarily been made in order to arrive at this conclusion. These include:

- 1) The use of 2017-18 export figures as a 'representative' season.
- 2) That Glencore's trading margins are \$1.50 per tonne.<sup>108</sup>
- 3) That Viterra's port terminal margins are \$10 per tonne.<sup>109</sup>
- 4) That 60 per cent of third party exporter volumes will switch to competing terminals (or the domestic or containerised markets) in response to Viterra denying access to its port terminal services.
- 5) That Glencore's trader margin increases by \$5 per tonne as a result of reduced competition from exporters sourcing grain from growers.

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.

Tables 2.6, 2.7 and 2.8 below present a sensitivity analysis of how this profit margin changes in response to various changes to the percentage of third party exporter grain that switches away from Viterra port terminal facilities, and the increase in Glencore's trader margin (i.e. assumptions 4 and 5 of those listed above respectively), compared to a case where third party exporters are not denied access to Viterra's facilities.

In addition, in relation to assumed port terminal margins (i.e. assumption 3 listed above) table 2.7 assumes a \$10 per tonne port terminal margin,<sup>110</sup> table 2.6 assumes a \$5 per tonne port terminal margin, and table 2.8 assumes a \$15 per tonne port terminal margin.

<sup>107</sup> Consistent with previous exemption decisions, the ACCC considers that a vertically integrated PTSP is more likely to have an incentive to provide favourable access to certain exporters (such as an associated entity) during periods of high demand, rather than necessarily being incentivised to completely deny access to third party exporters.

<sup>108</sup> See earlier discussion re Viterra and Glencore margin figures.

<sup>109</sup> See earlier discussion re Viterra and Glencore margin figures.

<sup>110</sup> As per assumption 3 above, CRA's report assumes a \$10 per tonne port terminal margin (Charles River Associates, *Charles River Associates Report on the Benefits of Code Exemption on Viterra Grain Export Terminals*, 7 November 2019, p. 19).



The sensitivity analysis only considers changes in assumptions 3, 4 and 5. That is because the ACCC considers assumptions 1 and 2 to be relatively reasonable as:

- the 2017-18 season is likely representative of a typical export season; and
- the \$1.50 per tonne margin is likely representative of Glencore's margins, given that the Department has reported that export margins are in the range of \$1 to \$2 per tonne.<sup>111</sup>

While the ACCC acknowledges that changes to assumptions 1 and 2 would still result in changes to the final result of CRA's modelling, the ACCC is less certain of the reasonableness of assumptions 3, 4 and 5. In particular the ACCC notes that, keeping all other assumptions the same, if the third party exporter switching percentage (assumption 4) is assumed to be less than 58.7 per cent (compared to the 60 per cent assumption used in CRA's own analysis), then the denial of access becomes profitable under CRA's modelling.

Similarly, the ACCC notes that if the increase in Glencore's trader margin (assumption 5) is greater than \$5.21 per tonne (compared to the \$5.00 per tonne assumption used in CRA's own analysis), then the denial of access also becomes profitable, keeping all other assumptions the same.

CRA's modelling therefore appears highly sensitive to the margins and switching percentages inputs, with relatively small changes to these assumptions potentially resulting in the model indicating that it would be profitable for Viterra to deny access. In particular the modelling appears to be extremely sensitive to the value assumed for port terminal margin.

The ACCC notes that the \$10 per tonne port terminal margin used in CRA's own analysis is an assumption and not necessarily Viterra's actual margin. While the ACCC is not aware of Viterra's actual port terminal margin(s), as shown in table 2.6 there are significantly more scenarios under which the denial of access becomes profitable if Viterra's port terminal margin is assumed to be \$5 per tonne (compared to the \$10 per tonne margin shown in table 2.7). Conversely, if a \$15 per tonne port terminal margin is assumed (see table 2.8) there are significantly more scenarios in which a denial of access becomes unprofitable (compare to table 2.7).

To highlight this point the ACCC notes that, holding all other CRA assumptions the same, changing the port terminal margin between \$5 per tonne, \$10 per tonne and \$15 per tonne significantly alters Viterra's incentive to deny access: the net profit for Viterra/Glencore Agriculture changes from a loss of 1.3 per cent under a \$10 per tonne margin, to a loss of 12.6 per cent using the \$15 per tonne margin, and to a gain of 30.4 per cent using the \$5 per tonne margin (as shown in tables 2.7, 2.8 and 2.6 respectively).

As previously noted, the ACCC considers issues around favourable access to be more relevant than the denial of access. Notwithstanding this, the ACCC considers that the apparent sensitivity of the modelling presented by CRA reduces the strength of the assertion that Viterra does not have an incentive to deny access to third party exporters.

**Table 2.6: CRA Modelling Sensitivity Analysis: Percentage Change in Net Profit - \$5 per tonne Port Terminal Margin Assumption**

Increase in Glencore trader margin (Assumed)	Percentage of Non-Glencore Grain that Switches from Viterra Port Terminals (Assumed)						
	30%	40%	50%	55%	60%	65%	70%
\$2.50	31.6%	21.8%	11.9%	7.0%	2.1%	-2.8%	-7.8%
\$4	53.6%	42.1%	30.6%	24.9%	19.1%	13.4%	7.6%
\$5	68.2%	55.6%	43.0%	36.7%	30.4%	24.2%	17.9%
\$6	82.8%	69.2%	55.5%	48.6%	41.8%	35.0%	28.1%
\$7.50	104.8%	89.5%	74.1%	66.5%	58.8%	51.1%	43.5%

Notes: (1) The switching percentage assumes that grain can be readily be switched to competing markets, including opportunities offered by competing PTSPs, and the domestic and container markets.

<sup>111</sup> DAWR, *Review of the wheat port access code of conduct*, October 2018, p. 58.

(2) Tables 2.6, 2.7 and 2.8 use CRA's methodology and assume that LINX and Semaphore are exporting from their Port Adelaide facilities at 2017-18 levels (i.e. a combined capacity of 510 000 tonnes per annum), and that Cargill and T-Ports are not exporting any grain from their respective facilities. Section 2.2 of the CRA box below assumes the current market scenario, with Cargill and T-Ports active and LINX having exited. As discussed in section 2.1.4 the ACCC notes there is likely to be between 1.30 and 1.51 million tonnes of third party PTSP capacity currently available in SA per annum.

(3) A 'switching percentage' of 30 per cent assumes that 990 000 million tonne of grain will be diverted from Viterra ports to alternate markets, while a 'switching percentage' of 70 per cent assumes 2.31 million tonne of grain will be diverted.

**Table 2.7: CRA Modelling Sensitivity Analysis: Percentage Change in Net Profit - \$10 per tonne Port Terminal Margin Assumption**

Increase in Glencore trader margin (Assumed)	Percentage of Non-Glencore Grain that Switches from Viterra Port Terminals (Assumed)						
	30%	40%	50%	55%	60%	65%	70%
\$2.50	8.0%	-0.1%	-8.1%	-12.2%	-16.2%	-20.3%	-24.3%
\$4	19.6%	10.7%	1.7%	-2.8%	-7.2%	-11.7%	-16.2%
\$5	27.3%	17.8%	8.3%	3.5%	-1.3%	-6.0%	-10.8%
\$6	35.0%	24.9%	14.8%	9.8%	4.7%	-0.3%	-5.4%
\$7.50	46.6%	35.6%	24.7%	19.2%	13.7%	8.2%	2.7%

Notes: Refer to table 2.6 notes.

**Table 2.8: CRA Modelling Sensitivity Analysis: Percentage change in net profit - \$15 per tonne Port Terminal Margin Assumption**

Increase in Glencore trader margin (Assumed)	Percentage of Non-Glencore Grain that Switches from Viterra Port Terminals (Assumed)						
	30%	40%	50%	55%	60%	65%	70%
\$2.50	-0.4%	-7.9%	-15.3%	-19.1%	-22.8%	-26.5%	-30.2%
\$4	7.4%	-0.6%	-8.6%	-12.7%	-16.7%	-20.7%	-24.7%
\$5	12.7%	4.2%	-4.2%	-8.4%	-12.6%	-16.8%	-21.1%
\$6	17.9%	9.1%	0.3%	-4.1%	-8.6%	-13.0%	-17.4%
\$7.50	25.8%	16.4%	7.0%	2.2%	-2.5%	-7.2%	-11.9%

Notes: Refer to table 2.6 notes.

## 2.2. *A future market in which Cargill and T-Ports are active participants*

The CRA modelling uses export figures from the 2017-18 shipping season and, as such, assumes that there are 5.4 million tonnes of exports through Viterra terminals (i.e. a total of 2.1 million tonnes Glencore and 3.3 million tonnes non-Glencore exports).

The ACCC notes that CRA's modelling therefore reflects the situation *before* the opening of two rival port terminal facilities, Cargill's berth 20, Inner Harbour facility (which will soon commence operations), and T-Ports' Lucky Bay facility (operational), as well as the closure of LINX's port terminal facility at Port Adelaide. The ACCC considers it more appropriate for any modelling to consider whether Viterra has an incentive to deny access in a *future* status quo in which Cargill's and T-Ports' facilities are active, and LINX's facility is inactive. The ACCC notes that ADM's potential Port Pirie facility has not been considered in the modelling.<sup>112</sup>

<sup>112</sup> The ACCC understands that ADM do not have appropriate exporter accreditation to perform export services at this time (see section 2.1.5). ADM has therefore not been included in the future modelling scenario. However the ACCC understands that ADM has recently performed a small number of coastal (i.e. domestic) shipments out of Port Pirie. In relation to the modelling, the ACCC understands that the capacity of ADM's facility will likely be relatively small in size and therefore is unlikely to have a large impact on the results presented in tables 2.9, 2.10 and 2.11. It is also noted that including the extra capacity from ADM's facility in the modelling would increase the profitability of the denial of access to Viterra's port terminal services.

The ACCC considers that modelling this future status quo means:

- subtracting 900 000 tonnes from the forecast exports through Viterra terminals (reflecting Cargill's and T-Ports' facilities operating at their combined nominal capacities<sup>113</sup>); and
- adding an additional 240 000 tonnes, due to the exit of LINX from the market.<sup>114</sup>

Factoring these changes into the model appears to reduce the volume of non-Glencore exports such that, even accepting all the other assumptions in CRA's model, a denial of access by Viterra now becomes profitable.<sup>115</sup>

Similarly the results presented below in tables 2.9, 2.10 and 2.11 show that, once Cargill's and T-Ports' facilities are included, and LINX's facility is removed, a greater number of the assumed scenarios become profitable if Viterra denies access to its port terminal services.

**Table 2.9: CRA Modelling Sensitivity Analysis in the future status quo (percentage change in profit) - \$5 per tonne Port Terminal Margin Assumption**

Increase in Glencore trader margin (Assumed)	Percentage of Non-Glencore Grain that Switches from Viterra Port Terminals (Assumed)						
	30%	40%	50%	55%	60%	65%	70%
\$2.50	32.3%	23.5%	14.6%	10.2%	5.8%	1.4%	-3.1%
\$4	54.4%	44.1%	33.7%	28.6%	23.4%	18.3%	13.1%
\$5	69.1%	57.8%	46.5%	40.8%	35.2%	29.5%	23.9%
\$6	83.8%	71.5%	59.2%	53.1%	46.9%	40.8%	34.6%
\$7.50	105.9%	92.1%	78.3%	71.4%	64.6%	57.7%	50.8%

Notes: (1) The switching percentage assumes that grain can be readily switch to competing markets, including opportunities offered by third party PTSPs, and the domestic and container markets.

(2) Tables 2.9, 2.10 and 2.11 assume a future market scenario in which T-Ports and Cargill are active, but LINX have exited. That is table 2.9, assumes Semaphore are exporting at their 2017-18 levels (370 000 tonnes), and that Cargill and T-Ports are exporting according to their nominal capacity (combined 900 000 tonnes). As discussed in section 2.1.4 the ACCC notes there is likely to be between 1.30 and 1.51 million tonnes of third party PTSP capacity in SA.

(3) A 'switching percentage' of 30 per cent assumes that 790 000 tonnes of grain will be diverted from Viterra ports to alternate markets, while a 'switching percentage' of 70 per cent assumes that 1.85 million tonne of grain will be diverted.

**Table 2.10: CRA Modelling Sensitivity Analysis in the future status quo (percentage change in profit) - \$10 per tonne Port Terminal Margin Assumption**

Increase in Glencore trader margin (Assumed)	Percentage of Non-Glencore Grain that Switches from Viterra Port Terminals (Assumed)						
	30%	40%	50%	55%	60%	65%	70%
\$2.50	9.3%	2.0%	-5.3%	-8.9%	-12.6%	-16.2%	-19.9%
\$4	21.1%	13.0%	4.9%	0.8%	-3.2%	-7.3%	-11.3%
\$5	28.9%	20.2%	11.6%	7.3%	3.0%	-1.3%	-5.6%
\$6	36.7%	27.5%	18.4%	13.8%	9.3%	4.7%	0.1%
\$7.50	48.4%	38.5%	28.5%	23.6%	18.6%	13.7%	8.7%

Notes: Refer to table 2.9 notes.

<sup>113</sup> Third party PTSPs' export volumes are assumed to be comprised from the non-Glencore share of exports.

<sup>114</sup> In the 2017-18 season LINX facilitated the export of 240 000 tonnes of grain, all of which was for by non-Glencore exporters.

<sup>115</sup> Under the future status quo a denial of access by Viterra to non-Viterra exporters, with all the other assumptions remaining the same, results in an increase in Viterra's and Glencore's net profit of 3.0 per cent, i.e. the complete denial of access become profitable.

**Table 2.11: CRA Modelling Sensitivity Analysis in the future status quo (percentage change in profit) - \$15 per tonne Port Terminal Margin Assumption**

Increase in Glencore trader margin (Assumed)	Percentage of Non-Glencore Grain that Switches from Viterra Port Terminals (Assumed)						
	30%	40%	50%	55%	60%	65%	70%
\$2.50	1.0%	-5.7%	-12.5%	-15.9%	-19.2%	-22.6%	-26.0%
\$4	9.0%	1.7%	-5.6%	-9.2%	-12.9%	-16.5%	-20.2%
\$5	14.3%	6.7%	-1.0%	-4.8%	-8.6%	-12.4%	-16.3%
\$6	19.6%	11.6%	3.6%	-0.4%	-4.4%	-8.4%	-12.4%
\$7.50	27.6%	19.1%	10.5%	6.3%	2.0%	-2.3%	-6.5%

Notes: Refer to table 2.9 notes.

### 2.3. Lesser Forms of Discrimination

As set out in the materials submitted to support Viterra's application for exemption, CRA and Viterra consider a complete denial of access to be the most extreme form of discrimination, and have argued that if such a form of discrimination is unprofitable, it follows that all lesser forms of discrimination are also unprofitable.<sup>116</sup>

The ACCC notes that this would mean that Viterra would not, for example, have an economic incentive to provide *favourable* access to Glencore during the peak shipping season.

While the ACCC does not necessarily disagree with CRA's and Viterra's proposition, the ACCC's draft view is that it is necessary to show that the *most profitable* increase in Glencore's margin,<sup>117</sup> following the denial of access, is unprofitable in order to definitively conclude that the complete denial of access is unprofitable.<sup>118</sup>

### 2.4. Potential Implications of Vertical Integration

As noted above, CRA's profit and loss is intended to demonstrate Viterra does not have an economic incentive to deny third party exporter's access to its facilities despite being vertically integrated with, and an associated entity of, Glencore.

The ACCC also notes that Viterra has submitted that vertical integration in and of itself is not anti-competitive, and that there are a number of benefits associated with vertical integration:

*Viterra is an associated entity of an exporter, Glencore Agriculture. However, vertical integration is not in and of itself anti-competitive, and a corporation should not be subject to regulation merely because of its vertical integration.*<sup>119</sup>

The ACCC does not consider vertical integration in a market to be inherently problematic. In circumstances where adequate competition is present between competing supply chains, vertical integration does not necessarily pose a problem. However, in circumstances where a vertically integrated firm holds substantial market power in, say, downstream markets (for example as a result of the ownership of a piece bottleneck infrastructure), this can create an opportunity (and the incentive) for the vertically integrated firm to engage in discriminatory or foreclosure strategies against rival upstream firms, thus having a substantial negative impact on rival downstream competition and/or investment in the absence of adequate regulation.

In order to enter the market and compete, upstream firms must make substantial investments in reliance on (their or their clients') access to the bottleneck facility. In order to justify such investments, these upstream firms are likely to seek strong assurances that: there will not be discriminatory behaviour from the vertically integrated firm; information will not be misused; and access

<sup>116</sup> Viterra, *Submission in response to the ACCC's supplementary issues paper and third party responses 2020*, 26 June 2020, p. 3.

<sup>117</sup> CRA assumes that the increase in Glencore's margin is due to Glencore being able to offer growers a lower price for grain (i.e. \$5 per tonne) as a result of reduced competition from third party exporters.

<sup>118</sup> Or, alternatively (and equivalently), it would need to be shown that every possible increase in Glencore's margin following the denial of access is unprofitable.

arrangements to bottleneck services (owned by the vertically integrated firm) will not change in the future, which would prevent the rival firms' ability to obtain access on fair and transparent terms. Such assurances may be difficult to obtain and/or are not sufficiently robust to support investment.

When a firm is vertically integrated, transactions which would otherwise be arms-length arrangements between separate firms, such as those between the owner of a piece of bottleneck infrastructure and a user of that infrastructure, are converted into internal transactions within the vertically integrated firm. This can therefore make discrimination difficult to detect. As a consequence, upstream firms may be reluctant to invest, and existing firms may leave the market, reducing competition and economic welfare.

Therefore, in considering the potential competitive effects of exempting Viterra's port terminal facilities from Parts 3 to 6 of the Code, the ACCC notes that if there is insufficient transparency in the dealings of Viterra and Glencore it would likely be difficult for rival firms along the supply chain to detect discrimination occurring, or to be confident that discrimination is not occurring. Furthermore, rival firms may also hold concerns around the possibility of the misuse of information gained by Viterra in its dealings with competing exporters to favour Glencore, or the possibility of increases to charges for access to port terminal facilities that cannot otherwise be passed on.

Absent the presence of regulatory oversight (such as the Code), rival firms in upstream markets may be reluctant to invest and/or may seek to exit the market, therefore reducing competition.

The ACCC notes that historically this broadly appears to be the case in relation to upcountry storage for the export market in SA. However, the recent entry of T-Ports and ADM upcountry, in addition to Cargill's forthcoming entry at port (which will make use of its existing SA GrainFlow upcountry storage sites) may potentially indicate that entry into the upcountry storage market is more feasible when associated with a port terminal facility.<sup>120</sup>

Concerns around vertical integration and access may also lead rival firms to look for ways to bypass bottleneck infrastructure, even when it is not economically efficient to do so. In the context of the grain export industry this could include, for example, establishing their own port terminal facilities even when sufficient spare capacity is otherwise available.

When considering the viability (or otherwise) of entry into the SA market the ACCC notes that it has limited oversight of Viterra's pricing of port (or related) services under the Code. For example, the ACCC does not approve prices and should parties seek to dispute prices by way of arbitration the matter would be referred to an independent arbiter. However, the ACCC acknowledges that firms have entered the market at various positions in the bulk export supply chain, suggesting there are sufficient incentives to justify entry. In addition to existing new entrants, the ACCC also notes that a number of potential port terminal facility developments are currently proposed across several catchment areas in SA. However the ACCC understands that these proposals generally have a number of important stages to progress through before commencing operations (see section 2.1.5).

The ACCC has not undertaken a detailed analysis of the level of infrastructure investment appropriate to the SA grain market. However the ACCC notes that, in addition to affecting the likelihood that exporters will be able to obtain fair and transparent access to port terminal facilities, further entry into the supply chain markets has the potential to affect economic outcomes for the SA grain market more broadly.

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<sup>120</sup> The ACCC also acknowledges that, subject to market conditions, it is possible that the reverse could also be the case.

## 3. Competition across the bulk grain supply chain, container exports and domestic demand

This chapter sets out the ACCC's draft views on bulk grain supply chain services, such as upcountry storage and grain transportation services, upstream from each of SA's port terminal facilities.<sup>121</sup> In particular, the ACCC has considered the extent to which each of the port terminal facilities draws grain from overlapping catchment areas, and therefore the extent to which each of the facilities compete for bulk grain export volumes.

The ACCC has also considered the interaction between the ownership of upcountry supply chain assets and competition at port. Ownership of upcountry supply chain assets, such as storage facilities, may provide an alternate avenue for vertically integrated PTSPs to limit the ability of third party PTSPs to compete for grain at port. That is, the potential exists for a vertically integrated PTSP to use its position in the upcountry supply chain to hinder (or prevent) third party exporters from accessing competing PTSPs' facilities. There is also the potential for a vertically integrated PTSP to use its position at port to affect upstream markets.

In considering Viterra's position in the SA supply chain, the ACCC notes that the majority of grain that is exported through Viterra's port terminal facilities uses a logistics package known as Export Select.

This chapter also discusses the competitive effect of container export services and domestic demand. Containerised exports and domestic demand are alternative options for grain marketers wishing to sell grain, and therefore potentially impose a level of competitive constraint on the bulk grain port terminal service providers.

The ACCC's consideration of the extent to which Viterra's port terminal facilities compete for wheat (and other grains) with alternative PTSPs, or are constrained by containerised exports and domestic demand, is relevant to the ACCC's assessment of the exemption application, having regard to the matters which the ACCC is required to consider under subclause 5(3) of the Code.

### 3.1. South Australian port terminals' upcountry links

#### 3.1.1. Upcountry storage and handling

The ACCC considers the state of competition in upcountry storage and handling facilities across SA to be relevant to the assessment of an exemption application. In the absence of sufficient alternate upcountry services (i.e. 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.

Both GPA and T-Ports noted the importance of the entire supply chain in facilitating a competitive market for port terminal services in their submissions to the ACCC's initial Issues Paper. Specifically, GPA submitted that the availability of competitive upcountry services is related to the ability to negotiate access to export facilities on equal terms:

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<sup>121</sup> As noted in chapter 1, the terminology used by the bulk grain industry does not typically distinguish between bulk wheat and other bulk grains. Bulk wheat is stored and transported using the same equipment as other grains and the analysis provided in this chapter reflects this. As noted in chapter 1, where the analysis relating to the Draft Determinations refers to bulk grain it should be taken to relate to bulk wheat for the purposes of the Code.

*Whilst in some areas growers have access to alternative up-country facilities the ability of these facilities to offer comparable rates and competitive pricing is in most instances also linked to their capacity to negotiate access to export facilities on equal terms to those offered by Viterra to their own marketing arm.<sup>122</sup>*

T-Ports submitted that competition in each part of the supply chain is interlinked across the entire supply chain:

*The ability to compete in any part of the supply chain is dependent upon the ability to compete across the full supply chain. The commercial access to port terminal services is a combination of all the components of the supply chain, and also of price & service levels across all these components.<sup>123</sup>*

Viterra submitted that its supply chain is efficient and would be bypassed by exporters) in favour of alternative options if it became inefficient.<sup>124</sup> Viterra also noted that ESCOSA, in its inquiry into the SA bulk grain export supply chain costs, considered Viterra's supply chain to be efficient:

*In its recent report into the supply chain in South Australia, ESCOSA found that the South Australian supply chain was efficient.*

*If Viterra did not operate an efficient supply chain, growers and traders would turn to these other providers of upcountry storage and receival facilities in South Australia and Victoria.<sup>125</sup>*

Additionally, Viterra noted that ESCOSA did not find conclusive evidence of Viterra exercising market power to the detriment of competition:

*[ESCOSA has] not found or been presented with any conclusive evidence of Viterra exercising market power to the detriment of competition.<sup>126</sup>*

Furthermore AEGIC has indicated that Viterra's Export Select (see below) rates steadily decreased over 2012-13 to 2017-18:

*Export select rates charged by Viterra for SA indicate that transport costs have steadily declined over the past five years and there are significant differences between routes.<sup>127</sup>*

*Freight rates from the top 22 sites responsible for outturning 80 per cent of the grain delivered to the Viterra network have declined to a greater extent (about 9.6 per cent) than the average for all sites and have decreased every year since 2012–13, except for 2014–15 and including 2017–18.<sup>128</sup>*

### **Export Select**

Viterra makes the port terminal services at its facilities available either as a stand-alone service (Export Standard) or as part of a bundle of services (Export Select).

Export Select is an end-to-end package that bundles a number of services across the supply chain to move grain from a Viterra upcountry storage or receival site to a Viterra port terminal facility. The package includes: grain accumulation planning and storage, outturn from

<sup>122</sup> GPA submission, 4 October 2019, p. 2.

<sup>123</sup> T-Ports submission, 26 August 2019, p. 2.

<sup>124</sup> Viterra, *Exemption Application 2019*, 2 July 2019, p. 17.

<sup>125</sup> *Ibid* pp. 37-38.

<sup>126</sup> ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report*, December 2018, p. 35.

<sup>127</sup> AEGIC, *Australia's grain supply chains – costs, risks and opportunities*, October 2018, p. 55.

<sup>128</sup> *Ibid* p. 56.



Viterra's upcountry storage, transportation to port, and in-loading at the relevant port terminal facility. The users of Export Select effectively transfer their grain into Viterra's system.<sup>129</sup>

The ACCC understands that the majority of grain exported through Viterra's port terminal facilities is done using Export Select, and that Export Select is used by nearly all of Viterra's export customers.<sup>130</sup> Consistent with this, the ACCC notes that CRA has submitted that exporters that use Viterra's storage facilities typically also purchase logistics services (such as storage, freight, and port services) from Viterra via Export Select.<sup>131</sup>

Viterra indicates that:

*Export Select enables Viterra to manage an efficient supply chain to all Viterra Export Terminals...*

*...Our current Export Select freight rates reflect efficiency gains that we've obtained through changes in our operations, while also ensuring the long term sustainability of our supply chain through ongoing investment.<sup>132</sup>*

Viterra also states that:

*Export Select provides Clients with a low risk and cost effective method of accumulation from Viterra Upcountry Receiving Facilities.<sup>133</sup>*

Reflecting the bundled nature of the service offering, the ACCC understands that grain moved using the Export Select service must move from a Viterra upcountry site to a Viterra port terminal facility.<sup>134</sup>

The ACCC notes that, in addition to offering its services provided under Export Select through a combined/single fee structure ('Export Select Grouped Service Fee'), a rebate ('Export Select Rebate') is also provided in relation to using Export Select to move grain to export at certain Viterra port terminal facilities, though the size of this rebate has reduced since its introduction in 2009.<sup>135</sup>

Consistent with the high-volume nature of bulk grain exports, freight is typically the most significant cost component of the total Export Select package.<sup>136</sup> Freight costs are discussed in more detail in section 3.2.1.

The ACCC also notes that certain Viterra sites (as well commodities or grain grades) are designated as 'Export Select only'. Viterra states that this in order to enable the effective and cost effective handling of grain at these facilities.<sup>137</sup>

As discussed elsewhere, the ACCC notes that ESCOSA investigated pricing structure, fees and practices in its 2017 inquiry. While ESCOSA indicated possible concerns in relation to the pricing structure, it found that Viterra's other fees and practices (which included Export Select) were not, on their own, detrimental to the efficiency of the supply chain.<sup>138</sup> ESCOSA

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<sup>129</sup> The ACCC understands that clients for Export Select are predominantly third party exporters.

<sup>130</sup> ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report*, December 2018, p. 26.

<sup>131</sup> Charles River Associates, *Charles River Associates Report on the Benefits of Code Exemption on Viterra Grain Export Terminals*, 7 November 2019, p. 9.

<sup>132</sup> <http://viterra.com.au/index.php/export-select-freight-rates/> (accessed 28 July 2020).

<sup>133</sup> [http://viterra.com.au/wp-content/uploads/Viterra\\_1920-Season\\_Pricing-Policy-Protocols-Manual-v1.pdf](http://viterra.com.au/wp-content/uploads/Viterra_1920-Season_Pricing-Policy-Protocols-Manual-v1.pdf), p. 17.

<sup>134</sup> ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report*, December 2018, p. 23.

<sup>135</sup> *Ibid* p. 68.

<sup>136</sup> Freight appears to typically constitute more than half of the cost of the Export Select service. Details of Viterra's Export Select fees are available at: <http://viterra.com.au/index.php/export-select-freight-rates/>.

<sup>137</sup> [http://viterra.com.au/wp-content/uploads/Viterra\\_1920-Season\\_Pricing-Policy-Protocols-Manual-v1.pdf](http://viterra.com.au/wp-content/uploads/Viterra_1920-Season_Pricing-Policy-Protocols-Manual-v1.pdf), p. 18.

<sup>138</sup> ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report*, December 2018, p. 4.



also did not find conclusive evidence of Viterra exercising market power to the detriment of competition.<sup>139</sup>

The ACCC acknowledges that the bundling of services has the potential to offer a range of benefits to Viterra and its clients, including creating efficiencies across the supply chain and reducing the transaction costs associated with accumulating and moving grain to a port terminal facility. However, given Viterra's dominant position in SA's storage networks (see section 3.1.1), the bundled nature of the Export Select service may also serve to reinforce Viterra's position upcountry and at port by strengthening the vertically integrated connection of the services offered across these two markets.

The ACCC notes that it appears Viterra's clients need to use the full suite of services in order to benefit from Export Select (or avoid certain fees). When combined with the network effects associated with Viterra's dominant presence in SA's upcountry networks, this may affect the ability of third party exporters to access alternate upcountry supply chains and move grain to non-Viterra port terminal facilities, affecting competition in upcountry markets as well as at port.

While the bundling of services has the potential to reduce competition at port and upcountry, the ACCC notes that it also has the potential to deliver benefits to exporters (to the extent that the bundled service creates cost saving efficiencies across the supply chain). However the ACCC also notes that, while ESCOSA did not find Viterra's fees excessive compared to its Australian counterparts, ESCOSA did consider Viterra's earnings to be at the upper end of what might be expected for its level of risk, and that Viterra had not shared efficiencies with industry (through lower fees) to date.

Given the above, the ACCC's draft view is that the effect of Viterra's bundling of services is unclear. However the ACCC notes that Viterra's bundling of services may interact with the network effect of Viterra's dominant position at port and upcountry (see section 3.1.1).

***The ACCC welcomes views from stakeholders in relation to these matters.***

Before discussing the various storage options offered by Viterra and alternative providers, the ACCC considers it relevant to note that the extent of available storage is influenced by the size of harvest, which varies from season to season.<sup>140</sup>

SA has, on average since the 2011-12 season, produced 7.2 million tonnes of grain per season. While SA's grain production has typically been relatively stable,<sup>141</sup> particularly in comparison to the eastern states, there can still be relatively large grain production discrepancies across seasons. For example, since 2011-12 grain production has ranged from a low of 5.3 million tonnes in the 2018-19 season, to a high of 10.7 million tonnes in the bumper 2016-17 season.

### **Viterra upcountry storage**

In addition to being the dominant PTSP in SA, Viterra is also the largest provider of upcountry storage and has a well-established and extensive network of upcountry storage sites. Viterra's website indicates that Viterra has a total storage capacity of 9.8 million

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<sup>139</sup> ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report*, December 2018, p. 35.

<sup>140</sup> The ACCC understands that upcountry storage sites which have been previously closed in certain seasons may be opened in response to a larger harvest.

<sup>141</sup> Since 2011-12 every season, with the exception of the 2016-17 and 2018-19 seasons, has had production between 6.0 and 7.5 million tonnes.

tonnes,<sup>142</sup> and, in its 2017 submission to ESCOSA, stated that it has a ten year average receipt of 6.3 million tonnes per season.<sup>143</sup>

However the ACCC understands that Viterra has been focussing on the rationalisation of its upcountry network: Viterra owned 114 upcountry sites in 2010, compared to 103 sites in 2017.<sup>144</sup>

The ACCC also notes that the total number of Viterra sites that are operational in any given season may be less than this amount depending on the size of the harvest.<sup>145</sup> For example, the ACCC understands that Viterra opened 62 upcountry storage sites for the 2019-20 harvest. In addition, in March 2020, Viterra announced that it intends to open 55 upcountry sites for the 2020-21 harvest (these are shown in figure 3.1 below).<sup>146</sup> The ACCC understands that additional upcountry sites may be opened in response to large harvests.

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<sup>142</sup> Viterra, <http://viterra.com.au/index.php/about-us/> Accessed 11 September 2020.

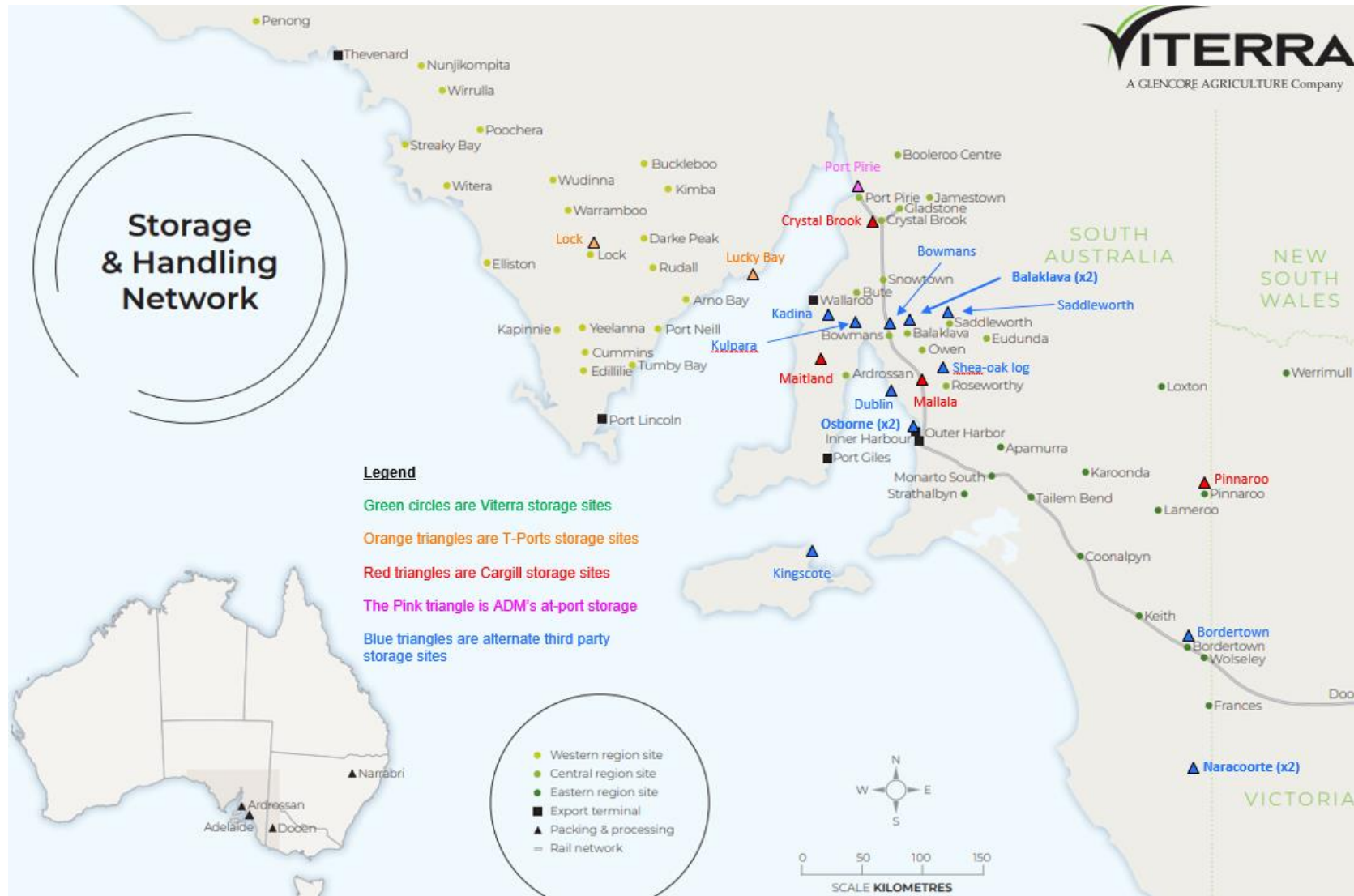
<sup>143</sup> Viterra, *Submission to the Inquiry into the South Australian Bulk Grain Export Supply Chain Costs*, May 2017, p. 9.

<sup>144</sup> AEGIC, *Australia's Grain Supply Chains: Costs, Risks and Opportunities*, October 2018, p.42.

<sup>145</sup> Ibid.

<sup>146</sup> These sites have previously taken 97 per cent of total receipts. Viterra media release: <http://viterra.com.au/index.php/2020/03/03/viterra-adapts-to-provide-more-efficient-supply-chain/>

Figure 3.1: SA Upcountry Storage Sites



Source: Viterra 2020-21 upcountry sites, see: [http://viterra.com.au/wp-content/uploads/Storage-and-Handling-Map\\_website-pdf](http://viterra.com.au/wp-content/uploads/Storage-and-Handling-Map_website-pdf) (accessed 24 September 2020). Third party storage sites indicated in this figure were obtained from Viterra's exemption application and GTA's 2019-20 Location Differential sites. Any further sites the ACCC is aware of have also been included.

Notes: Third party Victorian storage sites are not shown in the above figure.

## Alternate upcountry storage providers

### Third party storage providers

Viterra has submitted that it faces an increasing level of competition across its supply chain, and that this has resulted in a lower proportion of the SA harvest entering its supply chain:

*Historically, grain grown in South Australia was mainly delivered using Viterra's supply chain and to Viterra's port terminals (or to port terminals in neighbouring Victoria) for shipping. However, this has changed and will continue to change with an increasingly lower proportion of South Australian grain being delivered into Viterra's supply chain, and an even lower proportion being exported from Viterra's port terminals. This is due to the entry of alternate supply chains and the flexibility of market participants to react to changing economic conditions across Australia.<sup>147</sup>*

Viterra also submitted that, in addition to competing with on-farm storage, it competes with eleven alternate providers of upcountry storage:

- AGT Foods Australia (sites at Bowmans and Kadina)
- Australian Grain Exports (grain receival, storage, cleaning and processing facility at Dublin)
- Australian Growers Direct (storage site at Balaklava)
- AW Vater & Co (grain receival and storage site at Saddleworth)
- Cargill which operates sites through GrainFlow (grain receival and storage sites at Pinnaroo, Crystal Brook, Maitland and Mallala)<sup>148</sup>
- Kangaroo Island Pure Grain (grain receival and storage site at Kingscote and Osborne)
- Pilgrim Grain Storage (grain receival and storage site at Bordertown)
- San Remo (grain receival sites at Balaklava and Kulpara)
- TE Storage and Logistics (grain storage site at Naracoorte)
- T-Ports (operates grain receival and storage sites at Lock and Lucky Bay); and
- Tremlett Grain and Fertiliser (grain receival and storage site at Shea-Oak Log).<sup>149</sup>

In addition, the ACCC also understands that:

- ADM operates a storage facility at Port Pirie;<sup>150</sup>
- GrainCorp operates a storage facility at Naracoorte,<sup>151</sup> and
- Semaphore has a small amount of at-port storage at its Osborne port terminal facility (see table 2.1).

The ACCC notes that Grain Trade Australia (**GTA**) publish a list of storage sites alongside their Location Differentials, with GTA listing a total of nine alternate upcountry sites in SA in

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<sup>147</sup> Viterra, *Response to 14/11/19 information request from the ACCC, 2020, Question 9 – Catchment Zones*, 13 January 2020, p. 2.

<sup>148</sup> GrainFlow is a wholly owned subsidiary of Cargill Australia Ltd. See: <https://www.cargill.com.au/en/grainflow>.

<sup>149</sup> Viterra, *Exemption Application 2019*, 2 July 2019, pp. 34-35.

<sup>150</sup> Note: this facility opened after Viterra submitted its application for exemption: <http://www.admgrain.com.au/news/details/new-grain-option-at-port-pirie>.

<sup>151</sup> As per GTA's 2019-20 Location Differentials.

the 2019-20 season.<sup>152</sup> The ACCC understands the more extensive list of storage providers submitted by Viterra better represents the total number of alternative storage providers in SA.<sup>153</sup>

T-Ports has submitted that competing storage and handling sites provide alternatives to Viterra's upcountry storage at 'strategic' sites, but not across all areas of SA:

*The existing competitive upcountry alternatives to Viterra's upcountry storage and handling network/system are located in strategic sites across the state, providing alternatives in those immediate areas, but still not providing alternatives to all areas across the state.*<sup>154</sup>

As illustrated above in figure 3.1, most of the alternative third party storage and handling facilities in SA are located in the Lower, Mid and Upper North regions. As such, the competition these facilities provide to Viterra's upcountry storage and handling services largely relates to these regions. However the ACCC notes that Viterra is still expected to operate the majority of upcountry sites (12 out of 21) in these regions in the 2020-21 season. Viterra also has a combined 1.2 million tonnes of at-port storage through its IHB, OHB and Wallaroo port terminal facilities.<sup>155</sup> The ACCC notes that Cargill has no at-port storage, while Semaphore has 16 500 tonnes (see table 2.1).

While the ACCC is not aware of the size of most alternate upcountry storage providers, the ACCC notes that ESCOSA has indicated that most of the above-noted third party storage providers are relatively small in scale, and that many of them serve the domestic and container export markets.<sup>156</sup> The ACCC understands that third party storage operators may also service particular markets and production processes. As such, they may not provide a storage facility for the purpose of grain warehousing or accumulation for the export market.

### ***The ACCC welcomes views from stakeholders in relation to the upcountry storage and handling market in SA.***

The ACCC has also considered both T-Ports' and Cargill's storage facilities. Given the size of these facilities (510 000 tonnes and 670 000 tonnes respectively), both appear likely to provide a material amount of competition to Viterra's storage facilities.

T-Ports, which is the only alternate third party storage provider on the Eyre Peninsula, detailed its storage facilities in its March 2019 application for an exemption in respect of its Lucky Bay facility:

*T-Ports operations will be supported by the development and operation of grain receipt and storage facilities at Lock (132km from Lucky Bay) and bunker facilities at Lucky Bay (2km from berth). Lock facilities include sampling, weighbridge and 150,000mt of bunker storage. Lucky Bay facilities include sampling, weighbridges and 360,000mt of bunker storage.*<sup>157</sup>

In its October 2019 exemption application in respect of its facility at Port Adelaide's Inner Harbour, Cargill stated that its four upcountry facilities (Pinnaroo, Crystal Brook, Maitland and Mallala) combine to provide a total network capacity of 665 000 tonnes.<sup>158</sup> Cargill also

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<sup>152</sup> These sites were operated by: Australia Grower Direct (Balaklava), Cargill/AWB (Crystal Brook, Maitland, Mallala and Pinnaroo), T-Ports (Lock), GrainCorp (Naracoorte), TE Storage & Logistics (Naracoorte), and Tremlett (Shea-Oak Log).

<sup>153</sup> The ACCC notes ESCOSA in their 2018 Inquiry into the bulk grain export supply chain used a similar list of alternative providers to that submitted to the ACCC. See ESCOSA report, p. 26.

<sup>154</sup> T-Ports supplementary submission, 19 June 2020, p. 3.

<sup>155</sup> Viterra, *Attachment 1 – Response to 14/11/19 information request 2020, Questions 1 and 2 – Viterra port terminal facility features*, 13 February 2020.

<sup>156</sup> ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report*, December 2018, p. 26.

<sup>157</sup> T-Ports, *Application for exemption from the Competition and Consumer (Industry Code – Port Terminal Access (Bulk Wheat)) Regulation 2014*, 28 March 2019, p. 3. Note: T-Ports appears application to use 'mt' in relation to metric tonnes, rather than million tonnes.

<sup>158</sup> Cargill, *Application for exemption under the Port Terminal Access (Bulk Wheat) Code of Conduct*, 30 October 2019, p. 9.

stated that it does not have storage facilities at its upcoming Port Adelaide, Inner Harbour port terminal and will operate this facility on a Just In Time basis.<sup>159</sup> As explained by Cargill:

*Consequently, the combination of Cargill's proposed port terminal facility and its current upcountry storage facilities is likely to increase competition along the bulk grain export supply chain, and increase choice in the market for consumers seeking the services of bulk storage providers and export ship loading providers.*<sup>160</sup>

The ACCC notes that the recent (or upcoming) establishment of T-Ports' and Cargill's vertically integrated supply chains provides (or will provide) exporters with two potential alternatives to Viterra's supply chain. The ACCC considers that the ability of both T-Ports and Cargill to move grain via their own upcountry storage facilities means they are likely to place greater competitive pressure on Viterra at the port terminal level. This is because they are not reliant on a competitor's supply chain to access their grain, and therefore are likely to have greater flexibility in storing and transporting grain to their respective port terminal facilities.

### On-farm storage

The ACCC considers that on-farm storage may also serve as an alternative to Viterra's storage and handling network to some extent. The Department of Primary Industries and Regions South Australia (**PIRSA**) estimates that there was approximately 1 million tonnes in on-farm storage in SA in 2017, much of which is used as short-term storage to manage logistics of harvest buffering for cartage to silos.<sup>161</sup>

As submitted by Viterra, this suggests that there is enough on-farm storage to store approximately 9 to 14 per cent of the South Australian harvest.<sup>162</sup> Viterra also submitted that the amount of on-farm storage is increasing in SA.<sup>163</sup> The ACCC notes that the same conclusion (i.e. increasing levels of on-farm storage in SA) was reached by both AEGIC and ESCOSA, although they both note that the level of on-farm storage in SA is relatively small and increasing at a slower pace than in the eastern states (see below).

### AEGIC

*Farm storage in SA and WA is at a lower level than in these other states but continues to grow, albeit at a slower pace.*<sup>164</sup>

### ESCOSA

*A small number of growers submitted to the Commission that South Australian grain growers are building an increasing amount of on-farm storage infrastructure in response to concerns about Viterra's storage and handling services. While [ESCOSA] has not had access to independently derived data, based on the advice it has received during consultation it concludes that there has been an increase in the amount of on-farm storage in South Australia in recent years, although this is likely to be occurring mainly in eastern South Australia. The level of on-farm storage in South Australia remains relatively small compared to the eastern States.*<sup>165</sup>

*The trend to on-farm storage in South Australia has been a lot slower than in the eastern states. Eastern states have significant domestic consumption that has driven growers to invest in on-farm storage, giving them the option to enter the export supply chain. In contrast, Eyre Peninsula*

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<sup>159</sup> Ibid, pp. 3-4.

<sup>160</sup> Ibid, p. 9.

<sup>161</sup> PIRSA, *Submission to the Inquiry into the South Australian Bulk Grain Export Supply Chain Costs*, May 2017, p. 6.

<sup>162</sup> Viterra, *Exemption Application 2019*, 2 July 2019, p. 35.

<sup>163</sup> Ibid, p. 49.

<sup>164</sup> AEGIC, *Australia's grain supply chains – costs, risks and opportunities*, October 2018, p. 38.

<sup>165</sup> ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report*, December 2018, p. 24.

*farmers are unlikely to participate in the supply chain through on-farm storage, because for most seasons their primary market is export; they use such storage for logistical reasons, to deal with the volume of grain coming off the field during harvest.*<sup>166</sup>

As above, ESCOSA state that the majority of on-farm storage is located in eastern SA. The ACCC notes that this is also where the majority of third party storage lies (see figure 3.1).

ESCOSA has also suggested that the relatively small amount of on-farm storage on the Eyre Peninsula is due to the reduced range of domestic market options that grain from this area can be delivered to (as above). GPSA has also submitted that growers on the Eyre Peninsula have limited access to the SA domestic market.<sup>167</sup> This is discussed further in section 3.3.

In contrast, the introduction of T-Ports' Lucky Bay facility could encourage greater investment in on-farm storage in the future. The ACCC notes that T-Ports' storage is primarily located at its port facility and that the operation appears to be orientated towards grower direct-to-port delivery arrangements.<sup>168</sup> As submitted in T-Ports' 2019 exemption application for its Lucky Bay facility:

*In addition to storage facilities at Lock and Lucky Bay, T-ports will also offer an off-farm accumulation service, direct to ship loading service, supporting the development of effective on-farm storage options. The proximity of the port to the growing areas enables such a service to be viable.*<sup>169</sup>

In addition, ESCOSA also stated that a small number of growers may have built on-farm storage in response to concerns about Viterra's storage and handling services.<sup>170</sup>

The ACCC notes that GPA has questioned whether the increasing volume of on-farm storage in SA indicates that the current upcountry storage market is inefficient:

*Up-country competition is used to illustrate competition but even if access to a port is no longer predicated on use of a particular supply chain then why is on farm storage increasing and duplicative port facilities being seen as a viable investment when it is actually an inefficient way of managing supply chain issues.*<sup>171</sup>

The ACCC notes that ESCOSA found that SA's supply chain was not demonstrably inefficient in terms of its costs and that it did not find any evidence of market power being exercised to the detriment of competition. However, ESCOSA did note that Viterra's earnings were at the upper end of what might be expected for its level of risk and that Viterra had not shared efficiencies with industry to date (through lower fees).<sup>172</sup>

#### ACCC draft view on alternative storage to Viterra

The ACCC considers that the level of upcountry storage alternatives to Viterra's storage and handling network differs by region in SA.

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<sup>166</sup> ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report*, December 2018, p. 25.

<sup>167</sup> GPSA submission, 4 October 2019, pp. 3-4.

<sup>168</sup> Of the 510 000 tonnes of storage T-Ports owns and operates, 360 000 tonnes is located at Lucky Bay. See also: <https://tports.com/lucky-bay/>.

<sup>169</sup> T-Ports, *Application for exemption from the Competition and Consumer (Industry Code – Port Terminal Access (Bulk Wheat)) Regulation 2014*, 28 March 2019, p. 6.

<sup>170</sup> ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report*, December 2018, p. 24.

<sup>171</sup> GPA submission, 4 October 2019, p. 4.

<sup>172</sup> ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report*, December 2018, p. 35.

In particular, the ACCC understands that the majority of alternative storage (both that provided by third party storage providers and via on-farm storage<sup>173</sup>) is located in the Lower, Mid and Upper North regions of SA. This storage is expected to provide a level of competition to Viterra's upcountry storage and handling network in this area. However, the ACCC notes that Viterra will operate 12 out of 21 upcountry sites in these regions for the 2020/21 season, as well as an additional 1.2 million tonnes of at-port storage at its IHB, OHB and Wallaroo facilities.<sup>174</sup> The ACCC's draft view is that there are meaningful alternative storage options available to traders within this region, as well as a higher level of on-farm storage (when compared to the Eyre Peninsula).

The ACCC notes that determining the extent to which this storage is likely to competitively constrain Viterra's services is difficult to assess due to the lack of information around the size of non-Viterra storage sites. However the ACCC understands these sites are likely relatively small (compared to Viterra's sites), and predominantly deliver to the domestic and container markets.

Consequently, the ACCC understands that exporters are likely still heavily reliant on Viterra's upcountry network if they wish to export grain from Port Adelaide and/or Wallaroo. This is expected to be particularly the case during the peak period (as Viterra likely has an incentive to prioritise port terminal access for grain in their upcountry network over third party networks. This incentive is likely to be strongest when there are capacity constraints at Viterra's port terminal services).

The ACCC's draft view is therefore that Viterra is likely to continue to have a degree of market power in the Lower, Mid and Upper North regions of SA in relation to storage. It is possible that this market power could be leveraged to restrict the ability of third party exporters to secure fair and transparent access at port.

The ACCC notes that T-Ports is the only alternative storage provider on the Eyre Peninsula. In addition, as indicated by ESCOSA, most of SA's on-farm storage is not located within the Eyre Peninsula, though the entry of T-Ports has the potential to encourage investment in on-farm storage.

The ACCC also notes that Viterra is expected to operate the vast majority of upcountry sites in south eastern SA in the 2020-21 season (12 out of 16). While the ACCC acknowledges that (consistent with ESCOSA's report) there is likely a higher degree of on-farm storage in this region, the ACCC considers it likely that Viterra still owns the majority of storage in south eastern SA.

Furthermore, the ACCC considers that Viterra is likely to own the majority of storage on the Yorke Peninsula. There are only five upcountry storage sites on the Yorke Peninsula (two of which are owned by Viterra),<sup>175</sup> however Yorke Peninsula storage appears to be largely located at port with Viterra's Port Giles and Wallaroo facilities accounting for 1.27 million tonnes of at-port storage.

The ACCC's draft view is that Viterra is the dominant upcountry storage provider on the Eyre Peninsula and the Yorke Peninsula, as well as in the south eastern regions of SA. As such the ACCC's draft view is that in these regions, absent the application of Parts 3 to 6 of the

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<sup>173</sup> The ACCC understands most of SA's on-farm storage lies within eastern SA, of which the Lower, Mid and Upper North regions are a part of. The ACCC is not aware of the prevalence of on-farm storage within specific regions in eastern SA.

<sup>174</sup> Viterra, *Attachment 1 – Response to 14/11/19 information request 2020, Questions 1 and 2 – Viterra port terminal facility features*, 13 February 2020.

<sup>175</sup> In its exemption application Viterra submitted that there are five upcountry sites on the Yorke Peninsula: Ardrossan (Viterra), Bute (Viterra), Kadina (AGT Foods Australia), Kulpara (San Remo), and Maitland (Cargill). GTA did not include the Kadina and Kulpara sites in their 2019-20 list of upcountry storage sites.



Code, 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.

### **Deliveries to Viterra port terminal services through alternate upcountry storage providers**

There are two alternate paths to deliver grain to Viterra's port terminal services outside of Viterra's storage and handling network: direct deliveries by growers from on-farm storage, and from approved third party storage sites. The ACCC notes that growers' and third parties' ability to deliver grain direct to port (i.e. bypass Viterra's upcountry facilities) has the potential to constrain Viterra's ability to exercise market power upcountry.

GPSA has expressed concerns that the fees charged by Viterra for grain received from both third party and on-farm storage, which is delivered direct to its port terminal facilities, discourage the use of alternative storage. Specifically, GPSA submitted that:

*In the absence of ACCC regulatory oversight, GPSA notes the potential for [these fees] to be used as a mechanism to encourage, use of Viterra's upcountry storage facilities rather than third party facilities and from on-farm storage.*<sup>176</sup>

The ACCC notes that Viterra charged the following fees for the delivery of major wheat<sup>177</sup> to its port terminal facilities in the 2019-20 season:

- **Grower deliveries direct to port:** \$17 per tonne for all port terminals except Wallaroo, and \$17.50 per tonne for Wallaroo.<sup>178</sup>
- **Deliveries to port from approved third party storage:** \$2.76 per tonne.<sup>179</sup>

In response to GPSA's concern, Viterra stated in its supplementary submission that:

*...in practice, this fee has only been used on a limited number of occasions in the past few years. However, it is important for Viterra to reserve an ability to charge this fee in order to provide additional services (if needed) to ensure the integrity and quality of South Australian grain exports.*<sup>180</sup>

The ACCC understands from ESCOSA's 2018 inquiry report that Viterra accepts 25 per cent of total receivals from deliveries local to port.<sup>181</sup> As such, the ACCC considers that direct-to-port grower deliveries are likely to be a relevant factor.

Viterra has submitted that its receival-at-port fees reflect the need to manage the risk associated with the quality of grain received, and to ensure quality standards for clients:

*There are different risks associated with receivals from each of these sources. Therefore, the number and type of services that have to be undertaken at port on receipt of grain will vary depending on the source of the grain. This results in Viterra incurring different costs at port*

<sup>176</sup> GPSA submission, 27 September 2019, p. 6.

<sup>177</sup> Major wheat includes ASW1, APW1 and H2. See Viterra, *Wheat reference prices – port terminals services 2019/20*, p. 7.

<sup>178</sup> Viterra, *Wheat reference prices – port terminals services 2019/20*, p. 1. The ACCC notes that on page 8 of the same document Viterra state that the difference in receival charges between Wallaroo and the rest of their port terminals '...reflects the difference between efficiency between these categories of sites within Viterra's storage and handling network'.

<sup>179</sup> Viterra, *Wheat reference prices – port terminals services 2019/20*, p. 3.

<sup>180</sup> Viterra, *Exemption application 2019 – supplementary submission*, 11 November 2019, p. 5.

<sup>181</sup> ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report*, December 2018, p. 70.

*dependent on the source of grain, which is reflected in the receival fee for wheat from (a) Approved Third Party Storage providers (A\$2.76 per tonne); and (b) non-approved third party sources (A\$17.00 per tonne for all port terminals except Wallaroo; \$17.50 per tonne for Wallaroo)...*

*...parcels of grain received at port carry different levels of quality and contamination risks depending on how they have been managed prior to receival. These risks directly impact on the ability of Viterra to co-mingle those grains with grains owned by other clients.<sup>182</sup>*

Viterra has also submitted that, while grain from approved third party storage still has to undergo a range of tests to ensure its quality, Viterra is able to have more confidence in the quality of that grain, and that this is reflected in the significantly reduced price.<sup>183</sup>

The ACCC notes that ESCOSA considered Viterra's receival-at-port service fee in its inquiry into the SA bulk grain export supply chain, and stated that:

*Viterra's pricing and operational behaviour might limit the potential for grower direct deliveries to port to constrain Viterra's exercising of market power upcountry to the detriment of competition.<sup>184</sup>*

However, ESCOSA subsequently concluded that Viterra was setting fees that reinforced its logistical and operational requirements, and ESCOSA did not consider there to be any issue with Viterra's pricing approach in this regard.<sup>185</sup>

ESCOSA also noted Viterra's submission that the grower receival fee helps to encourage efficient investment in storage facilities and considered that Viterra had clear and practical operational reasons for its behaviour:

*In addition, Viterra submitted that accepting too much grain [at port], or grain that is not in demand for immediate shipment, can result in the port 'blocking' (when the port has insufficient capacity to efficiently process grain for shipment). In this case, Viterra might invest in more storage capacity at port, assuming adequate land is available. But the resulting additional costs would be unlikely to represent an efficient investment for the supply chain, which already has sufficient total storage capacity to cope well with even the biggest harvest.<sup>186</sup>*

Charging different receival fees for third party grain received outside of a dominant PTSP's system has the potential to enable a PTSP to leverage its market power at port to affect competition in the upcountry markets limiting growers' and third parties' ability to bypass its network.

While the ACCC does not have reason to believe that the fees for port terminal deliveries via alternate upcountry storage providers are currently being used for these purposes, it is noted that differential receival fees do not appear to be widely used by other PTSPs.<sup>187</sup>

This notwithstanding, the ACCC's draft view is that the potential for Viterra to use these types of fees to its advantage is likely decreasing, given the trend towards increased competition in both the upcountry and port terminal service markets in SA.

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<sup>182</sup> Viterra, *Further Supplementary submission on Exemption Application 2020*, 11 March 2020, p. 5.

<sup>183</sup> *Ibid* pp. 6-7.

<sup>184</sup> ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report*, December 2018, p. 70.

<sup>185</sup> *Ibid*.

<sup>186</sup> *Ibid*.

<sup>187</sup> For example, GrainCorp and Emerald do not appear to vary these fees between storage providers.

## Barriers to entry

The ACCC considers the ability of third parties to enter into the storage market to be directly relevant to the discussion of alternate grain storage options. In its exemption application, Viterra noted that the Department has suggested that there are relatively low barriers to enter into the upcountry storage market:

*The costs of upcountry grain receival sites are around 10 times less than those of port facilities with public construction costs of some recently constructed (or being offered for sale) upcountry grain storage facilities being in the range of \$3 million to \$19 million.<sup>188</sup>*

Viterra also submitted that if it were to operate its supply chain inefficiently, the low barriers to entry would mean that alternate providers could be expected to respond, particularly given that Viterra's competitors are typically large multi-national exporters:

*Barriers to entry and expansion are particularly low for exporters that use Viterra's port terminals. These exporters are large multi-national businesses that have already invested in port terminal and upcountry storage infrastructure. It would be easy for these customers to invest upcountry in South Australia if they considered that Viterra or Viterra's upcountry competitors were not offering an efficient and competitive service.<sup>189</sup>*

The ACCC acknowledges that the barriers to small scale entry into the upcountry storage market are likely relatively low. However the ACCC notes that Viterra's upcountry network is extensive and well-established, reflecting Viterra's dominant position in the SA grain market since its acquisition of ABB Grain Ltd in 2009.<sup>190</sup>

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. However the ACCC considers it 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.

For example, while the barriers to small scale entry into the upcountry storage market may be low, the ability of these facilities to compete once entered may be hampered by a PTSP's dominance at port, as well as by possible network effects. In relation to the SA market, GPA has submitted that:

*Whilst in some areas growers have access to alternative up-country facilities the ability of these facilities to offer comparable rates and competitive pricing is in most instances also linked to their capacity to negotiate access to export facilities on equal terms to those offered by Viterra to their own marketing arm.<sup>191</sup>*

T-Ports submitted that being able to secure access to export services when entering the upcountry market is the most significant barrier to entry:

*T-Ports considers the biggest barrier to entry for more upcountry storage is the absolute reliance on interaction with all the other parts of the supply chain to make the investment work. T-Ports internal analysis, and anecdotal industry "belief" is that upcountry storage investment is difficult to justify without a rock solid path to export.<sup>192</sup>*

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<sup>188</sup> Viterra, *Exemption Application 2019*, 2 July 2019, p. 36.

<sup>189</sup> *Ibid* p. 36.

<sup>190</sup> As discussed earlier in this chapter, the number of upcountry storage sites operated by Viterra appears to be reducing somewhat.

<sup>191</sup> GPA submission, 4 October 2019, p. 2.

<sup>192</sup> T-Ports supplementary submission, 19 June 2020, p. 3.

In addition, the ACCC notes there may be the potential for the bundled nature of Viterra's Export Select service to reinforce barriers to entry upcountry, as the bundled nature of these services could enable Viterra's dominant position in upcountry and port terminal services markets to further complement and support each other. As such this has the potential to discourage entry into the upcountry market.

The ACCC also notes that due to efficiencies that can be achieved by operating a larger network, Viterra's dominant position in upcountry storage markets has the potential to act as a barrier to competitors seeking to enter into this market. That is, the extensive nature of Viterra's network can reasonably be expected to enable Viterra to achieve operational efficiencies (i.e. economies of scale) and service offerings that are likely beyond smaller entrants. For example, the ability to segregate and/or blend grain are important elements of the bulk grain supply chain,<sup>193</sup> and these are likely more effectively (or efficiently) achieved within an established network of larger sites (than at smaller storage sites that are not part of an integrated network).

### **Network Effects**

Viterra is the dominant vertically-integrated, provider of port terminal facilities and upcountry services in the SA bulk grain export market.

Viterra has significantly more capacity to store and export bulk grain than any other PTSP in SA and, importantly, it has occupied an incumbent position in SA markets for a significant period of time.<sup>194</sup>

A range of supply chain related factors can be expected to influence exporters' decisions around moving bulk grain to export markets, including location of grain production, the availability and ownership of storage facilities, access to, and the cost of, transport options, as well as the accessibility and timing of available capacity.

While these factors are discussed individually in greater detail in other sections of this document, the ACCC notes that there are likely to be network effects (as well as certain efficiencies) associated with a PTSP having a dominant presence across multiple elements of the supply chain, particularly when this has been the situation over an extended period of time.<sup>195</sup>

While acknowledging the increase in competition in SA, particularly with the recent commencement of operations at T-Ports' Lucky Bay facility, the ACCC considers it reasonable to expect that these network effects will influence an exporter's choice of port terminal facility, particularly in circumstances where an exporter is already using Viterra's network.

In this regard the ACCC notes that Viterra has offered a bundled end-to-end export services package, Export Select, since 2009 and that alternate PTSPs were not available to third party exporters in SA until 2015-16 (see the "Export Select" box above).<sup>196</sup>

As such the network effects (and efficiencies) arising from Viterra's dominant position may result in third party exporters preferring to remain within the Viterra network for a range of

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<sup>193</sup> ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report*, December 2018, p. 31.

<sup>194</sup> According to GTA's 2019-20 Location Differentials Viterra operated 66 out of 75 upcountry storage sites in SA. In addition, since 2016-17 (the first season both LINX and Semaphore were in the market) Viterra has facilitated 92 per cent of all SA bulk grain shipments.

<sup>195</sup> Network effects arise when a product or service becomes more valuable as the number of customers using it increases or due to the benefits of compatible and/or complementary products. Network effects therefore provide advantages to established firms with an existing customer base, relative to rivals and prospective entrants.

<sup>196</sup> In circumstances where a third party exporter has established its own port terminal facility the ACCC considers it likely that it will seek to use their own port terminal facility in preference to Viterra's facilities.

reasons, including the transaction costs associated with the need to establish new arrangements. This can be expected to make it more difficult for other PTSPs to enter the market and compete with Viterra at port.

### **ACCC Draft View**

The ACCC notes that third party storage providers now have more opportunities to outturn grain to different export markets through the introduction of Cargill's and Semaphore's facilities at Port Adelaide, and T-Ports' Lucky Bay facility on the Eyre Peninsula. This has the potential to support the entry and/or continued existence of third party upcountry sites and on-farm storage.

However, the barriers to entry into the upcountry storage market are likely higher than might otherwise be expected as a result of Viterra's dominant position upcountry, which may prevent smaller scale entry. In addition, there is also the potential for network effects and service bundling to affect competition upcountry.

Despite the increase in competitive alternatives at port, the ACCC considers that alternate storage and handling providers are likely still reliant on Viterra to accept their customers' grain at its port terminal facilities in order for them to be able to compete effectively with Viterra in the upcountry storage and handling market.

The ACCC has also considered the extent to which the Port Adelaide container market and the SA domestic market offer alternative pathways, via which the customers of third party storage providers can outturn their grain. As noted in section 3.3, these markets are relatively small in SA, with 81 per cent of grain grown in SA having entered the bulk export market since the 2011-12 season. These alternate markets are also primarily located within the east of the state. Given these limitations the ACCC considers that fair and transparent access to port terminal services is important if current, and prospective, third party storage and handling service providers are to compete with Viterra's upcountry storage and handling network.

As previously stated, the ACCC's draft view is that Viterra faces limited competition from third party and on-farm storage along the supply chain. Given Viterra also occupies a dominant position in the provision of port terminal services in SA, the ACCC has also reached the draft view that the incentives for competitors to enter these parts of the supply chain will be limited if they, or their clients, are unable to gain fair and transparent access to the bulk export market. This is particularly the case given the majority of grain grown in SA is exported in bulk.

Nonetheless, the ACCC acknowledges that the recent introduction of third party PTSPs has increased incentives for prospective third party storage and handling providers to enter the supply chain, as their customers now have greater opportunities to sell grain into the bulk export market.

#### **3.1.2. Grain transport services**

The ACCC considers the use of rail and/or road networks to transport grain from storage facilities to port to be a relevant consideration in examining the level of competition between SA's bulk grain port terminal facilities.

Transport networks, and the associated freight charges to move grain to port, are significant factors for exporters/traders when determining which port terminal to export from. In particular, port terminal facilities are generally only considered viable substitutes for each other in circumstances where a sufficient number of exporters can transport grain to each of the competing facilities at similar cost.

The ACCC notes that Viterra has submitted that it does not have any ownership interests with road or rail freight companies, and that road and rail facilities compete with each other in SA due to the short distances to port.<sup>197</sup>

The ACCC notes that Viterra undergoes a tendering process when securing road and rail services for its logistical operations. As discussed below GWA are the only provider of rail freight services in SA and therefore for Viterra.

While the barriers to entry to the provision of road freight services are generally viewed as low, the ACCC notes that Viterra's tendering process results in a relatively small number of freight service providers being responsible for the delivery of grain via road freight services in SA.<sup>198</sup> This is because the majority of SA grain moves to export through Viterra's Export Select product. As previously discussed, Export Select is an end-to-end package that bundles a number of services across the supply chain (including transport) to move grain from a Viterra upcountry storage site to a Viterra port terminal facility.

In considering the substitutability of road and rail transport, the ACCC notes that the DAWR estimated that the catchment area in which rail and road are generally competitive with each other is for distances of up to 200 km from port, though this depends on the season and volume of grain needing to be transported.<sup>199</sup>

ESCOSA has noted that three quarters of SA's upcountry sites are within 200 km of port, and that road transport is therefore 'very competitive' with rail for these sites.<sup>200</sup> In addition, AEGIC has indicated that SA has the shortest distance between grain receipt sites and port of all states, averaging 144 km to port,<sup>201</sup> resulting in a relatively high portion of grain being transported to port via road freight services (50 per cent).<sup>202</sup>

The ACCC also notes that since the release of the AEGIC and ESCOSA reports, Viterra decided not to renew their Eyre Peninsula rail contract with GWA (in February 2019).<sup>203</sup> As such road transport is likely to account for the majority of grain delivered to port in SA going forward.

## Rail

GWA, SA's freight rail services provider for grain, operates all rail transportation services in SA (on ARTC's interstate rail network). Figure 3.2 below shows the current rail freight services used by Viterra, and by extension for all SA grain intended for export. As shown rail freight services are used to move grain to Viterra's IHB and OHB facilities at Port Adelaide.

Neither Cargill's nor Semaphore's facilities at Port Adelaide have rail access. As such Viterra's OHB and IHB port terminal facilities are the only facilities capable of receiving grain via rail in SA (as set out in table 2.1).

Viterra has submitted that road and rail services compete strongly with one another.<sup>204</sup> This view is also held by T-Ports, who submitted that:

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<sup>197</sup> Viterra public exemption application, p. 33.

<sup>198</sup> ESCOSA's *Inquiry into the SA Bulk Grain Export Supply Chain* indicates that Viterra has consolidated the tender of road transportation contracts and, as of the time of the release of ESCOSA's report (2018) Viterra used seven different road freight providers.

<sup>199</sup> DAWR, *Wheat Port Code Review*, Interim Report, p. 10.

<sup>200</sup> ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report*, December 2018, p. 37.

<sup>201</sup> AEGIC, *Australia's grain supply chains – costs, risks and opportunities*, October 2018, p. 22.

<sup>202</sup> *Ibid* p. 50.

<sup>203</sup> Viterra, media release, Viterra decision provides competitive supply chain to Eyre Peninsula growers, viewed 1 June 2020. See: <http://viterra.com.au/index.php/2019/02/26/viterra-decision-provides-competitive-supply-chain-to-eyre-peninsula-growers/>.

<sup>204</sup> Viterra, *Exemption Application 2019*, 2 July 2019, p. 4.

Rail has historically provided operational efficiencies (at higher Capital expense) to handle larger tonnages, usually with dedicated equipment (receiving sheds, pits, conveyors etc.). However, for a long time now, the “all-up” per tonne rate for rail transfers compared to road transfers have been very evenly matched. It is hard to argue rail provides any advantage in drawing grain from different regions.<sup>205</sup>

As noted by AEGIC, the rail services available in eastern SA were considered to have several advantages over those on the Eyre Peninsula (such as higher axle loads and train speeds).<sup>206</sup>

The ACCC notes that Viterra and GWA previously had a rail agreement for the Eyre Peninsula to transport grain from Kimba and Wudinna down into Viterra’s Port Lincoln facility. The ACCC understands that grain was the only commodity moved on the Eyre Peninsula lines and, on 26 February 2019, Viterra announced its intention to transition all grain movements on the Eyre Peninsula to road transport.<sup>207</sup>

This resulted in a significant proportion of Eyre Peninsula grain shifting to road freight. As noted by Viterra, between 60 to 70 per cent of grain was previously transported to port by road to port on Eyre Peninsula.<sup>208</sup>

**Figure 3.2: Rail services in SA**



Source: [http://viterra.com.au/wp-content/uploads/Storage-and-Handling-Map\\_website-.pdf](http://viterra.com.au/wp-content/uploads/Storage-and-Handling-Map_website-.pdf).

<sup>205</sup> T-Ports supplementary submission, 19 June 2020, p. 2.

<sup>206</sup> AEGIC, *Australia's grain supply chains – costs, risks and opportunities*, October 2018, p. 56.

<sup>207</sup> Viterra, media release, Viterra decision provides competitive supply chain to Eyre Peninsula growers, viewed 1 June 2020. See: <http://viterra.com.au/index.php/2019/02/26/viterra-decision-provides-competitive-supply-chain-to-eyre-peninsula-growers/>.

<sup>208</sup> Viterra, *Exemption Application 2019*, 2 July 2019, p. 33.

## Road

Unlike rail, all of SA's port terminal facilities have the ability to receive grain via road transport services. As noted by AEGIC, road transport can offer a number of advantages over rail:

*...road rates [show] more flexibility and variability than fixed rail rates...Road freight has advantages, including scalability, lesser regulation and ability to redeploy to or from alternate industries in very good (or very poor) seasons.<sup>209</sup>*

As previously noted, Viterra undertakes a tendering process when securing road and rail services for its logistical operations. This has resulted in a relatively small number of road freight service providers being responsible for transporting grain (via road) that has entered into Viterra's system.<sup>210</sup> These arrangements are particularly significant, given the majority of SA grain moves to export through Viterra's Export Select product.

T-Ports submitted that the dynamics in the road freight market have the potential for major road freight service providers to be reluctant to engage with third parties' PTSPs:

*Viterra may not be vertically integrated with road/rail providers but as the dominant PTSP across the state of SA has the ability, either intentionally or non-intentionally, to exert influence on major suppliers of services. Due to their market dominance they find "allies" intent on serving the needs of Viterra, sometimes at the expense of any new entrant.*

*T-Ports has gathered anecdotal evidence of road transport providers un-willing to engage with us as they did not wish to risk their relationship with Viterra.<sup>211</sup>*

However, the ACCC notes that T-Ports acknowledged these issues are not necessarily the result of intentional action undertaken by Viterra, but rather due to the size of Viterra.

The ACCC notes that, while only a small number of road freight companies provide services to Viterra, road transport is typically characterised by a large number of players. As submitted by SAFC:

*Competition within the road transport industry is fierce, with many providers and low profit margins. Viterra is not integrated with any road or rail companies – they access services from the market like any other player.<sup>212</sup>*

In addition, both AEGIC and ESCOSA considered that the road freight transport industry was competitive and had low barriers to entry, in their respective reviews of the SA market.<sup>213</sup>

Given the above, the ACCC's draft view is that there may be potential for other PTSPs to encounter difficulties when attempting to engage with larger road freight services who are contracted to Viterra, particularly given the majority of SA grain is sold into Export Select. In addition, as noted in section 3.1.1, Viterra charges a grower receival-at port-fee which has the potential to discourage grower deliveries to port. This could further encourage the use of Export Select and therefore the amount of grain which is facilitated by road freight services contracted to Viterra. However, given the relatively low barriers to entry and large number of potential providers within the road freight market, third party PTSPs are unlikely to

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<sup>209</sup> AEGIC, *Australia's grain supply chains – costs, risks and opportunities*, October 2018, p. 54.

<sup>210</sup> According to ESCOSA's *Inquiry into the SA Bulk Grain Export Supply Chain*, 2018, Viterra has consolidated the tender of road transportation contracts, and as of the time of the release of the report (2018) Viterra used seven different road freight providers.

<sup>211</sup> T-Ports submission, 26 August 2019, p 4.

<sup>212</sup> SAFC submission, 6 September 2019, p. 3.

<sup>213</sup> ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report*, December 2018, p. 38.



experience prolonged issues when securing road freight services, although broader network effects may also be relevant (see section 3.1.1).

The ACCC notes that the efficiency of road transport differs by region in SA due to a variety of factors. In particular, AEGIC found that the transport rates offered in eastern SA were up to 35 per cent higher than those offered in the western region (i.e. the Eyre Peninsula) for an equivalent 150 km journey. AEGIC stated that the discrepancy in these costs likely related to:

- trucks with a load size of 72 tonnes being allowed on the Eyre Peninsula, versus 44 tonnes in the Adelaide region;
- greater demand for trucking services in the east and central regions compared to the Eyre Peninsula (however the ACCC notes that with the closure of rail on the Eyre Peninsula the demand for trucking services will increase on the Eyre Peninsula, therefore likely increasing the price); and
- the need to pass through the Adelaide hills on some routes increasing road transportation costs relative to the Eyre Peninsula.

The general efficiency of road transport also appears to have increased over time, with AEGIC finding that the average load size of a truck having increased from approximately 24.5 tonnes in 2009-10, to over 29 tonnes in 2016-17.<sup>214</sup>

### **Comparing road and rail transport**

The ACCC notes that AEGIC investigated the costs of rail and road transport for different regions in SA in its 2018 report.<sup>215</sup> These results are displayed in figure 3.3 below, with AEGIC finding “...considerable variation in the competitiveness between road and rail transport in South Australia’s eastern and central regions compared with the western region.”<sup>216</sup>

Figure 3.3 indicates there is little difference in the efficiency of road and rail freight services on the Eyre Peninsula. Figure 3.3 also indicates that rail offered a relatively large freight advantage in the central region, and a somewhat less pronounced advantage in the eastern region. However the ACCC notes that, due to the small number of rail sites in the eastern region, the linear relationship here should be interpreted cautiously.

### **Comparing road and rail transport – ACCC draft view**

The ACCC considers that the relatively shorter distances to port, as well as the widespread use of road to transport grain, suggests that road transport is a viable alternative to rail in SA. The ACCC also notes that, in the current environment, road transport appears to be the preferred form of transport by a number of industry participants in certain areas of SA.

In relation to the Eyre Peninsula, the ACCC does not expect Viterra’s Port Lincoln and Thevenard facilities to be advantaged over T-Ports’ Lucky Bay facility as a result of being able to draw grain from further distances (as none of these facilities receive grain via rail).

As Viterra’s Port Giles and Wallaroo facilities are also not capable of receiving grain via rail, they are also unlikely to have a competitive advantage sourcing grain over their closest third

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<sup>214</sup> AEGIC, *Australia’s grain supply chains – costs, risks and opportunities*, October 2018, p. 53.

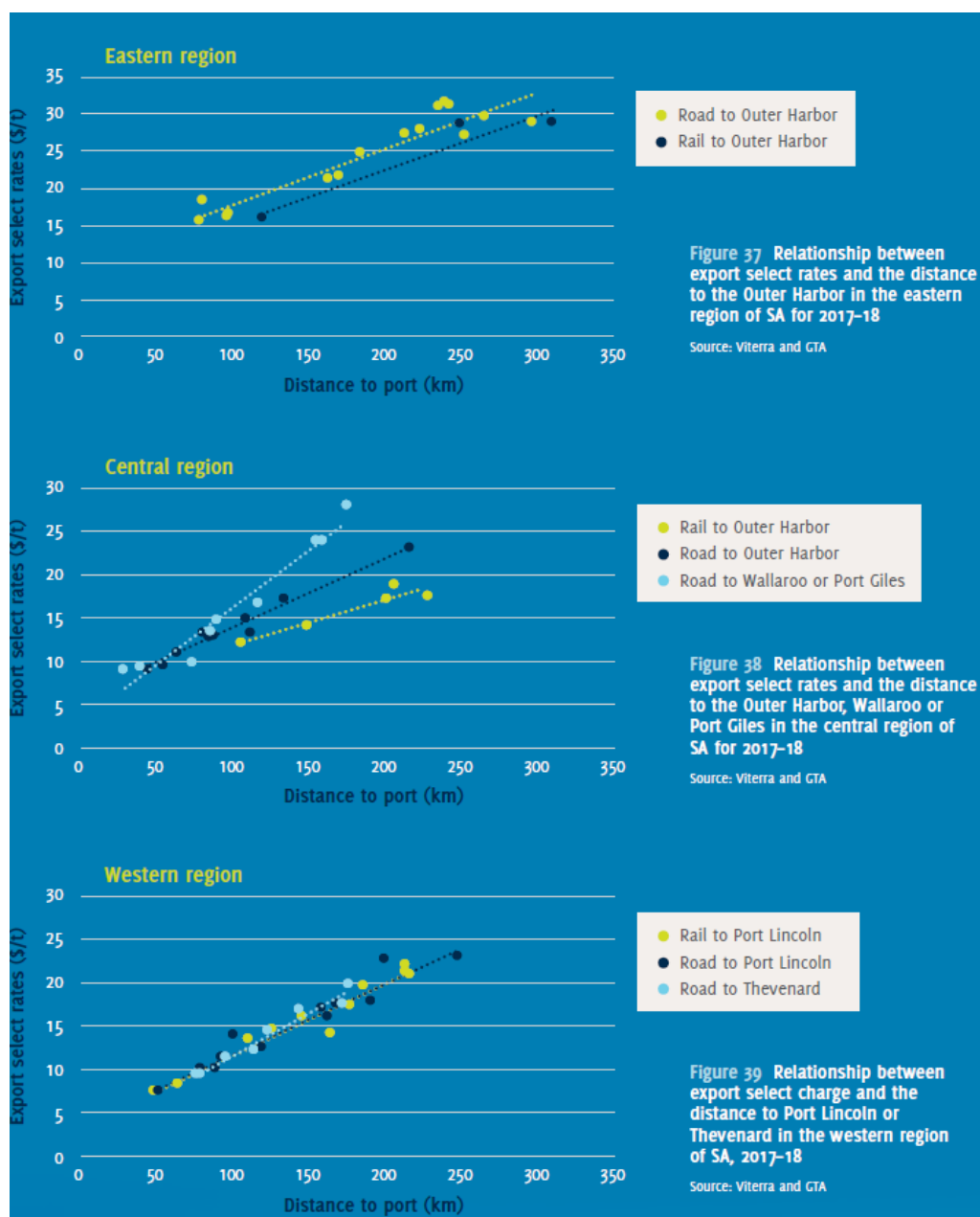
<sup>215</sup> The ACCC notes that rail was operational on the Eyre Peninsula at the time of AEGIC’s consideration. As previously stated, rail operations on the Eyre Peninsula have since stopped.

<sup>216</sup> AEGIC, *Australia’s grain supply chains – costs, risks and opportunities*, October 2018, p. 56. AEGIC considered the western region encompassed the Eyre Peninsula; the central region encompassed the Yorke Peninsula, Lower, Mid and Upper North regions (i.e. most of the area north of Adelaide), and the eastern region, which primarily encompassed anything south-east of Adelaide.

party competitors – Cargill’s and Semaphore’s Port Adelaide facilities – due to access to different transportation methods.

Viterra’s IHB and OHB facilities are the only port terminal services in SA that are able to receive grain via both rail and road. Consistent with AEGIC’s analysis (see figure 3.3) the ACCC considers that IHB and OHB appear to have material freight advantages when using rail to transport grain to port,<sup>217</sup> compared to third party PTSPs at Port Adelaide, which are reliant on road transportation. The ACCC notes that AEGIC’s analysis indicates that, the further away from port grain is located, the larger the advantage rail transportation provides to Viterra. As such, the ACCC considers that both Viterra’s IHB and OHB facilities have an advantage in terms of being able to source grain from a larger area compared to Cargill’s and Semaphore’s Port Adelaide facilities.

**Figure 3.3: Road vs rail freight rates across SA, as estimated by AEGIC**



Source: AEGIC, *Australia’s grain supply chains – costs, risks and opportunities*, October 2018, p. 57.

<sup>217</sup> See the eastern and central region charts within figure 3.3.

## 3.2. Grain catchment areas by port

The ACCC generally expects port terminal facilities to be in competition with each other to the extent that grain from the same region can practically and economically move to either of the two (or more) facilities.

The grains industry generally refers to geographic areas where it is typically economically viable for grain to move to a particular port for export as a ‘catchment area’ (or ‘catchment zone’).

The ACCC generally considers the relevant catchment area for a port terminal facility to be related to a number of factors, including: established transportation links to each port including rail networks and road pathways that connect the port terminals to growing regions, and the associated upcountry storage infrastructure. In its exemption application Viterra submitted that:

*Traditional “catchment zones” for grain grown in South Australia are fluid and increasingly outdated constructs. Traders purchase grain from, and traders and growers move grain to, the locations where it is most profitable having regard to the price of grain that can be obtained in domestic and export markets, the cost of freight to port terminals (or to domestic customers), the cost of sea freight, and the cost of using a particular port terminal. If Viterra is inefficient or its terms of access—including its fees—are unreasonable, grain traders will source grain from regions outside of South Australia or use alternative and competing terminals in South Australia or neighbouring states to export South Australian produced grain, or will sell grain in Australia, including directly from on-farm storage.<sup>218</sup>*

In relation to the grain catchment areas for each of its facilities, Viterra also submitted the following:

*Port Lincoln has traditionally sourced grain from growers on the Eyre Peninsula in South Australia.<sup>219</sup>*

*Thevenard has traditionally sourced grain from regions including the Eyre Peninsula in South Australia.<sup>220</sup>*

*Port terminals at Port Adelaide have traditionally sourced grain from a large grain growing region that encompasses the Yorke Peninsula and a large area surrounding Adelaide...<sup>221</sup>*

*Walleroo has traditionally sourced grain from a region that extends from above Melrose down to the Yorke Peninsula.<sup>222</sup>*

*Port Giles competes for the same grain as port terminal operators at Port Adelaide.<sup>223</sup>*

In its submission T-Ports’ supported Viterra’s view that catchment zones are fluid, though not to the extent implied by Viterra in its exemption application:

*T-Ports supports Viterra comments that catchment zones are fluid, however not to the extent implied... should a PTSP charge unreasonable fees or access, prohibitive distance and road freight costs give little opportunity for movement out of catchment zones or to alternative ports<sup>224</sup>*

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<sup>218</sup> Viterra, Public exemption application, p. 1.

<sup>219</sup> Ibid p. 41.

<sup>220</sup> Ibid p. 46.

<sup>221</sup> Ibid p. 48.

<sup>222</sup> Ibid p. 58.

<sup>223</sup> Ibid p. 62.

<sup>224</sup> T-Ports submission, 26 August 2019, p. 3.

*As discussed earlier, there is small scope for competition of grain grown near the lower SA/Vic border, but other than that grain seldomly [sic] moves outside of traditional catchment zones.<sup>225</sup>*

Specifically, T-Ports noted that catchment zones overlap and fluctuate based on market conditions, however freight costs will limit the flexibility to move outside these zones:

*There are some terminals where catchment zones overlap and fluctuate with market conditions, but in general terms, road distances and associated freight costs between competing terminals is a limiting factor in the flexibility to move outside catchment zones.<sup>226</sup>*

The ACCC recognises that there is a level of fluidity to the catchment areas for different port terminal facilities. However the ACCC considers that catchment areas remain broadly relevant.

This section discusses: the relationship between distance and freight costs; the ACCC's view on catchment areas; and the extent to which exporters are able to access port terminal facilities to export grain grown in different geographical locations across SA.

### **What are the different growing regions in SA?**

AEGIC states that SA is unlike other Australian states, due to its unique geography. AEGIC considers that the existence of two major growing areas on the two different peninsulas (the Eyre and Yorke) has resulted in a higher number of ports than other Australian states:

*Different geographies also need to be considered when comparing the supply chains of each state of Australia. For example, SA with its series of peninsulas and coastal cropping areas results in it having a higher number of smaller ports compared with other states, and its resulting need to balance land transport costs with the operating scale of ports. Some Thevenard growers, for example, would incur additional freight of more than \$34/t if shipping only occurred through Port Lincoln.<sup>227</sup>*

The ACCC notes that, despite the relatively high number of ports in SA compared to other states, SA's geography results in grain grown in many areas being unlikely to be able to (practically and/or economically) move to export via numerous port terminal facilities. In its inquiry into the SA bulk grain export supply chain costs ESCOSA suggested that the SA market can be split into two distinct regions:

*For this Inquiry, the (local) market for supply chain services is defined as the area bounded by the South Australian borders. Within that area, two separate geographic markets may be defined: the Eyre Peninsula and eastern South Australia (remainder of the South Australian land mass). Factors such as the location of grain producing areas, the isolated Eyre Peninsula rail network, and the distance from the Eyre Peninsula to domestic markets means the potential for substitution between these two geographic areas is low.<sup>228</sup>*

Furthermore, it appears that SA's unique geography has resulted in differences in how logistical networks operate across different parts of the state. As noted by AEGIC (see figure 3.3 above):

*There is also considerable variation in the competitiveness between road and rail transport in South Australia's eastern and central regions compared with the western region. Road transport rates are up to 35 per cent higher in the eastern region than in the western region for an equivalent 150km road journey.<sup>229</sup>*

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<sup>225</sup> T-Ports submission, 26 August 2019, p. 4.

<sup>226</sup> T-Ports supplementary submission, 19 June 2020, p. 2.

<sup>227</sup> AEGIC, *Australia's grain supply chains – costs, risks and opportunities*, October 2018, p. 52.

<sup>228</sup> ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report*, December 2018, pp. 42-43.

<sup>229</sup> AEGIC, *Australia's grain supply chains – costs, risks and opportunities*, October 2018, p. 56.

Given the above, the ACCC will consider how likely it is for grain from various growing regions to move to port terminal services outside those regions (see below). However the ACCC will first examine the relationship between freight costs and distance in SA.

### **3.2.1. The relationship between distance and freight costs in SA**

As noted above, Viterra has submitted that catchment areas are fluid and increasingly outdated concepts. However Viterra has also acknowledged that distance is a relevant cost driver when exporters outturn grain to a port terminal facility.<sup>230</sup>

The ACCC considers that it is useful to explore the relationship between distance and freight costs. The ACCC provides its views on this relationship below using Viterra's Export Select freight rates.<sup>231</sup>

#### Export Select freight rates

As previously noted, Viterra's Export Select is a logistics package that bundles a number of services including: accumulation planning, outturn from Viterra's upcountry storage, transport to port and in-loading at port. Viterra's Export Select freight rates (i.e. transport to port) comprise the most significant cost element of the total Export Select package offered by Viterra.

The ACCC notes that CRA modelled a linear regression using Viterra's Export Select freight rates in order to establish the level of competition Viterra face from Victorian port terminals.<sup>232</sup> Figure 3.4 below presents CRA's results, which appear to indicate a pronounced relationship between freight costs and distance. Specifically, CRA found that every additional kilometre grain has to travel to port adds an extra 7.9 cents per tonne to the total freight cost:

*The estimated intercept term is 8.1351, which is interpreted to mean that the fixed cost of freight (e.g. loading and other handling costs, which are incurred irrespective of the distance shipped) is \$8.14 per tonne. The estimated slope term is 0.0792, which is interpreted to mean that the incremental freight cost for every additional kilometre shipped after is \$0.079/tonne.<sup>233</sup>*

The degree to which Viterra faces competition from Victorian markets is discussed in section 3.2.3.

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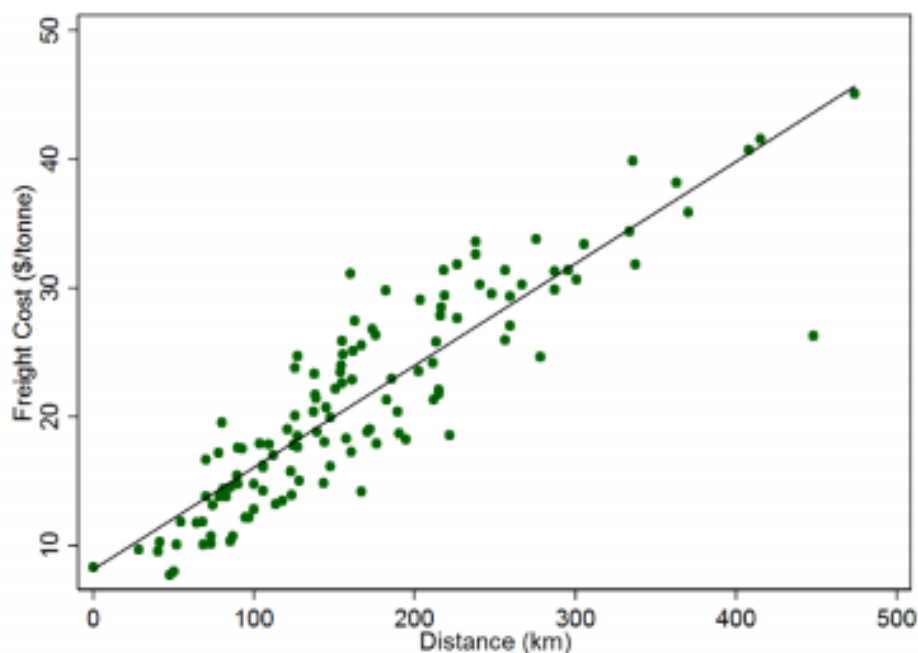
<sup>230</sup> Viterra, *Response to 14/11/19 information request 2020 – Question 9 – Catchment zones*, 13 February 2020, p. 3.

<sup>231</sup> Viterra's Export Select freight rates are the basis for GTA's Location Differential values (see 'GTA Location Differentials' box in section 3.2.3).

<sup>232</sup> See Charles River Associates, *Supplement to CRA Report on the Benefits of Code Exemption for Viterra Grain Export Terminals*, 9 January 2020, Appendix A.

<sup>233</sup> Charles River Associates, *Supplement to CRA Report on the Benefits of Code Exemption for Viterra Grain Export Terminals*, 9 January 2020, Appendix A, p. 11.

**Figure 3.4: Scatter plot of freight rates and distances, extracted from CRA supplementary report**



Source: CRA Supplementary report, Appendix A, p. 12.

The importance of distance in Export Select rates appears to have reduced over time

Noting that Viterra submitted in its exemption application that catchment areas were more relevant in the past,<sup>234</sup> the ACCC considers it appropriate to consider the extent to which distance has diminished as a factor in determining freight costs. This may provide an indication as to the expected importance of distance in future freight costs.

Figure 3.5 below, which was produced by AEGIC, shows the relationship between transport costs (using Export Select charges) and distance between the 2012-13 and 2017-18 seasons.<sup>235</sup> The analysis by AEGIC shows that the importance of distance to overall freight costs (shown by the slope of the graph) has declined close to 15 per cent.<sup>236</sup>

The ACCC considers that the reduced distance premium supports the view that catchment areas have likely become less relevant compared to previous seasons. As such grain grown or stored in different areas likely now has a greater range of competitive alternatives that it is able to access. However, as illustrated in figure 3.5, there continues to be a strong relationship between distance and freight costs.

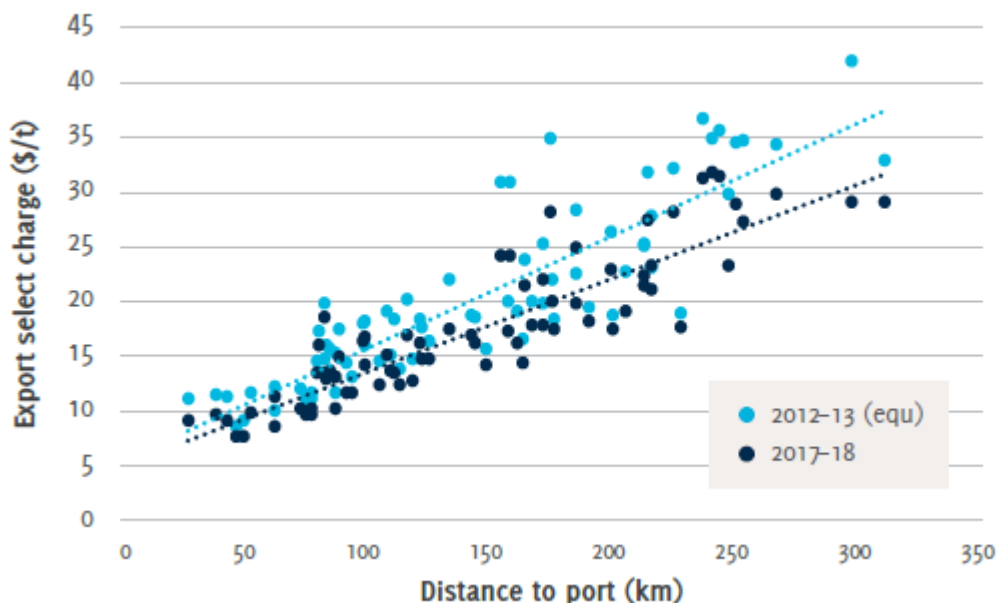
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<sup>234</sup> Viterra, *Response to 14/11/19 information request 2020 – Question 9 – Catchment zones*, 13 January 2020, p. 2.

<sup>235</sup> AEGIC, *Australia's grain supply chains – costs, risks and opportunities*, October 2018, p. 55.

<sup>236</sup> In real terms.

**Figure 3.5: Relationship between Export Select rates and the distance to the closest port in SA for the 2012-13 and 2017-18 seasons**



Source: AEGIC, *Australia’s grain supply chains – costs, risks and opportunities*, October 2018, p. 55.

**ACCC draft view on the relationship between freight costs and distance**

Consistent with the above analysis, the ACCC continues to consider that distance remains a significant factor in freight costs, and therefore relevant when considering which port terminal facilities are available to exporters seeking to export grain from different areas.

The ACCC also considers that the boundaries of catchment areas are not fixed, and notes that it is not necessarily the case that grain will be moved to the closest port terminal facility. In particular, the ACCC acknowledges that certain market conditions, such as recent drought conditions on the east coast, can result in grain which is located in ‘traditional’ catchment areas moving to alternate locations.

The ACCC also acknowledges that it is likely that the relationship between distance and freight costs has weakened over time. Catchment areas are therefore likely becoming more fluid as a result.

**3.2.2. Competition for grain on the Eyre Peninsula**

***Is there competition for grain grown on the Eyre Peninsula from outside the Eyre Peninsula?***

As noted in section 3.2.1 ESCOSA considers SA to be comprised of two distinct markets: the Eyre Peninsula and eastern SA, with little substitution between these regions.<sup>237</sup>

As part of its exemption application Viterro submitted that it’s Port Lincoln and Thevenard facilities have traditionally sourced grain from the Eyre Peninsula, however Viterro also noted that competition for grain from the Eyre Peninsula is not limited to port terminals on

<sup>237</sup> ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report*, December 2018, pp. 42-43.

the Eyre Peninsula.<sup>238</sup> In contrast, T-Ports submitted that Port Lincoln only draws grain from the Eyre Peninsula.<sup>239</sup>

In considering these grain movements, the ACCC acknowledges that some of the grain shipped via Viterra's Port Lincoln and Thevenard facilities could be sourced from regions in eastern South Australia, however the ACCC considers this likely represents an unusual case. For example, Viterra's closest storage facility in eastern SA to the Eyre Peninsula is Melrose, which is located 163 km from Viterra's closest facility (Wallaroo), and 407 km and 535 km from Viterra's Port Lincoln and Thevenard facilities respectively, as well as 253 km from T-Ports' Lucky Bay facility.<sup>240</sup> As such, the ACCC considers it unlikely that grain grown outside of the Eyre Peninsula will move to export from either Viterra's Port Lincoln or Thevenard facilities under typical market conditions.

In addition, Viterra's closest upcountry storage facility on the Eyre Peninsula to Wallaroo, Kimba, is located 212 km and 316 km from Viterra's Port Lincoln and Thevenard facilities respectively, and 102 km from T-Ports' Lucky Bay facility. However Kimba is located 350 km away from Viterra's Wallaroo facility.<sup>241</sup> Given these distances, it seems unlikely that grain would move from the Eyre Peninsula to eastern SA under typical market conditions.

However, the ACCC acknowledges that distance from a particular port terminal facility is not the only factor which influences the movement of grain. For example the recent east coast drought, represents non-typical market conditions during which it may have been economical for grain grown on the Eyre Peninsula to move outside the Eyre Peninsula. The ACCC notes that 440 000 tonnes of grain was transported via coastal shipments to the east coast via Viterra's Port Lincoln and Thevenard facilities in 2018-19 drought-affected season (compared to the 50 000 tonnes of grain that was coastal shipped to the east coast from the rest of SA). As such, this appears to indicate that transporting grain to nearby port terminal facilities was preferred by the market even when sending grain to the east coast from the Eyre Peninsula.

Given that grain grown on the Eyre Peninsula appears unlikely to leave the Eyre Peninsula other than via a port terminal facility, the ACCC's draft view is that the vast majority of grain grown on the Eyre Peninsula is unlikely to have routine access to markets outside the Eyre Peninsula.

### ***Competition for grain between PTSPs on the Eyre Peninsula***

The ACCC notes that T-Ports' Lucky Bay facility is now operational and is relevant to the consideration of catchment areas on the Eyre Peninsula. Viterra has submitted that T-Ports' Lucky Bay facility will be a strong competitor to its Port Lincoln and Thevenard facilities.<sup>242</sup>

With respect to freight advantages on the Eyre Peninsula, T-Ports submitted in its exemption application for its Lucky Bay facility that:

*Lucky Bay export facilities represent a freight advantage for local growers compared to the cost of haulage to Port Lincoln... The catchment zone area is estimated to include the entire Eastern Eyre region where the cost of transporting grain from farm to Lucky Bay would be notably less than transporting to Port Lincoln.*<sup>243</sup>

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<sup>238</sup> Viterra, *Exemption Application 2019*, 2 July 2019, p. 28 & p. 44.

<sup>239</sup> T-Ports supplementary submission, 19 June 2020, p. 2.

<sup>240</sup> Distances from storage locations to terminals were obtained using Google Maps.

<sup>241</sup> Distances from storage locations to terminals were obtained using Google Maps.

<sup>242</sup> Viterra, *Revised exemption application 2019*, 7 February 2020, p. 28 & p. 44.

<sup>243</sup> T-Ports, *Application for exemption from the Competition and Consumer (Industry Code – Port Terminal Access (Bulk Wheat)) Regulation 2014*, 28 March 2019, p. 3.



SAFC submitted that T-Ports' Lucky Bay facility is likely to change/restrict the catchment area of Viterra's Port Lincoln facility:

*SAFC notes that T-Ports facility at Lucky Bay is likely to significantly change/restrict the catchment area for Viterra's Port Lincoln facility. There will be significant new competition for EP grain, particularly on the eastern side of the peninsula.<sup>244</sup>*

SAFC also suggested that the closure of rail transport along the Eyre Peninsula will decrease the Port Lincoln facility's catchment area:

*The cessation of grain transport by rail on the Eyre Peninsula will also change catchment areas. Where previously rail lines funnelled grain towards Pt Lincoln, increasing its catchment area, now trucking distance (and cost) will be a greater factor.<sup>245</sup>*

In contrast however, T-Ports submitted that the closure of rail is unlikely to affect the Port Lincoln facility's catchment area:

*...Port Lincoln only draws its grain from the Eyre Peninsula. T-ports does not consider the use of or discontinuation of rail on the EP affecting the ability to source grain from other growing regions.<sup>246</sup>*

Figure 3.6 (below) shows T-Ports' estimated freight advantage to Lucky Bay over Port Lincoln. T-Ports considers that its Lucky Bay facility will have a large freight advantage for the bulk export of grain grown on the Eastern Eyre Peninsula, with smaller freight advantages in parts of the Lower and Western Eyre Peninsula. Specifically, T-Ports submitted that:

*Future service offering (i.e. T-Ports Lucky Bay) will represent a viable competitive alternative to a portion of the Eyre Peninsula (EP) catchment zone. As identified in T-Ports application for exemption, this area comprises mainly the North Eastern parts of the EP, with the western and southern zones retaining their freight advantage to Viterra facilities at Thevenard and Port Lincoln.<sup>247</sup>*

The ACCC considers that, in addition to freight costs, catchment areas are also dependent on the relative efficiency and/or capacity of the relevant port terminal facilities. The ACCC notes that T-Ports' Lucky Bay facility, while offering large freight advantages across the mid-to-north eastern regions in the Eyre Peninsula, may prove to be less efficient than a traditional port in practice due to the double handling of grain with its transshipment operation. However, this currently remains unclear given T-Ports' relatively brief operating period to date.

While the ACCC accepts that T-Ports' Lucky Bay facility will compete for grain, particularly on the Eastern Eyre Peninsula, it is not yet clear to what extent T-Ports offers a viable competitive alternative for the export of grain from different regions of the Eyre Peninsula.

Noting the above, the ACCC's draft view is that it is reasonable to expect that T-Ports' Lucky Bay facility will compete for grain grown within certain parts of the catchment areas of Viterra's Port Lincoln and, to a lesser extent, Thevenard facilities.

Given the recent commencement of its operations, the ACCC will closely observe how the introduction of T-Ports' Lucky Bay facility alters the competitive landscape on the Eyre Peninsula.

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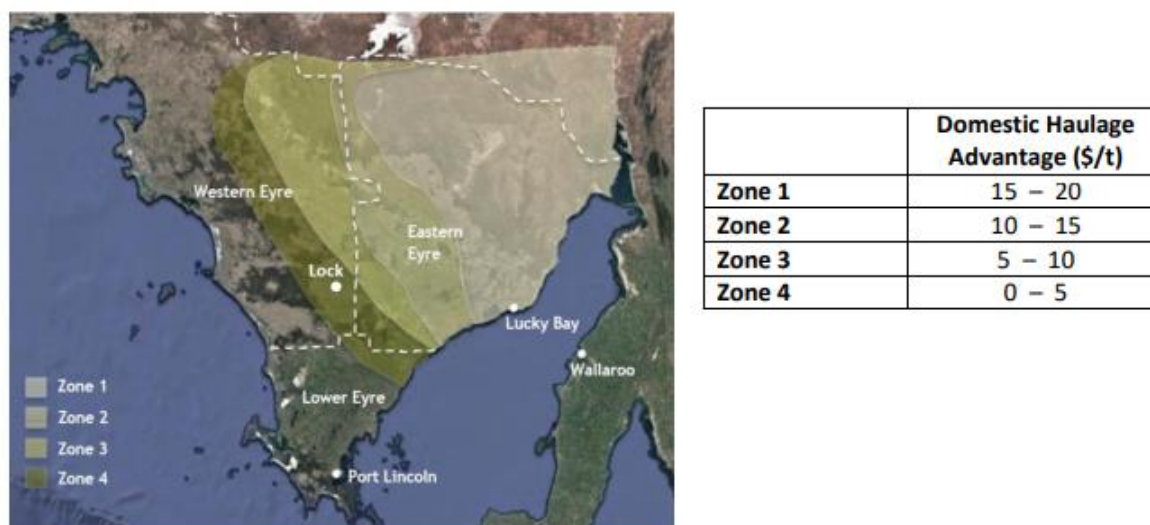
<sup>244</sup> SAFC submission, 6 September 2019, p. 2.

<sup>245</sup> Ibid.

<sup>246</sup> T-Ports supplementary submission, 19 June 2020, p. 2.

<sup>247</sup> T-Ports submission, 26 August 2018, p. 4.

**Figure 3.6: T-Ports estimated freight advantage to Lucky Bay harbour**



Source: T-Ports exemption application, p. 3.

### 3.2.3. Competition for grain in Eastern SA

The ACCC considers that there is a range of potential opportunities to export or otherwise sell grain grown in eastern SA. The exact competitive constraint each of these opportunities place on each other depends on the specific location in which the grain is grown. However there appears to be an interplay between the available port terminal facilities and their catchment areas; which likely intersect with each other to some degree.

The ACCC understands that, depending on the specific location, grain grown in eastern SA can potentially be exported through: Port Giles or Wallaroo on the Yorke Peninsula; Port Adelaide (via the bulk export services provided by Vittera, Semaphore, Cargill, or via containers); or port terminal facilities located in Victoria.

The ACCC also considers that the export of this grain is likely subject to a degree of competitive constraint from SA and/or interstate domestic markets. This is discussed further in section 3.3.2.

The ACCC will first discuss the catchment area of the Port Adelaide facilities in relation to the Mid and Upper North regions, and the Yorke Peninsula. The ACCC will then discuss the extent to which catchment areas for facilities at Port Adelaide are considered to interact with the catchment areas for Victorian facilities.

Vittera has submitted that grain grown in the ‘traditional’ Adelaide region is subject to a variety of competitive constraints:

*Grain is commonly delivered or outturned from the Adelaide region to sites outside of what has been considered the traditional Adelaide catchment zone. This includes delivering and outturning grain to bulk grain port terminals on the Yorke Peninsula and in Victoria, for export by container as well as, more recently, to the east coast, for domestic consumption.<sup>248</sup>*

Similarly, Vittera has submitted that grain grown in the Yorke Peninsula can be delivered to Adelaide:

*Grain is commonly delivered or outturned from the Yorke Peninsula to sites outside of what has been considered the traditional Yorke Peninsula catchment zone. This includes delivering grain to*

<sup>248</sup> Vittera, *Response to 14/11/19 information request - question 9 – catchment zones*, 13 January 2020, p. 4.

the Adelaide region and/or outturning grain to Port Adelaide (where Viterra faces competition from LINX and Semaphore), as well as, more recently, delivering to the east coast, for domestic consumption.<sup>249</sup>

### **GTA Location Differentials**

As per below the ACCC refers to GTA's Location Differentials to estimate freight costs. GTA's Location Differentials are a value attributed to an upcountry grain bulk storage and handling facility,<sup>250</sup> which represents the transport costs to move grain from that upcountry site to a port terminal facility.

The ACCC notes that GTA uses the rates set by Viterra's Export Select freight rates for their SA Location Differentials. However, the ACCC also notes that there are a small number of third party sites which are not located at the same location as a Viterra site (for example Cargill operates a site at Maitland, whereas Viterra does not). In these cases GTA is not able to use Viterra's Export Select freight rates for its Location Differentials.<sup>251</sup>

The ACCC's understanding of how Location Differentials are used by industry is consistent with ESCOSA, which in its 2018 inquiry stated:

*[ESCOSA] understands that traders use locational differentials set by Grain Trade Australia in developing contracts with growers.<sup>252</sup>*

The ACCC considers that Location Differentials provide a useful indication of the costs to move grain from a specific upcountry site to port. Accordingly, GTA's Location Differentials can assist in consideration of the extent to which port terminal facilities compete for bulk grain export volumes.

T-Ports submitted that Location Differentials are a suitable proxy for the cost of transport:

*GTA Location differentials are a suitable proxy for the cost of transport. No doubt, there are occasions when spot freight may be able to be negotiated at lower rates, but the GTA [Location Differentials] are a good proxy.<sup>253</sup>*

While the ACCC acknowledges that particular market conditions may affect the relationship between freight costs and distance (and that certain regions may have favourable costs to transport to certain ports at certain times as a result), the correlation between Location Differentials and generally accepted industry principles suggests that, for the majority of grain movements, Location Differentials serve as a useful proxy for freight costs.

<sup>249</sup> Viterra, *Response to 14/11/19 information request - question 9 – catchment zones*, 13 January 2020, p. 4.

<sup>250</sup> According to Grain Trade Australia Fact Sheet Series No.005 20 April 2018, a Location Differential is the "value" attributed to a specific up-country grain bulk storage and handling facility to an export port terminal facility. They are produced by the GTA Commerce Committee for the purpose of valuing upcountry grain on a 'port basis'. For the determination of the Natural Terminal Port for a site, rail transportation to a port takes precedence over road transportation to that same port. For sites with only road access, the natural port terminal for a storage site is the port with the lowest location differential.

<sup>251</sup> In addition, the ACCC notes that table 3.1 contains Location Differentials (from both Viterra and third party storage sites) to Victorian port terminals, whose Location Differentials were not able to be taken from Viterra's Export Select freight rates.

<sup>252</sup> ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report*, December 2018, p. 53, fn. 175.

<sup>253</sup> T-Ports supplementary submission, 19 June 2020, p. 2.

## Mid and Upper North Regions of SA

Table 3.1 below presents GTA's 2019-20 Location Differentials for various upcountry sites across the Mid and Upper North regions of SA, to Viterra's Port Adelaide OHB,<sup>254</sup> Port Giles and Wallaroo facilities.<sup>255</sup>

The ACCC notes that OHB is able to receive grain via rail transport which, as discussed in section 3.1.2 (see figure 3.3<sup>256</sup>) is a more efficient mode of transport than road for grain located in the Mid and Upper North regions. The relative efficiency of upcountry sites with rail access is likely reflected in GTA's Location Differentials. The ACCC notes that Viterra's IHB facility is also able to facilitate receipt via rail, and that Cargill's and Semaphore's Port Adelaide facilities are not. As such, it appears that GTA's Location Differentials may underestimate the freight cost to transport grain from storage sites with rail access to Cargill's and Semaphore's port terminal facilities.

Table 3.1 indicates that, for most sites in the Mid and Upper North regions, there is a slight freight advantage in moving grain to Viterra's Wallaroo facility over its OHB facility. However table 3.1 only considers a selection of sites in the Mid and Upper North regions. When considering GTA's Location Differentials for all 14 sites in the Mid and Upper North region, nine sites have a freight advantage to move grain to Wallaroo, while five sites are freight advantaged to move grain to OHB.

GTA's Location Differentials also show that both Viterra's Wallaroo and OHB facilities have significant freight cost advantages over its Port Giles facility for sites in this region (see table 3.1).

In addition, table 3.1 indicates that typically the further south a site is located, the more advantaged that site will be to Viterra's OHB facility compared to Viterra's Wallaroo facility. For example, Crystal Brook has a \$2.98 freight advantage to Wallaroo over OHB, whereas Bowmans, which is located 105 km south of Crystal Brook has a \$0.26 freight advantage to OHB over Wallaroo.

However, as previously noted, the relative efficiency and capacity of a port terminal facility is also relevant to the consideration of where it is most economically efficient to move grain.

Table 3.1 also presents an analysis of the combination of Viterra's freight and at-port costs to provide an indication of which port terminal facility it is most economically efficient to move grain to.<sup>257</sup> These costs were determined using Viterra's upcountry receipt fee,<sup>258</sup> Export Select Grouped Service fee,<sup>259</sup> and Port Handling & Shipping fee.<sup>260</sup> Unlike the consideration of GTA's Location Differentials (which indicated that 9 out of 14 sites in the Mid and Upper North regions were freight advantaged to Wallaroo over OHB), once Viterra's at-port fees

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<sup>254</sup> The Export Select freight rate (and therefore GTA Location Differential) for Viterra's IHB facility is an extra \$1.95 per tonne on top of the freight rate for Viterra's OHB facility.

<sup>255</sup> There is some discrepancy in the number of upcountry sites submitted by Viterra (as in section 3.1.1) and the sites listed in GTA's 2019-20 Location Differentials. Excluding sites Viterra does not intend to open for the 2020-21 season, GTA listed 14 upcountry sites (11 of which are owned Viterra) in the Mid and Upper North regions in their Location Differentials. However, in Viterra's list of alternate storage providers there are 18 upcountry sites in the Mid and Upper North regions (11 of which are owned by Viterra). As in section 3.1.1 the ACCC understands Viterra's list of upcountry storage sites to be more representative of the SA storage market.

<sup>256</sup> The Mid and Upper North regions are a part of the 'central' region used by AEGIC in figure 3.3.

<sup>257</sup> The 'Export Select and port costs' presented in table 3.1 considers the combination of Viterra's 2019-20 fees for: Receipt Fee (Major Wheat), Export Select Grouped Service fee and Viterra's 'Port Handling & Shipping Fee' (which differs by port). Viterra's Port Handling & Shipping Fee is described fully in Viterra's wheat reference prices document, which can be [found here](#).

<sup>258</sup> See section A1 (Major Wheat) of: Viterra, Schedule A – Storage & Handling Charges 2019/20.

<sup>259</sup> See: <http://viterra.com.au/index.php/export-select-freight-rates/>, accessed 1 September 2020.

<sup>260</sup> See section C3 of: Viterra, Schedule A – Storage & Handling Charges 2019/20.

are considered, there are nine upcountry sites that are economically advantaged to move grain to the OHB facility, and five to the Wallaroo facility.

The ACCC notes that the costs in table 3.1 are not representative of the total costs exporters face when using Viterra's network. Rather table 3.1 intends to show the *relative difference in fees* when comparing the cost of using Viterra's port terminal facilities. In practice, there are a variety of extra fees which exporters may face when using Viterra's services, including: at-port and/or upcountry storage fees, booking fees, vessel nomination/variation fees, and administration fees.<sup>261</sup>

Consequently, table 3.1 indicates that when also considering the relative efficiency of the port terminal services (in addition to freight costs), for most sites in the Mid and Upper North regions it is more economically efficient to export grain out of Viterra's OHB facility over Viterra's Wallaroo facility.

The ACCC notes that a range of other factors, such as available capacity and at port storage, will impact on the ability of grain in the Mid and Upper North regions to move to Viterra's IHB, OHB or Wallaroo facilities.<sup>262</sup>

As such, the ACCC's draft view is that grain from the Mid and Upper North regions likely falls within the catchment area of both Viterra's Wallaroo and Adelaide facilities. The ACCC considers that the Wallaroo facility likely has a small freight advantage over the IHB and OHB facilities, both of which are able to receive grain via rail. However, as above, the ACCC considers that the freight advantage to the Wallaroo facility is likely larger when compared to Cargill's and Semaphore's facilities at Port Adelaide's IHB, neither of which can facilitate rail receipts.

Furthermore, the ACCC notes that because of the similar differential in freight costs, the efficiency of the facilities at Port Adelaide and Wallaroo will likely be relevant to decisions around which facility to export from. As discussed above, this is expected to result in Viterra's OHB having a slight cost advantage over its Wallaroo facility.

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<sup>261</sup> Viterra's fees are set out in *Wheat Reference Prices – Port Terminal Services 2019/20*: [http://viterra.com.au/wp-content/uploads/Viterra\\_1920-Season\\_Wheat-Reference-Prices.pdf](http://viterra.com.au/wp-content/uploads/Viterra_1920-Season_Wheat-Reference-Prices.pdf)

<sup>262</sup> For example, OHB only has 65 000 tonnes of at port storage, so if grain is transported to Adelaide it may need to be stored at Viterra's IHB facility which has 366 500 tonnes of storage capacity.

**Table 3.1: GTA location differentials (and selected supply chain fees) for storage sites in the Mid and Upper North regions to SA port terminal facilities**

Site and site operator	Adelaide (OHB)	Port Giles	Wallaroo
<b>GTA location differentials*</b>			
Gladstone (Viterra)	18.75	-	16.61
Crystal Brook (Viterra and Cargill)	17.97	30.25	14.99
Snowtown (Viterra)	14.32	24.64	11.35
Bowmans (Viterra)	12.39	19.65	12.65
Saddleworth (Viterra)	14.25	-	23.80
<b>Export Select and port costs**</b>			
Gladstone (Viterra)	53.33	-	54.55
Crystal Brook (Viterra and Cargill)	52.55	65.52	52.93
Snowtown (Viterra)	48.90	59.91	49.29
Bowmans (Viterra)	46.97	54.92	50.59
Saddleworth (Viterra)	48.83	-	61.74

Source: GTA Location Differentials 2019/20; Viterra 2019/20 Export Select rates; and Viterra 2019-20 Storage & Handling Charges 2019/20.

Notes: \* As noted above GTA uses Viterra's Export Select freight rates to determine Location Differentials where available.

\*\* The 'Export Select and port costs' fees are comprised of the total Export Select Grouped Service fee (of which the Export Select freight rates are one component of), Viterra's upcountry receipt fee and Viterra's Port Handling & Shipping fee (see footnotes 254 to 257 for full references).

The above fees are not indicative of the total fees exporters will pay to export grain, and are only intended to show the relative differences in the efficiencies of Viterra's different port terminal services.

### Yorke Peninsula

There is relatively limited upcountry storage on the Yorke Peninsula, with Viterra submitting there are five upcountry sites (two of which are owned by Viterra).<sup>263</sup> However the ACCC notes that Viterra's Port Giles and Wallaroo facilities have a combined 1.27 million tonnes of storage capacity. This suggests that a relatively large proportion of grain grown on the Yorke Peninsula is delivered directly to port.

The GTA Location Differential figures in table 3.2 below also suggest that grain grown on the Yorke Peninsula has a significant freight advantage to Viterra's Port Giles and/or Wallaroo facilities, as compared to OHB (and other Port Adelaide port terminal facilities by extension).

<sup>263</sup> These sites are located at: Ardrossan (Viterra), Bute (Viterra), Kadina (AGT Foods), Kulpara (San Remo) and Maitland (AWB/Cargill). The ACCC, however notes that GTA have submitted there are three upcountry sites on the Yorke Peninsula (Ardrossan, Viterra; Bute, Viterra; Maitland, Viterra).

Furthermore, the ACCC notes that Viterra has indicated that in 2017-18 [c-i-c] of grain grown on the Yorke Peninsula was exported via its Wallaroo and Port Giles facilities, further indicating that grain grown on the Yorke Peninsula is unlikely to move to Adelaide for export.

However the ACCC notes that large quantities of grain moved from the Yorke Peninsula to domestic markets on the east coast in response to recent drought conditions. For example, while PIRSA estimates that 1.2 million tonnes of grain was grown on the Yorke Peninsula in 2018-19, the ACCC notes that Viterra's Port Giles and Wallaroo facilities' combined export volume that year was only 410 000 tonnes. This suggests that most of the grain grown on the Yorke Peninsula in 2018-19 was not exported and it appears likely that the remaining grain largely moved east in response to the drought conditions. The ACCC also notes that the combined exports of Viterra's OHB and IHB facilities was 240 000 tonnes in 2018-19, suggesting it is unlikely that a significant quantity of grain from the Yorke Peninsula was instead exported from Port Adelaide.

Given the above, the ACCC considers that, while grain from the Yorke Peninsula can move to alternate locations, this is likely to occur only in specific and unusual market conditions, such as the east coast drought. Consequently, the ACCC's draft view is that the port terminal facilities located at Port Adelaide provide limited competition for grain grown on the Yorke Peninsula.

**Table 3.2: GTA's Location Differentials from Yorke Peninsula storage sites to SA port terminals**

Site and site operator	Adelaide (OHB)	Port Giles	Wallaroo
<b>Yorke Peninsula</b>			
Ardrossan (Viterra)	19.48	9.95	11.41
Bute (Viterra)	18.53	21.35	9.88
Maitland (Cargill)	21.03	11.66	8.75
Port Giles (Viterra)	27.45	-	20.65
Wallaroo (Viterra)	23.10	20.65	-

Source: GTA 2019/20 Location Differentials; and Viterra 2019/20 Export Select rates.

Notes: As noted above GTA uses Viterra's Export Select freight rates to determine Location Differentials where available.

### Lower North

Table 3.3 below sets out GTA's Location Differentials for various storage sites in the Lower North region.<sup>264</sup> As shown, areas within the Lower North have a significant freight advantage when delivering to port terminal facilities at Port Adelaide over the Wallaroo facility (and the Port Giles facility by extension). As such, the ACCC expects that grain from the Lower North region will move to export via port terminal facilities at Adelaide.

<sup>264</sup> In addition to the sites in table 3.3, which lists all storage sites in the Lower North per GTA's 2019-20 Location Differentials (minus Viterra's Mallala facility which [Viterra did not open in the 2020-21 season](#)), Viterra have submitted there is an additional upcountry storage site at Dublin (owned by Australian Grain Exports).

Furthermore, given the high Location Differential to move grain from IHB to Wallaroo (27.45, see table 3.3), it appears unlikely that grain located to the south east of Adelaide would move past the facilities at Port Adelaide to either Wallaroo or Port Giles for export.

**Table 3.3: GTA Location Differentials from Lower North storage sites to SA port terminals**

Site and site operator	Adelaide (OHB)	Port Giles	Wallaroo
<b>Lower North</b>			
Mallala (Cargill)	10.71	-	17.20
Inner Harbor (Viterra)	1.95	-	27.45
Roseworthy (Viterra)	9.70	-	22.50

Source: GTA 2019/20 Location Differentials; and Viterra 2019/20 Export Select rates.

Notes: As noted above GTA uses Viterra's Export Select freight rates to determine Location Differentials where available.

### Competition between south-east SA and Victoria

In relation to the interaction between catchment areas in SA and Victoria, Viterra has submitted that:

*...Viterra is constrained by competition with port terminals in other states. This is particularly the case for grain grown in the eastern regions of South Australia—this grain is often exported through port terminals in Victoria.<sup>265</sup>*

Reflecting this, CRA has contended that any attempt by Glencore to reduce prices to growers in the Adelaide region will likely be unsuccessful due to the availability of alternate port terminal services, as well as the domestic and container markets:

*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.<sup>266</sup>*

In relation to competition between the SA and Victoria markets, T-Ports has submitted that the competition Viterra faces is limited to the south eastern border and is relatively minor.<sup>267</sup>

The ACCC notes that Viterra operates two storage sites in Victoria, Werrimull and Dooen (see table 3.4), one of which is advantaged to OHB (Werrimull) and the other to Portland (Dooen).<sup>268</sup> In addition GrainCorp operates two storage sites at Underbool and Murrayville that are freight advantaged to Viterra's OHB facility.<sup>269</sup>

Table 3.4 below presents a selection of SA and Victorian upcountry storage sites located near the SA-Victorian border (excluding Tailem Bend, which is located closer to Adelaide). As shown most upcountry storage sites in south-east SA do not have Location Differentials

<sup>265</sup> Viterra, *Exemption Application 2019*, 2 July 2019, p. 14.

<sup>266</sup> Charles River Associates, *Charles River Associates Report on the Benefits of Code Exemption on Viterra Grain Export Terminals*, 7 November 2019, p. 19.

<sup>267</sup> T-Ports submission, 26 August 2018, p. 3.

<sup>268</sup> As per GTA 2019/20 Location Differentials,

<sup>269</sup> GTA 2019-20 Location Differentials.



available for Victorian port facilities (or other SA ports). However, there are several Victorian upcountry storage sites which have Location Differentials available for both Viterra's OHB facility and Victorian port facilities, which likely give a better indication of potential catchment areas.

Table 3.4 shows that there is the potential for SA grain to move to Victorian port terminal facilities and, conversely, that there is also the potential for Victorian grain to move to port terminal facilities at Adelaide. For example grain stored at Frances (located in south east SA) is freight advantaged to Portland over OHB, while grain located at Werrimull (located in north-west Victoria) has a substantial freight advantage to OHB over Melbourne and Geelong. Specifically, table 3.4 indicates that grain near the northern SA-Victorian border is freight advantaged to Adelaide (Werrimull and Underbool storage sites), but grain located further south along the border is freight advantaged to Portland over Adelaide (Dooen, Lillimur and Frances storage sites).

Given the above, the ACCC considers that grain near the border of SA and Victoria can move into both the SA and Victorian bulk export markets, as well as the Victorian domestic and container markets. The opportunity to access these markets depends on the exact location of the grain, with more northern locations appearing to be economically advantaged to Adelaide, while southern locations appears to favour Portland.

**Table 3.4: GTA's Location Differentials from South East SA and Vic storage sites to SA and Victorian port terminals**

Site and site operator	Adelaide (OHB)	Geelong	Melbourne	Portland
<b>South east SA</b>				
Bordertown (Viterra)	30.88	-	-	-
Frances (Viterra)	31.35	-	-	22.60
Pinnaroo (Cargill and Viterra)	29.65	56.30	57.10	-
Tailem Bend (Viterra)	16.15	-	-	-
<b>Victoria</b>				
Dooen (Viterra)	42.75	29.75	32	25
Lillimur (GrainCorp)	32.25	40.25	41.25	27.75
Underbool (GrainCorp)	34.25	46.50	45.50	-
Werrimull (Viterra)	37.29	54.25	54	-

Source: GTA 2019/20 Location Differentials; and Viterra 2019/20 Export Select rates.

Notes: As noted above GTA uses Viterra's Export Select freight rates to determine Location Differentials where available.

## ACCC draft view on SA catchment areas

Consistent with the above analysis the ACCC considers that, amongst other factors, the location where grain is grown relates to the port terminal facility to which that grain is economically advantaged to move to. The ACCC considers that port terminal facilities typically source grain from the regions set out below:

- **Adelaide:** The Adelaide region appears to encompass a large area that can extend from the Mid and Upper North regions of SA down to the Victorian-SA border. It seems unlikely that grain from the Yorke Peninsula moves in large quantities to Adelaide for export.
- **Lucky Bay:** Although operations have only recently commenced it appears that Lucky Bay's catchment area is predominantly located on the Eastern Eyre Peninsula (an area traditionally advantaged to Port Lincoln), with the potential to compete for some grain in the Lower and Western Eyre Peninsula.
- **Port Giles:** Port Giles appears to source the majority of its grain from the Yorke Peninsula.
- **Port Lincoln:** Port Lincoln has traditionally sourced grain from the Lower and Eastern Eyre Peninsula, as well as some areas of the Western Eyre Peninsula. T-Ports' Lucky Bay facility seems likely to compete for grain with Port Lincoln to on the Eastern Eyre Peninsula.
- **Thevenard:** Thevenard is the most remote facility and appears to source most of its grain from the northern area of the Western Eyre Peninsula.
- **Wallaroo:** Wallaroo's catchment area appears to extend from the Yorke Peninsula to the Upper and (to a lesser extent) Mid North regions, where it competes for grain with port terminal facilities at Adelaide.

Furthermore, the ACCC notes Viterra's statement that:

*...if the ACCC continues to adopt the view that catchment zones exist to some extent, then it must recognise that the boundaries of these "zones" are no longer fixed and are influenced by market conditions within South Australia, and more broadly within Australia and overseas.<sup>270</sup>*

The ACCC considers that catchment areas do not necessarily have fixed boundaries. Catchment areas can, at times, be relatively flexible and influenced by a range of factors, which themselves affect the profitability of a trade. However the ACCC considers that transport costs, and therefore distance to port, remain a materially relevant factor when deciding where to sell grain. The ACCC's draft view therefore is that catchment areas remain an important and relevant concept to the assessment of an exemption application under the Code.

The ACCC acknowledges that the 2018-19 and 2019-20 shipping years, where large quantities of grain were transported interstate from SA to meet domestic demand on the east coast, are prominent examples of situations where non-typical market conditions resulted in it becoming feasible for grain to move significantly beyond traditional catchment areas.

The ACCC also acknowledges that grain can move outside traditional catchment areas in more typical seasons in response to a variety of factors, such as capacity constraints at certain port terminal facilities. However, with the exception of circumstances where grain is located within two catchment areas, or close to alternate catchment areas, instances of grain moving outside traditional catchment areas are likely to be limited to unusual market conditions.

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<sup>270</sup> Viterra, *Response to 14/11/19 information request 2020 - Question 9 – Catchment zones*, 13 January 2020, p. 5.

### 3.3. Containerised exports and domestic demand

The ACCC considers the domestic and container markets to be relevant to its consideration of the level of competition faced by bulk grain export port terminal facilities.

The ACCC notes that SA has the smallest domestic and container markets out of all states in Australia.

However, in their exemption application Viterra stated that both the container and domestic market provide a competitive constraint on Viterra:

*Viterra considers that container grain exports compete with bulk grain exports, and therefore act as a competitive constraint to bulk grain port terminal service providers. In addition, the supply of grain to domestic customers is as a competitive constraint on bulk grain port terminal service providers.<sup>271</sup>*

#### 3.3.1. Containerised exports

Exports of grain can be either in bulk or in containers. The ACCC does not consider containerised grain exports to be a perfect substitute for bulk grain exports. However containerised exports may provide a viable alternative export path for some growing regions, niche and high quality products, or for particular destinations.

SA has the smallest containerised grain exporter market in Australia. On average SA exports 300 000 tonnes of grain per annum via containers, which represents only 4 per cent of SA's total grain production. This is significantly below the 8 per cent national average for grain exported via the container market.

As shown below in table 3.5 the vast majority (94 per cent) of containerised grain in SA is exported from Port Adelaide.

**Table 3.5: Location of containerised exports out of SA (mt)**

	2014-15	2015-16	2016-17	2017-18	2018-19	Total
Port Adelaide	0.14	0.11	0.37	0.37	0.45	1.43
Port Giles	0.01	0	0	0	0	0.01
Port Lincoln	0	0	<0.01	<0.01	0.02	0.03
Thevenard	0.04	0	0	0	0	0.04
Wallaroo	0	0	0	0	0.01	0.01
<b>Grand Total</b>	<b>0.20</b>	<b>0.11</b>	<b>0.37</b>	<b>0.37</b>	<b>0.47</b>	<b>1.52</b>

Source: ACF, Export report.

In response to Viterra's exemption application several stakeholders submitted that containerised exports provide a competitive constraint on Viterra's port terminal operations.

PGA of WA submitted that both container and domestic markets provide a competitive constraint on Viterra's operations:

*Viterra is already subject to competition at Port Adelaide from containerised exports and a bulk ship-loader, but also to domestic grain movements from competitors' sites and directly from on-farm storages.<sup>272</sup>*

Similarly the SAFC submitted that containerised exports represent a competitive constraint and do not have capacity restrictions like bulk exports, though they acknowledged that containerised exports are available only out of Port Adelaide:

<sup>271</sup> Viterra, *Exemption Application 2019*, 2 July 2019, p. 32.

<sup>272</sup> PGA of WA submission, 3 September 2019, p. 1.

*Containerised grain exports also offer an alternative export channel, with only location, not capacity restrictions (i.e. only available via Pt Adelaide only).<sup>273</sup>*

In contrast GPSA submitted that container exports provide only a limited constraint on Viterra:

*GPSA does not support the assertion that the limited volume of grain exported in containers from South Australia presents a strong competitive constraint to bulk grain terminal services providers.<sup>274</sup>*

The ACCC considers that containerised exports provide some competitive constraint on Viterra. However the ACCC agrees with the view of some stakeholders that the level of competitive constraint imposed by containerised exports is likely to be small, and is also limited to the Port Adelaide region (see table 3.5).

The ACCC notes that of SA's total exports, on average only 5.3 per cent of grain has been exported via containers since the 2014-15 season (see table 3.6 below).

Table 3.6 shows a significant increase in the proportion of container usage for 2018-19, however as seen this is due to the significantly reduced bulk export volumes across SA (which fell by 57 per cent from the 2017-18 season) as opposed to a large increase in container exports.

**Table 3.6: Portion and Volume of Containerised and Bulk Exports in SA**

	Proportion of Bulk exports (%)	Proportion of Container exports (%)	Bulk (mt)	Container (mt)	Total (mt)
<b>2014-15</b>	96.7%	3.3%	5.79	0.20	5.99
<b>2015-16</b>	97.9%	2.1%	5.12	0.11	5.23
<b>2016-17</b>	95.6%	4.4%	8.05	0.37	8.42
<b>2017-18</b>	94.0%	6.0%	5.89	0.37	6.26
<b>2018-19</b>	84.3%	15.7%	2.54	0.47	3.01
<b>Avg (%) / Total (mt)</b>	94.7%	5.3%	27.39	1.52	28.92

Source: PTSPs loading statements; ACF Shipping Stem and Market Share Reports; and ACF Export Reports.

As previously mentioned the vast majority of SA's containerised grain is exported out of Port Adelaide. Consequently, containerised exports are considered against bulk exports from Viterra's IHB and OHB facilities as in table 3.7 below.

Table 3.7 shows that despite SA containerised exports almost exclusively coming out of Port Adelaide they still appear to only represent a limited competitive constraint on Viterra's operations at Port Adelaide. Specifically, since the 2014-15 season IHB and OHB have, on average, combined to export 1.82 million tonnes of grain in bulk, compared to an average of 286 000 tonnes of (Port Adelaide) containerised exports

<sup>273</sup> SAFC submission, 6 September 2019, p. 2.

<sup>274</sup> GPSA submission, 27 September 2019, p. 4.

**Table 3.7: Port Adelaide container exports compared to Viterra IHB and OHB bulk exports**

	Portion of bulk exports	Portion of container exports	IHB and OHB bulk exports (mt)	Container exports (mt)	Total exports (mt)
<b>2014-15</b>	94.0%	6.0%	2.20	0.14	2.34
<b>2015-16</b>	93.6%	6.4%	1.60	0.11	1.71
<b>2016-17</b>	88.0%	12.0%	2.69	0.37	3.05
<b>2017-18</b>	86.5%	13.5%	2.36	0.37	2.73
<b>2018-19</b>	35.0%	65.0%	0.24	0.45	0.69
<b>Avg %/ Total mt</b>	86.4%	13.6%	9.09	1.43	10.52

Source: PTSP loading statements; ACF Shipping Stem and Market Share Reports; and ACF Export Reports.

Notes: Table 3.7 does not include data from third party Port Adelaide PTSPs.

### 3.3.2. Domestic demand

The ACCC notes that domestic demand has the potential to affect the amount of grain that is available for export.

The ACCC understands that Australia’s domestic markets are generally considered within the industry to have ‘first call’ on grain, with the amount of grain remaining after demand in domestic markets has been satisfied often referred to as the ‘exportable surplus’.

The ACCC notes that the movement of grain to satisfy domestic demand is not regulated under the Code and that the domestic market likely offers a reliable and stable source of demand for grain. The supply of grain to the domestic market is also likely to involve lower supply chain costs (relative to export markets) making it a relatively attractive (but limited) option that generally leaves a surplus of grain to move to export markets. However supply side conditions, notably the growing conditions on the east coast (or elsewhere), can have a significant effect on the stability of domestic demand.

As previously noted, SA has the lowest domestic demand for bulk grain of any mainland Australian state (see figure 3.7 below).<sup>275</sup> On average SA consumes 1.2 million tonnes of grain per season domestically. This represents 16 per cent of SA’s total production. In comparison at the national level Australia consumes 32 per cent of the grain it produces.

The ACCC considers SA domestic consumption, which has varied between 1.11 million tonnes and 1.24 million tonnes per annum since 2014-15, to be relatively stable (see figure 3.7).

T-Ports submitted that SA has a relatively fixed volume of domestic demand, and that this does not provide a competitive constraint to the SA bulk export market:

*T-Ports believes the domestic market / grain flows from South Australia are a relatively fixed volume, and do not provide a competitive constraint on South Australia’s bulk export market to date nor in the longer term.*<sup>276</sup>

In addition, GPSA submitted that growers on the Eyre Peninsula have limited access to the domestic market:

*...on the Eyre Peninsula, where Viterra is the sole port terminal operator servicing the region and growers have limited access to the domestic market.*<sup>277</sup>

<sup>275</sup> ACF, Supply and Demand report.

<sup>276</sup> T-Ports supplementary submission, 19 June 2020, p. 3.

ESCOSA in its 2018 inquiry also contended that the Eyre Peninsula is largely confined to the export market:

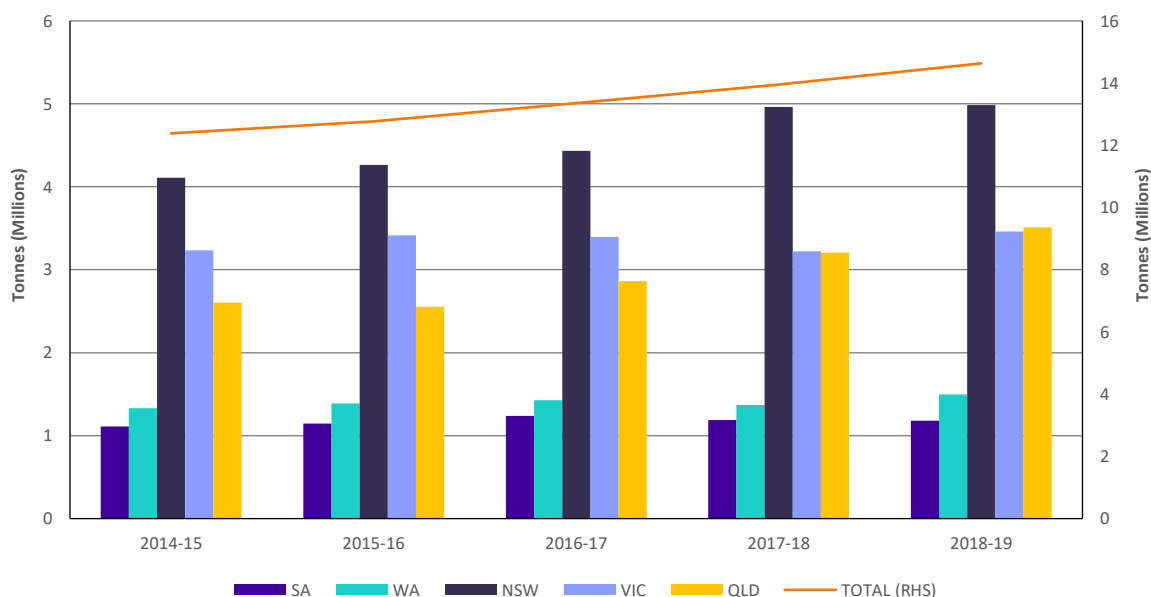
*Further, eastern South Australia has limited access to the domestic bulk grain market whereas the Eyre Peninsula, given its location and an unconnected rail system, is largely confined to the export market.<sup>278</sup>*

As discussed in section 3.2.2 the ACCC considers there is limited interaction between the Eyre Peninsula and eastern SA in terms of grain movements. In addition the ACCC notes that PIRSA estimates that on average 2.48 million tonnes of grain is produced on the Eyre Peninsula each season.<sup>279</sup> Given that on average 2.18 million tonnes of grain is shipped via Viterra’s Port Lincoln and Thevenard facilities each season, this suggests that only a small amount of grain grown on the Eyre Peninsula is supplied to the SA domestic market.

As such, the ACCC considers that the majority of domestic consumption in SA occurs within the east of the state.

The ACCC also notes T-Ports’ above comments that SA domestic demand does not place a competitive constraint on the bulk export market. As previously noted, the ACCC understands that in practice grain is typically viewed as moving to the domestic market in the first instance, with the remaining surplus then being available for export. The ACCC is inclined to consider that SA’s domestic market likely provides a degree of competitive constraint to the bulk export market. However, given the SA domestic market is small this competitive constraint is likely to be limited, and is not expected to provide a constraint on all SA grain (given the large exportable surplus that typically exists in SA). The level of competitive constraint imposed in relation to the export of bulk grain may also depend on factors particular to the domestic demand, such as the level of demand for certain grain types and/or the substitutability of different grains.

**Figure 3.7: Domestic grain consumption across Australia**



Source: ACF, Supply and Demand report.

<sup>277</sup> GPSA submission, 27 September 2019, pp. 3-4.

<sup>278</sup> ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report*, December 2018, p. 43, fn. 136.

<sup>279</sup> Data between, and inclusive of, the 2012-13 and 2018-19 seasons.

In addition to domestic consumption in SA, domestic markets in other states have the potential to competitively constrain bulk export facilities in SA in certain circumstances. For example the recent east coast drought resulted in large volumes of grain moving towards the east coast from SA (and WA) via rail services and coastal shipments. The resulting effect of the increased need for grain along the east coast provided a strong competitive constraint to the bulk export market during that time.

Viterra submitted that drought-related market conditions will become a more common occurrence due to the impact of climate change:

*In 2018-19 and 2019-20, grain moved to the east coast in large quantities due to drought conditions. This is not a unique or “shock” market event. Droughts and climate-related events are becoming increasingly regular in Australia and it is likely that the domestic market will continue to be affected by these in the coming years.<sup>280</sup>*

Viterra also submitted that the drought has established supply chains with the east coast, which will mean grain is more readily able to move east in future seasons:

*In addition, grain will more readily be able to be moved towards the East Coast from both South Australia and Canada than prior to 2018-19. This is because of the development of new logistics knowhow and relationships to move grain to the East Coast from these areas.<sup>281</sup>*

In contrast, T-Ports submitted that the 2018-19 season represented highly unusual market conditions, and that any new resulting supply chains do not reflect permanent market conditions:

*The 2018/19 harvest reflected an extreme market, where domestic demand in western areas of Qld and NSW could not be satisfied by local supply, and business conditions did support the transfer of grain from some SA locations, but this is not the norm.<sup>282</sup>*

*T-Ports does not believe the increase in domestic grain flows, and any resulting new supply chains, reflects a longer term trend in the market. 2018/19 was a response to a severe drought and production losses in Queensland and NSW.<sup>283</sup>*

However SAFC considered that the possibility of future droughts, and their effects, is highly uncertain:

*SAFC agrees with the ACCC analysis that ‘it is unclear that the domestic grain flows that occurred in the recent shipping season can be viewed as reflecting a longer term trend.’ While climate change suggests that droughts may become a more frequent occurrence, it is not possible to identify what the exact effects on domestic demand may be in any given year. In this season the eastern states were strongly affected and SA was not – in other droughts SA may be affected more than the eastern states; or both may be affected equally. Either of these scenarios would result in different domestic grain movements.<sup>284</sup>*

The ACCC notes that matters relating to future growing conditions and climate change are highly complex and the ACCC’s draft view is that there is insufficient evidence that the 2018-2019 season reflects a longer term trend in domestic grain movements. While noting droughts are not uncommon in Australia, at this time the ACCC is inclined to view recent east coast drought conditions, while undoubtedly significant for those affected, to be a temporary event in the context of the SA grain market. As such, the related grain movements may not reflect a long-term trend in domestic grain flows, but rather reflect the poor growing conditions along the east coast.

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<sup>280</sup> Viterra, *Response to 14/11/19 information request 2020, Question 9 – Catchment Zones*, 13 January 2020, pp. 3-4.

<sup>281</sup> Viterra, *Further Supplementary Submission on Exemption Application 2020*, 11 March 2020, p. 10.

<sup>282</sup> T-Ports submission, 26 August 2018, p. 3.

<sup>283</sup> T-Ports supplementary submission, 19 June 2020, p. 3.

<sup>284</sup> SAFC supplementary submission, 19 June 2020, p. 2.

In addition, the ACCC does not generally expect grain to move interstate in significant quantities to satisfy a state's domestic demand during seasons or circumstances where that state is readily able to meet its own needs.

The ACCC also anticipates that grain movements from SA to the east coast will likely cease in the 2020-21 season. The ACCC notes ABARES has predicted a harvest of 15.5 million tonnes of grain for NSW (11.0 million tonnes above average domestic demand), and a harvest of 3.1 million tonnes for Queensland (which is in line with their pre-drought production levels of 3.4 million tonnes, and at an aggregate level above average domestic demand of 3.0 million tonnes).<sup>285</sup>

***The ACCC welcomes views from stakeholders regarding the degree of competitive constraint that domestic consumption, both in SA and interstate, places upon Viterra's operations.***

### **3.3.3. Total competitive constraint faced by Viterra**

The ACCC acknowledges that Viterra's port terminal facilities face competition from a range of different sources. However the extent to which each of Viterra's facilities is competitively constrained, while differing across the facilities, is generally limited.

Table 3.8 shows bulk grain exports (by Viterra and third party PTSPs), container exports and domestic consumption as a proportion of the total SA grain production by season from 2014-15 to 2018-19. As shown, on average 71 per cent of the grain grown in SA has been shipped through one of Viterra's port terminal facilities during this period.

The ACCC notes that two additional third party PTSPs entered the SA market during this period, LINX (formerly Patrick) in 2015-16 and Semaphore in 2016-17.<sup>286</sup> T-Ports also began operations at its Lucky Bay facility in March 2020 season. This is expected to further increase the proportion of grain exported by third parties.

Table 3.8 also shows that domestic and container exports account for a limited amount of SA's total grain production (20 per cent combined). As such, while expected to place some competitive constraint on Viterra's port terminal facilities, the extent of this constraint is likely to be limited (on a state level). However it is noted that the domestic market is generally considered to be a stable and attractive market. As such grain generally only becomes available for export via containers or in bulk once the domestic demand has been met. As such, the domestic market likely offers limited competitive constraint for the majority of grain in SA in practice (see section 3.3.2).

While the data in table 3.8 is presented on a state-wide basis for convenience the ACCC notes that, as discussed in section 3.3.1, containerised exports from SA come almost exclusively from Port Adelaide.

The ACCC also notes that ESCOSA in its 2018 inquiry contended the Eyre Peninsula has a limited domestic market and is therefore largely reliant on the export market.<sup>287</sup> In addition

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<sup>285</sup> The ACCC notes that the shortfall of grain in a state is dependent on the specific types of grain that are demanded, however overall state production and consumption of grain can still serve as a useful indication for a general indication of how much grain can be expected to be moved interstate to certain markets.

<sup>286</sup> On 8 April 2020 LINX announced they would cease providing bulk grain export operations out of Port Adelaide. Relevantly, the ACCC notes that LINX's only export customer, Cargill, announced they would be entering the port terminal services market, and were determined an exempt status service provider on 2 July 2020. Cargill's facility is not currently operational and is awaiting the arrival of a mobile ship loader.

<sup>287</sup> ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report*, December 2018, p. 43, fn. 136



GPSA submitted that the Eyre Peninsula has a small domestic market, and that most domestic consumption in SA is located in eastern SA.<sup>288</sup>

Given the third party PTSP percentage figures in table 3.8 reflect both LINX's and Semaphore's operations at Port Adelaide,<sup>289</sup> the Adelaide and eastern region of SA likely faces greater competitive constraints than other areas of SA.

In particular, given there is no container market and only a limited domestic market on the Eyre Peninsula, T-Ports' Lucky Bay facility will likely be the most material competitive constraint to Viterra on the Eyre Peninsula. The extent to which each port terminal is considered to be competitively constrained is discussed in more detail in chapter 4.

The ACCC also notes that the percentage figures in table 3.8 do not add up to 100 per cent for each shipping season. This is because the domestic consumption figures do not include grain that has been transferred interstate for domestic use. That is, the domestic consumption figures only include SA domestic consumption, and do not include grain grown in SA that was subsequently transported to the east coast. This is particularly relevant to the 2018-19 season where bulk exports, containerised exports and SA domestic consumption accounted for only 78 per cent of grain usage, with the remaining grain either being kept in storage or sent interstate. Grain may also be put in storage from one season to the next season.

**Table 3.8: South Australia grain usage 2014-15 to 2018-19**

	2014-15	2015-16	2016-17	2017-18	2018-19	Average
Total Production (mt)	7.44	6.10	10.66	7.02	5.28	7.30
Bulk exports – Viterra	78%	81%	68%	77%	47%	71%
Bulk exports – third party PTSPs	0%	3%	7%	7%	1%	4%
SA Domestic consumption	15%	19%	12%	17%	22%	16%
Container export	3%	2%	3%	5%	9%	4%

Source: ABARES, State data underpinning: Australia crop report: September 2020 No. 195; PTSP loading statements; ACF Shipping Stem and Market Share Reports; ACF, Export Reports; and ACF, Supply and Demand Reports.

Notes: Percentages do not add up to 100 per cent as grain may be: transferred interstate for domestic use (which is not captured in the above domestic row); and/or kept in storage for subsequent seasons.

<sup>288</sup> GPSA submission, 27 September 2019, pp 3-4.

<sup>289</sup> LINX and Semaphore entered the PTSP market in the 2015-16 and 2016-17 seasons respectively.

## 4. ACCC's draft exemption assessment of Viterra's South Australian port terminals

The ACCC's draft assessment of whether it should determine under subclause 5(2) of the Code that Viterra is an exempt service provider of none, some or all of its port terminal facilities is set out in this chapter.

In making a determination under subclause 5(2), subclause 5(3) provides that the ACCC must have regard to the following matters:

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

The ACCC's draft assessment below is set out against the matters which the ACCC must have regard to in subclause 5(3)(a) to (j) of the Code.

### 4.1. Port Adelaide Inner Harbour

#### ***(a) the legitimate business interests of the port terminal service provider***

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.

The ACCC considers that an exemption will be in a PTSP's legitimate business interests when there are sound reasons why it is not necessary for the PTSP to be subject to all of the Code's obligations. For example, obligations in the Code intended to prevent a PTSP from exercising market power may not be necessary where competition already provides sufficient constraint on the PTSP's ability to exercise market power.

The ACCC considers when having regard to the legitimate business interests of the PTSP (as required under subclause 5(3)(a) of the Code), the following may be relevant:

- the ongoing commercial viability of services provided from the relevant port terminal facility

- the likely impact that greater regulation (through the application of Parts 3 to 6 of the Code) may have on any investment decisions made by the port terminal service provider
- the likely impact of the costs incurred by the service provider if it were subject to the requirements of Parts 3 to 6 of the Code, including any opportunity costs arising from having to comply with these Parts of the Code
- the likely impact of greater regulation (through the application of Parts 3 to 6 of the Code) on the service provider's ability to compete in the provision of port terminal services or other upstream and downstream markets.

The ACCC recognises that regulation imposes costs, both direct and indirect, on the regulated business. These costs also have the potential to affect the markets that the regulated business participates in, as well as in related upstream and downstream markets.

To the extent that compliance with the stricter obligations under Parts 3 to 6 of the Code results in such costs, the ACCC considers that this is appropriate to the extent necessary to ensure that the Code's purpose is achieved (i.e. ensuring that exporters of bulk wheat have fair and transparent access to port terminal services).

In circumstances where stricter regulation is unnecessary, such as where there is sufficient competition, it is appropriate and efficient to reduce those costs and the related restrictions on operational flexibility.

Viterra has submitted that an exemption from Parts 3 to 6 of the Code would be in its legitimate business interests as it would reduce the direct costs imposed on its operations:

*An exemption from Parts 3 to 6 of the Code for Viterra's port terminals would result in its regulatory costs decreasing significantly. The resources reallocated to, and the costs of responding to, requests for information by the ACCC and other regulators since the Code was introduced are extensive. These regulatory requirements have also impeded the availability of key personnel during crucial operational times.<sup>290</sup>*

CRA submitted that:

*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 [long term agreement] 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.<sup>291</sup>*

Viterra also submitted that there are significant indirect costs associated with complying with the Code, which places a burden on its operations and reduces flexibility:

*The Code—and, in particular, the strict requirements to comply with highly prescriptive port loading protocols (PLPs)—prevent Viterra from being able to meet changing market conditions and to quickly adopt efficient and flexible practices that would help it, growers and exporters make longer term investments and customer commitments.<sup>292</sup>*

*Parts 3 to 6 of the Code substantially reduce the flexibility of a non-exempt port terminal operator as it cannot quickly and readily respond to changing circumstances or exporter requests in regard*

<sup>290</sup> Viterra, *Exemption Application 2019*, 2 July 2019, pp. 1-2.

<sup>291</sup> Charles River Associates, *Charles River Associates Report on the Benefits of Code Exemption on Viterra Grain Export Terminals*, 7 November 2019, p. 25.

<sup>292</sup> Viterra, *Further Supplementary submission on Exemption Application 2020*, 11 March 2020, p. 2.

*to the allocation of capacity. These costs and limitations are more acute today than when the Code was first introduced due to its unequal application.*<sup>293</sup>

Viterra also referenced a submission made by CBH, in response to the then Department of Agriculture and Water Resources' 2018 draft Code review report, which indicated that the delays associated with regulatory approval caused significant frustration and uncertainty for exporters seeking to buy WA grain for international sales.<sup>294</sup> CBH also stated that exemption from the full application of the Code had provided significant flexibility:

*Once CBH was exempted from the Code and was no longer subject to a regulatory drawn-out approval process, the LTAs CBH subsequently negotiated created considerably enhanced access certainty and flexibility of service for export customers.*<sup>295</sup>

Stakeholders who made submissions to the ACCC's initial Issues Papers had varying views on the operational flexibility afforded to Viterra:

- Cargill submitted that Viterra is currently afforded adequate flexibility and opportunity in how it provides services under the Code.<sup>296</sup>
- GrainGrowers submitted that the Code plays an important role in relation to competition at ports and that applications for exemptions need to provide evidence that the Code places an unfair burden on their operations.<sup>297</sup>
- GPA considered that Viterra had not evidenced the impact on their legitimate business interests.<sup>298</sup>
- T-Ports submitted it accepted that compliance with the Code incurs costs for the service provider, but noted that exemptions would provide scope for Viterra to favour certain clients.<sup>299</sup>
- GPSA submitted concerns regarding the impact of the Code on SA's competitiveness, but also noted the lack of assurance around the conduct of Viterra absent full application of the Code as follows:

*The nature of the bulk wheat export industry means that the cost of any access difficulties as well as the direct costs of access will be borne by growers as reflected in the price received for their grain.*<sup>300</sup>

*Viterra's past behaviour with respect to sharing efficiencies through fees does not provide confidence that any efficiencies (though none have yet been demonstrated) from exemption will be passed on through more competitive pricing, and by extension for the benefit of growers.*<sup>301</sup>

- GPSA also indicated that it does not consider the Code to be an appropriate instrument for governing the grain export market.<sup>302</sup>

In relation to the direct costs of regulation, the ACCC recognises that the Code imposes costs on regulated businesses, and that non-exempt PTSPs likely face a higher level of compliance costs than exempt PTSPs.

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<sup>293</sup> Viterra, *Exemption Application 2019*, 2 July 2019, p. 21.

<sup>294</sup> Ibid.

<sup>295</sup> Ibid p. 23.

<sup>296</sup> Cargill submission, 6 September 2019, p. 2-3.

<sup>297</sup> GrainGrowers submission, 26 September 2019, p. 1.

<sup>298</sup> GPA submission, 4 October 2019, p. 2.

<sup>299</sup> T-Ports submission, 26 August 2019, p. 2.

<sup>300</sup> GPSA submission, 27 September 2019, p. 6.

<sup>301</sup> Ibid p. 7.

<sup>302</sup> Ibid p. 5.

While the ACCC is not in a position to assess the direct costs figure submitted by CRA (of more than \$800 000), the ACCC notes that it appears to include both the costs associated with the approval of long-term agreements as well as other 'parallel' regulatory processes.

The ACCC also considers that, in general, the compliance costs faced by a large well-established PTSP with multiple facilities are likely to be proportionally lower than those faced by a smaller PTSP or a PTSP that has recently commenced operations (i.e. on a per port basis).

However the ACCC accepts that the direct costs of regulation under the full Code are likely significant. The ACCC also notes that the then Department of Agriculture Water and Resources estimated that an exemption from Parts 3 to 6 of the Code would substantially reduce the direct costs of the Code:

*The direct costs of complying with the former access test were estimated at between \$500,000 and \$700,000 per operator per year (DAWR, 2014). The mandatory code at its introduction was estimated to impose a lower direct cost of \$360,000 per year for operators subject to the full provision of the Code and only \$20,000 per year for exempt operators.<sup>303</sup>*

In addition to direct regulatory costs, the ACCC acknowledges that Parts 3 to 6 of the Code have the potential to reduce a PTSP's flexibility to respond to its customers, imposing indirect costs. However, the ACCC notes that all PTSPs (whether exempt or otherwise) have a level of flexibility in how they provide services under the Code. For example, non-exempt PTSPs are able to:

- set prices, terms and conditions (the Code requires that these standard terms and reference prices be published, and that they include a dispute resolution mechanism, but does not stipulate what they should contain)
- negotiate prices, terms and conditions with individual access seekers that are different to published standard terms (as long as these negotiations are consistent with the good faith, non-discrimination and no hindering obligations)
- vary their capacity allocation system (with ACCC approval).

Given the above the ACCC considers that, under the existing regulatory arrangements, Viterra has a reasonable level of flexibility to set prices, terms and conditions for elevation, as well as being able to negotiate non-standard terms for different exporters.

As such, the ACCC considers that the indirect costs of regulation under the full Code primarily relate to the impacts on a PTSP's operational flexibility, and accepts that an exemption from Parts 3 to 6 of the Code can reasonably be expected to provide a PTSP with greater operational flexibility.

In considering the impact of the full application of the Code on Viterra's operational flexibility, the ACCC notes that the Code provides for Viterra to apply to the ACCC for approval to vary its capacity allocation arrangements.<sup>304</sup> The ACCC notes that Viterra has not sought to change its capacity allocation system since its initial approval in 2015. However, as quoted above, Viterra has submitted that amendments to its PLPs are unlikely to be an adequate approach to addressing its concerns around flexibility.<sup>305</sup>

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<sup>303</sup> AEGIC, *Australia's grain supply chains – costs, risks and opportunities*, October 2018, p. 35.

<sup>304</sup> Subclause 27(1) of the Code provides that a PTSP may vary its PLP. However, variations to an approved capacity allocation system must be approved by the ACCC (subclause 27(2)).

<sup>305</sup> Viterra, *Further Supplementary Submission on Exemption Application*, 11 March 2020, p. 2.

The ACCC acknowledges that variation via an approval process is unlikely to provide a PTSP with the same level of flexibility as an exemption (particularly with respect to the time required to make any changes). The ACCC also acknowledges that changes to a PTSP's PLPs are unlikely to be able to resolve all inflexibilities imposed by the current regulation, and that seeking approval for changes to PLPs also imposes additional direct costs on the regulated PTSP.

As an exempt PTSP, the ACCC expects that Viterra would face reduced direct and indirect costs, largely as a result of having greater flexibility to make changes to its capacity allocation arrangements and operations more broadly. Viterra could also be expected to be able to engage more freely in direct commercial negotiations, vary its operational rules for commercial reasons and tailor access agreements for certain customers.

The ACCC considers the removal of unnecessary regulatory obligations and costs to be in a PTSP's legitimate business interests. The ACCC also considers it is in a PTSP's legitimate business interests to promote the ongoing commercial viability of its business, and that this may involve efforts to reduce its regulatory compliance costs (or to not incur additional costs) – Viterra, an associated entity of exporter Glencore Agriculture Pty Ltd,<sup>306</sup> has an incentive to minimise costs and maximise the use of its infrastructure to provide a return to shareholders.

The ACCC also acknowledges that increased operational flexibility is in the business interests of a PTSP. However, the ACCC considers that such business interests will not be 'legitimate' business interests if they involve PTSPs preventing access seekers from obtaining fair and transparent access to port terminal services. As such operational flexibility is to be balanced against the extent to which, in the absence of Parts 3 to 6 of the Code, there are other constraints on the exercise of any market power in the provision of port terminal services.

While the ACCC considers that Viterra has a level of flexibility to manage its legitimate business interests in relation to its IHB facility under the existing regulatory arrangements, in an environment where Viterra faces significant competition the increased flexibility resulting from an exemption would allow Viterra to compete more vigorously. The ACCC also notes the potential for benefits to flow to other parties, such as third party exporters and growers, in these circumstances.

The ACCC has also considered the effect that exempting some facilities and not others may have on Viterra's legitimate business interests. The ACCC acknowledges the potential for additional administrative and/or operational requirements as a result of Viterra having to manage facilities under different levels of regulation under the Code. However, the ACCC considers it reasonable to expect that the benefits of an exemption(s) at some facilities and not others would generally exceed the cost of any additional requirements arising from differing levels of regulation to their facilities.

As such, the ACCC's draft view is that an exemption in respect of IHB is in the legitimate business interests of Viterra. However the ACCC considers that Viterra's legitimate business interests must be balanced against the level of competitive constraint faced by Viterra and the other matters the ACCC must have regard to in subclause 5(3) of the Code. This includes the interests of exporters who may require access to port terminal services, as well as the public interest.

These matters are discussed in detail below.

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<sup>306</sup> Viterra, Exemption Application 2019, 2 July 2019, p. 1.

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

The ACCC considers that subclauses 5(3)(b) and (g) relate to the promotion of competition in markets, including the market for bulk wheat port terminal services as well as for upstream, downstream and related markets.

Relevant upstream and downstream markets considered by the ACCC include: the international bulk wheat export market (including how the Code impacts SA's competitiveness in this market); the grain acquisition market (where grain is acquired prior to being exported or on-sold); as well as other markets discussed in chapter 3 (such as grain storage and handling services) and the transport of grain to port.

Related markets, such as container grain exports and domestic demand for grain, are also discussed in chapter 3.

The ACCC recognises the importance of the grain industry, in particular the grain export supply chain, to the SA economy (as per below).

As such, the ACCC considers the efficient operation of the bulk grain export supply chain, including the ability of exporters to obtain fair and transparent access to bulk grain export services, to be in the public interest.

Consistent with its consideration of this matter in previous exemption determinations, the ACCC considers the following factors are relevant when having regard to subclauses 5(3)(b) and (g):

- Whether there is a sufficient competition in the market for bulk wheat export port terminal services, such that the full application of the Code may not be required to promote competition for those services or in upstream and downstream markets.
- Whether reducing regulation will allow the port terminal service provider to better compete in upstream or downstream markets such that it would also promote competition. This consideration overlaps with the ACCC's consideration of legitimate business interest (subclause 5(3)(a), discussed above).
- Whether there is sufficient competition in upstream and downstream markets such that there is a constraint on the exercise of market power in the provision of port terminal services in the absence of Parts 3 to 6 of the Code applying.

***The competitiveness of SA's bulk wheat exports***

Viterra has submitted that the SA grain supply chain, including the grain export supply chain, is significant to the SA economy, and that the efficient operation of the supply chain is therefore in the public interest. Viterra considers that exemption/s would contribute to the efficient operation of the supply chain, and therefore is in the public interest:

*Viterra considers that it is in the public interest for the ACCC to provide these exemptions. The grain industry is a significant contributor to the South Australian economy. The 2017/18 harvest produced 6.94 million tonnes of grain in South Australia worth an estimated \$1.7 billion at the farm gate, with about 5.94 million tonnes (86% of the harvest) exported. The ability of growers to export their product is a significant contributor to the South Australian rural and regional economies, and is dependent upon efficiencies to cover narrowing margins in a global market which is highly*

*competitive and price-sensitive. Therefore, ensuring the efficient operation of the South Australian grain supply chain is in the public interest.*<sup>307</sup>

*An exemption from Parts 3 to 6 of the Code, and consequent reduction in potential regulatory distortions, will assist Viterra to engage commercially and more flexibly with third-party exporters. For example, Viterra would be better able to facilitate shipping slot trades as well as additions and changes to its shipping stem at short notice. This greater flexibility would enable Viterra to meet the different needs of its customers and therefore drive higher utilisation. This would facilitate the efficient allocation and use of port terminal infrastructure and the competitiveness of South Australian grain in global markets.*<sup>308</sup>

GPSA submitted that Viterra's dominant position in the SA grain export supply chain, and SA's dependence on grain exports, is of direct relevance when considering the public interest:

*An assessment of the public interest is critical to the determination of this application. GPSA submits that the public interest must be assessed with reference to grain producers based on two significant factors:*

- 1. Viterra's dominant position in South Australia's export grain supply chain and its ability to trade into end-user markets, and*
- 2. South Australia's dependence on the export grain supply chain.*<sup>309</sup>

In addition, GPA submitted that an exemption will be in the public interest only if returns are passed onto growers:

*GPA argue once again that the public interest in this case should be purely whether or not granting an exemption will encourage innovation and reduce prices to growers thereby facilitating trade of grain.*<sup>310</sup>

Relatedly, concerns have also been raised in regard to the impact of the Code on SA's international export competitiveness. Viterra has submitted that it faces competition from other Australian states as well as from international markets:

*The acquisition and trading of grain is undertaken globally, and South Australia, which accounts for less than 3% of global volume, is a price taker. South Australia face vigorous competition from other Australian states, Canada, the United States of America, France, Germany, Russia, Ukraine and Argentina to supply grain.*<sup>311</sup>

A number of stakeholders also submitted that the uneven application of the Code affects SA's competitiveness in global markets:

- SAFC submitted that while it understands the Code is intended to ensure there is no localised anti-competitive behaviour, it is perversely affecting SA's competitiveness against national and international markets.<sup>312</sup>
- GPSA submitted concerns regarding the impact of the Code on SA's competitiveness, but also noted the lack of assurance around the conduct of Viterra absent full application of the Code. GPSA also indicated that it does not consider the Code to be an appropriate instrument for governing the grain export market.<sup>313</sup>

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<sup>307</sup> Viterra, *Exemption Application 2019*, 2 July 2019, p. 6.

<sup>308</sup> *Ibid* p. 2.

<sup>309</sup> GPSA submission, 27 September 2019, p. 5.

<sup>310</sup> GPA submission, 4 October 2019, p. 2.

<sup>311</sup> Viterra, *Exemption Application 2019*, 2 July 2019, p. 4.

<sup>312</sup> SAFC supplementary submission, 19 June 2020, p. 1.

<sup>313</sup> GPSA submission, 27 September 2019, p. 5.



- Mr Geoff Ryan (Strategic Site Committee Chair<sup>314</sup>) submitted that an exemption from the Code for Viterra would reduce regulatory compliance costs and therefore improve the competitiveness of SA in the global market.<sup>315</sup>

The ACCC views issues relating to SA's competitiveness in the global market relevant to its consideration of the public interest, as well as competition in upstream and downstream markets.

In considering the public interest, the ACCC acknowledges that the Code imposes costs on Viterra and that, by extension, there is the potential to affect the SA grain industry more broadly. However the ACCC considers that any impacts need to be balanced against a range of other factors.

In particular, the ACCC notes that Viterra holds significant market power in upstream markets and could, in the absence of sufficient competitive constraints and/or appropriate regulation, provide favourable access to certain exporters. The ACCC considers that this has the potential to affect the ability of the SA grain industry (i.e. exporters and growers) to access international grain markets on a competitive basis. The ACCC notes that concerns regarding favourable access were raised in submissions by a number of stakeholders.<sup>316</sup>

As discussed in section 2.1.6, the ACCC accepts that Viterra (and the SA wheat industry more broadly) is a price taker in international markets. However the ACCC considers that, as an associated entity of an exporter (Glencore), Viterra's incentive is to maximise profit in order to generate a return to shareholders.

The ACCC notes that a PTSP can maximise its profits in a number of ways, including by reducing supply chain costs or by raising the price of port terminal prices (or in the case of a vertically integrated PTSP, by increasing upcountry or other service prices). In addition, in the absence of sufficient competitive constraints, a vertically integrated PTSP may seek to maximise its profits by providing favourable access to certain exporters (in particular its associated entity exporter).

The ACCC also notes ESCOSA's view that it appears Viterra has chosen not to share supply chain efficiencies with industry participants and that Viterra's earnings are at the "...upper end of what might be expected for a firm with Viterra's level of risk".<sup>317</sup> In circumstances where Viterra (or any PTSP) is able to prevent cost savings being passed onto other industry participants, these industry participants may reduce their upstream investments, or may exit the market, and/or focus their operations in markets where cost savings are passed on by the PTSP. This has the potential to harm competition in both upstream and port terminal service markets, further reducing incentives to improve supply chain efficiency and potentially affecting SA's position in international markets.

Given the above, the ACCC considers that Viterra faces incentives to maximise profits which, among other things, includes having the incentive to minimise supply chain costs as a result of competition in international markets. However, while acknowledging that the costs of business for PTSPs (or exporters and growers) have not been considered in detail as part of this assessment process, the ACCC considers that it is not clear that any cost savings will necessarily be passed on to other SA market participants in circumstances where Viterra retains significant market power at port.

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<sup>314</sup> Strategic Site Committees have been established by Viterra to act as a communication point between growers and Viterra regarding issues in local areas: <http://viterra.com.au/index.php/sscc/>.

<sup>315</sup> Mr Geoff Ryan submission, 18 June 2020, p. 1.

<sup>316</sup> Cargill, T-Ports, GPSA, GPA, and GrainGrowers all submitted that Viterra holds significant market power and has an incentive to discriminate in relation to access.

<sup>317</sup> ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report*, December 2018, p. 4.

As such, the ACCC's draft view is that, in the absence of sufficient competitive constraints, an exemption is unlikely to assist in improving SA's position in international bulk wheat markets, when considering all industry participants. The ACCC's draft view of the level of competitive constraint Viterra's IHB facility is subject to is discussed in detail below.

### ***Competition in bulk wheat export operations***

The ACCC notes that there is currently a total of four port terminal facilities located at Port Adelaide: two Viterra-owned facilities, (the smaller IHB facility and the larger deep water OHB facility), and two third party facilities (Cargill's Berth 20 Inner Harbour facility and Semaphore's Osborne facility).

While the ACCC has previously recognised increasing competition between port terminal services at Port Adelaide,<sup>318</sup> overall the ACCC continues to view Viterra as the dominant PTSP at Port Adelaide.<sup>319</sup>

The ACCC also considers it likely that Viterra will remain the dominant provider of port terminal services at Port Adelaide for the foreseeable future: Viterra's port terminal facilities at Port Adelaide are significantly larger than the alternate facilities, and Viterra is an associated entity of SA's largest exporter (Glencore). Given this relationship it appears unlikely that Glencore would transfer significant volumes of bulk grain exports to alternative suppliers of port terminal services at Port Adelaide. It is also likely that Viterra, as part of a vertically-integrated PTSP/exporter, has an incentive to favour Glencore over other exporters at its IHB facility (particularly during peak periods, when capacity is constrained and favourable grain prices are available in international markets).

In contrast however, the ACCC notes that Viterra's incentive to maximise profits (in order to provide a return to shareholders) likely also provides an incentive for it to ensure significant throughput at its IHB facility. This is because high levels of throughput are typically needed to ensure the viability of large conventional port terminal facilities, which have relatively high fixed-costs (particularly when compared to facilities that use mobile ship loaders). However the ACCC also notes that it is not clear that this incentive will necessarily promote access for smaller third party exporters, relative to larger exporters.

On balance the ACCC's draft view is that Viterra's IHB facility is likely sufficiently competitively constrained to support an exemption from Parts 3 to 6 of the Code. In forming this view, the ACCC considers it important to note that IHB faces competition from a number of sources in addition to other PTSPs at Port Adelaide. This includes containerised bulk grain exports and domestic demand for grain, as well as (to a lesser extent) competing PTSPs in Victoria.

The ACCC's draft view is based on the analysis of the port terminal services markets presented in chapter 2, and the consideration of upcountry and related markets presented in chapter 3. These indicate the following:

- **IHB is competitively constrained by third party PTSPs at Port Adelaide:** While the ACCC considers Viterra's IHB and OHB facilities to be significantly larger than alternate Port Adelaide PTSPs, the ACCC acknowledges that Cargill's and Semaphore's facilities place (or will place) a level of competitive constraint on Viterra's facilities.<sup>320</sup> However the level of constraint is limited by the comparative difference in the scale of operations: since the 2016-17 season (i.e. the first shipping

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<sup>318</sup> See: [ACCC final determination – Port Adelaide wheat code exemption assessment – Cargill Australia Limited](#).

<sup>319</sup> Average shipment figures at Port Adelaide excluding the 2018-19 (drought affected) season are: IHB 0.72mt, OHB 1.49mt, LINX 0.28mt, and Semaphore 0.32mt.

<sup>320</sup> Both Cargill's and Semaphore's Port Adelaide facilities are exempt from Parts 3 to 6 of the Code.

season both LINX<sup>321</sup> and Semaphore were operational at Port Adelaide) Viterra has performed 80 per cent of all bulk export shipments out of Port Adelaide (25 per cent from IHB, and 55 per cent from OHB). In addition, the extent to which mobile ship loader facilities provide a reliable and ongoing competitive constraint remains unclear: for example, recent events suggest that such operations are less likely to operate during low production seasons. However, the ACCC also acknowledges this may result in mobile ship loaders providing a form of flexible and responsive competition.

- **IHB are competitively constrained by Victorian markets in certain regions:** The ACCC considers that Viterra's IHB facility also faces competitive constraints near the SA and Victorian border from markets in Victoria (e.g. container, domestic and bulk grain export markets). In forming this draft view the ACCC notes that GTA's Location Differentials indicate that grain can be economically advantaged to travel to facilities located in Victoria over facilities located at Port Adelaide; sites closer to the south of the Victorian and SA border appear to be advantaged to Victoria, while sites on the northern border appear to be advantaged to Port Adelaide. The ACCC also notes that T-Ports submitted that Viterra faces minor competition from Victorian PTSPs along the SA-Victorian border.<sup>322</sup>
- **IHB's catchment area overlaps with third party (and exempt) PTSPs:** Given that Viterra's IHB and OHB facilities and Cargill's and Semaphore's facilities are all located at Port Adelaide the ACCC considers that these PTSPs can reasonably be expected to compete for grain within the same general catchment area. However the ACCC notes that catchment areas can be influenced by the mode of transport to port (amongst a range of other factors). As noted in section 3.1.2 rail is generally considered more efficient than road when transporting grain located over 200 km from port. Given that Viterra's IHB facility is able to facilitate rail receivals, whereas Cargill's and Semaphore's facilities can only receive grain via road services, the ACCC considers that IHB has an advantage in drawing grain located further from port than either Cargill's or Semaphore's facilities.<sup>323</sup>
- **IHB's infrastructure:** The ACCC considers that Viterra's IHB facility has several infrastructure advantages over third party PTSPs at Port Adelaide:
  - Viterra's IHB facility has a significant amount of at-port storage (366 500 tonnes) and is not reliant on a Just in Time process.<sup>324</sup> The ACCC therefore considers that IHB has greater flexibility in managing its operations compared to Semaphore's and Cargill's facilities (which have 16 500 tonnes and no at-port storage respectively). There also appears to be potential for Viterra to use the storage at its IHB facility at support operations at its OHB facility (see section 2.1).
  - In addition to being able to receive grain via rail (which neither Cargill's nor Semaphore's facilities are able to do), the rate at which IHB can receive grain from rail receivals is higher than the rate at which Cargill's and Semaphore's facilities can receive road receivals (as shown in table 2.1 IHB can receive grain via rail at 1 600 tonnes per hour, whereas Cargill's and Semaphore's

<sup>321</sup> Given Cargill was LINX's sole customer, the ACCC considers it reasonable to expect that Cargill will likely perform a similar amount of bulk exports through its Cargill facility as was performed through LINX.

<sup>322</sup> T-Ports submission, 26 August 2018, p. 3.

<sup>323</sup> The ACCC acknowledges that catchment areas are potentially fluid and that grain can and will move to where it is most economically advantaged. However the ACCC continues to consider distance to be an important factor in determining the likely movement of grain.

<sup>324</sup> Viterra, *Attachment 1 – Response to 14/11/19 information request 2020 – Questions 1 and 2 – Viterra port terminal facility features*, 13 February 2020.

facilities can receive grain via road at 1 000 tonnes per hour and 375 tonnes per hour respectively).<sup>325</sup>

- **Spare port terminal facility capacity:** As noted in section 2.2, there appears to be some degree of capacity constraint at Viterra's IHB facility, both on a peak period and annual basis. The ACCC generally considers that a vertically integrated PTSP faces incentives to favour certain exporters (such as an associated entity) in circumstances when supply is constrained. However the ACCC notes that the presence of third party PTSPs at Port Adelaide (and Victoria to a lesser extent), as well as the container and domestic markets (discussed below) likely serves to limit Viterra's incentive to offer favourable or discriminatory access to certain exporters.
- **Proposed port terminal facilities:** The ACCC notes that T-Ports has proposed building a port terminal facility at Wallaroo. This facility would compete most closely with Viterra's Wallaroo facility, though the catchment area of T-Ports' Wallaroo facility would also likely overlap with that of PTSPs located at Port Adelaide to some extent. It is therefore likely the facility would compete for the same grain as Viterra's IHB facility (in certain regions). In addition, ADM has also recently completed a small number of domestic coastal shipments out of Port Pirie: however the ACCC understands that ADM does not have appropriate exporter accreditation to provide export-related services at this time.<sup>326</sup> While the ACCC considers that the threat of entry by other PTSPs can be expected to place some level of competitive constraint on Viterra (to the extent it is considered credible), the ACCC generally does not consider the threat of competition to be as effective as actual competition. Proposed port terminal facilities are discussed further below in relation to subclauses 5(3)(e) and (f).

### ***Competition in upstream and downstream markets***

The ACCC has considered whether the level of competition in upcountry storage, handling, and transport markets might provide Viterra with market power. Absent the full application of the Code, the potential exists for any market power in these markets to affect competition in the port terminal services market by, for example, limiting the ability of third party exporters to participate in upstream grain acquisition.

In addition to upstream and downstream markets, the ACCC also considered the potential for related markets, such as container exports and domestic demand for grain, to affect the promotion of competition in bulk wheat port terminal services.

As discussed in chapter 3, the ACCC's draft view is that the level of competition from third party upcountry storage sites differs by region, with more alternatives appearing to be available in the Port Adelaide region (see figure 3.1). Nonetheless, the ACCC notes that Viterra still likely owns the majority of grain storage in the Port Adelaide region. Furthermore, Viterra's bundled-service offering (Export Select) also has the potential to interact with Viterra's position in upcountry markets and dominant position at port to affect competition.

As discussed in section 3.2 the ACCC considers the Port Adelaide catchment area likely encompasses a large region which stretches from the Lower, Mid and Upper North regions down to the Victorian and SA border (i.e. south-east SA):

- **Lower, Mid and Upper North regions:** the greatest number of third party upcountry storage sites are located in the Lower, Mid and Upper North regions, with Viterra expected to operate 12 out of a total of 21 upcountry sites in these regions in the

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<sup>325</sup> The ACCC notes that Viterra's OHB facility can receive grain via road receipt at a rate of 800 tonnes per hour.

<sup>326</sup> The ACCC notes there has been some media reporting that suggests ADM could commence export operations from its Port Pirie facility: <https://www.graincentral.com/logistics/port-pirie-south-to-open-as-first-australian-adm-bulk-grain-site/>.

2020-21 season. The ACCC notes that determining the extent to which third party storage sites are likely to competitively constrain Viterra's services is difficult to assess due to the lack of information around the size of these non-Viterra sites. However the ACCC understands that most of these third party sites are relatively small compared to Viterra's facilities, and deliver predominantly to domestic and container markets.

- **South-east SA:** Viterra likely owns the majority of storage in south-east SA. Viterra is expected to operate 12 out of a total of 16 sites for the 2020-21 season.
- **On-farm storage:** The ACCC understands that the majority of SA's estimated 1 million tonnes of on-farm storage is located in eastern SA, and is therefore expected to offer a competitive alternative to Viterra's upcountry network in this area.

The ACCC acknowledges there appear to be credible alternative storage options for grain grown within the Port Adelaide catchment area. However Viterra still appears to be the dominant storage provider in this area, and the ACCC considers that there is potential for Viterra's position upcountry to interact with its dominant position at port to affect competition.

Both road and rail options are available to Viterra's IHB facility at Port Adelaide. However third party PTSPs at Port Adelaide (Cargill and Semaphore) do not have rail receipt facilities. The ACCC notes that the relatively shorter distances to port at Port Adelaide (and in SA more broadly) promote the significant use of road transport as a viable alternative to rail in SA. However, as discussed in section 3.1.2, rail still appears to offer freight advantages when sourcing grain located further away from port. The ACCC considers that this means Viterra likely has a freight advantage in drawing grain from further away from Adelaide. Furthermore, despite the provision of road freight typically being more competitive than rail services, Viterra's tendering process may mean that relatively few road providers perform the majority of bulk grain services.

The ACCC also considers that PTSPs may be competitively constrained by the local domestic market. While the ACCC does not receive data on where grain is processed or consumed within a state, the ACCC notes that SA as a whole has the smallest domestic market of any mainland state in Australia (at 1.2 million tonnes of grain per annum).<sup>327</sup> However, as discussed in section 3.3.2, the ACCC understands that SA's domestic consumption is largely located within the east of the state, and therefore primarily draws grain from the same catchment area as Viterra's IHB facility.

The ACCC notes that SA's domestic consumption has been fairly constant since the 2014-15 season.<sup>328</sup> The domestic market also generally offers a reliable and stable source of demand for grain, and typically involves lower supply chain costs (relative to export markets) making it a relatively attractive (but limited) option. As such grain typically moves to the export market once domestic market opportunities have been met. The ACCC also notes that, as demonstrated by the poor growing conditions along the east coast in recent seasons, grain can move in large quantities to meet domestic demand in other states in response to certain market conditions.

As such, the ACCC's draft view is that the local domestic market places some degree of competitive constraint on Viterra's IHB facility. However, the level of the competitive constraint imposed is limited in practice, due to the domestic market offering an attractive (but limited) option for a relatively stable amount of grain. In addition, given the differences in

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<sup>327</sup> ACCC, *Bulk grain ports monitoring report 2018-19*, December 2019, Appendix 1 – supplementary spreadsheet – tables and charts.

<sup>328</sup> SA domestic consumption has varied between 1.11 and 1.24 million tonnes per annum since the 2014-15 season.

the type of grain required for each market, the domestic market is often not directly interchangeable with the bulk export market.<sup>329</sup>

PTSPs located at Port Adelaide also face a level of competitive constraint from the container market: 94 per cent of SA's bulk grain container exports have been loaded at Port Adelaide since the 2014-15 season. However the volume of container exports in SA (and therefore Port Adelaide) is relatively small: over the same period (i.e. since 2014-15) only 286 000 tonnes of grain has been exported from Port Adelaide via container per season on average. This is significantly below the total average bulk exports of 2.1 million tonnes (with IHB and OHB accounting for 550 000 and 1.21 million tonnes respectively).

Table 4.1 below summarises the total amount of grain that has been exported, via bulk and containers, from Port Adelaide, since the 2016-17 season.

**Table 4.1: Bulk and Container exports out of Port Adelaide, 2016-17 to 2018-19**

	2016-17	2017-18	2018-19	Average (mt)	Average (%)
<b>Viterra IHB</b>	0.87	0.73	0.07	0.55	21%
<b>Viterra OHB</b>	1.82	1.64	0.17	1.21	46%
<b>Port Adelaide LINX</b>	0.42	0.24	0.00	0.22	8%
<b>Port Adelaide Semaphore</b>	0.37	0.27	0.03	0.22	8%
<b>Container exports</b>	0.37	0.37	0.47	0.40	15%
<b>Grand Total</b>	3.84	3.24	0.75	2.61	100%

Source: PTSP loading statements; ACF Shipping Stem and Market Share Reports; and ACF Export Reports.

Notes: 2016-17 was the first season there were two third party Port Adelaide PTSP's to compete with Viterra's IHB and OHB facilities.

The ACCC also notes that containerised grain exports may also not provide a direct substitute for bulk grain exports as certain destinations may prefer particular grain types or grades of grain more suited to containers: for example, the export of wheat in containers is generally more heavily weighted towards South-East Asia than bulk wheat exports.<sup>330</sup>

As such, and in addition to the relatively small volume of container exports from SA, it appears that container exports may only provide a viable alternative export path for some growing regions, niche and high quality products, or for particular destinations in practice.

***The ACCC would welcome views from stakeholders in relation to the interaction between container, domestic and bulk export markets.***

## **Conclusion**

In light of the above, the ACCC's draft view is that, on balance, there is sufficient competitive constraint on Viterra's IHB facility such that competition at port and upcountry will likely be maintained if an exemption were granted to Viterra in relation to this facility. The ACCC considers this relevant to subclauses 5(3)(b) and (g) of the Code.

<sup>329</sup> For example the domestic feed market typically demands lower protein wheat compared to, say, the overseas milling market's demand for bulk export high protein wheat.

<sup>330</sup> AEGIC, *Australia's grain supply chains – costs, risks and opportunities*, October 2018.

In reaching its draft view the ACCC notes that the operational changes Viterra will make in response to an exemption are unclear,<sup>331</sup> and that the ACCC has received limited views from third party exporters regarding Viterra's application for exemption in relation to IHB (or any other Viterra facilities).

Significantly, while the ACCC considers the competitive constraint placed upon Viterra's IHB facility by third party PTSPs (at Port Adelaide and, to a lesser extent in Victoria), the container market and domestic demand, to be limited when viewed individually, the combined effect likely imposes sufficient constraint on IHB to support an exemption.

The ACCC notes the likelihood of capacity constraints at IHB, and that Viterra likely owns the majority of upcountry storage in the Port Adelaide region (however there does appear to be credible alternatives in the Lower, Mid and Upper North regions). However the ACCC considers the level of competitive constraint is likely sufficient to ensure exporters will be provided fair and transparent access absent the application of Parts 3 to 6 of the Code in relation to Viterra's IHB facility.

While the ACCC considers that it is not clear that granting an exemption to Viterra in respect of its IHB facility would necessarily promote a significant increase in competition in the port terminal services markets and in upstream or downstream markets, the ACCC does not expect an exemption to be detrimental to competition in these markets.

Given the above the ACCC's draft view is that exempting Viterra from Parts 3 to 6 of the Code in relation to its IHB facility is likely to be in the public interest, and unlikely to be detrimental to competition in upstream and downstream markets.

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

In deciding whether to exempt a PTSP, subclause 5(3)(c) of the Code requires the ACCC to have regard to the interests of exporters who may require access to port terminal services.

The ACCC generally considers that granting an exemption will not be detrimental to the interests of exporters requiring access to port terminal services if exporters can continue to access port terminal services on a fair and transparent basis and therefore compete on their relative merits.

In forming its draft view the ACCC has therefore considered the relative bargaining power of exporters, as well as exporters' access to the relevant port terminal facility and alternative port terminal facilities.

#### **Support for smaller exporters under the Code**

The ACCC notes that CRA contends on behalf of Viterra that the Code potentially focusses too heavily on the interests of individual smaller exporters and potential new entrants, to the detriment of competition:

*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*

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<sup>331</sup> The ACCC notes that CRA has set out a range of 'Likely Changes to Viterra's protocols' (see Charles River Associates, *Charles River Associates Report on the Benefits of Code Exemption on Viterra Grain Export Terminals*, 7 November 2019, pp. 26-28).



*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.*<sup>332</sup>

The Code provides protections to exporters to ensure they are able to access Viterra’s port terminal services on fair and transparent terms. In the absence of the Code, and/or sufficient competitive alternatives, the ACCC considers that exporters (particularly smaller<sup>333</sup> or entering exporters) may have difficulty accessing the level of port terminal services they would otherwise have been able to obtain in a competitive market (particularly in circumstances where these services are primarily supplied by a dominant vertically integrated PTSP).

While the ACCC acknowledges the possibility that the Code could allow for inefficient exporters to secure access, the ACCC notes that such exporters would still have to compete for grain with other exporters. Should certain exporters only be able to secure access as a result of the Code, those exporters will only be able to compete in the SA market in the long-term to the extent they are able to compete with other exporters (i.e. offer comparable (or better) terms and conditions to growers). While the ACCC acknowledges the possibility that an exporter could be competitive with other exporters from the perspective of a grower (i.e. in relation to the terms and conditions it offers to growers) while in some way imposing higher costs on Viterra (for example due to that exporter’s operational practices), the ACCC notes that the Code does not prevent a PTSP from charging different exporters different fees or offering different terms (to the extent these fees or terms do not discriminate in favour of the PTSP itself or an associated exporter entity and/or are not for the purpose of preventing or hindering access). A PTSP’s discrimination in favour of its exporter arm, by charging higher fees to another exporter, is permissible where it reflects higher costs of providing the same service to that other exporter.

Separately the ACCC also notes the potential for smaller market participants to play an important role in promoting competition and disrupting the market.

In addition, the ACCC acknowledges that exporters’ access (whether large or small) must be balanced against a range of other factors, including the public interest in having competition in markets and the legitimate business interests of the PTSP. The ACCC also acknowledges that interests likely vary between exporters (i.e. it is not reasonable to expect that exporters’ interests are entirely uniform in nature).

In considering Viterra’s interests, the ACCC notes that Viterra has a degree of flexibility under the current level of regulation; for example, Viterra has the ability to set standard terms and prices for its services. However the ACCC acknowledges that the added operational flexibility available to an exempt PTSP (as well as the direct cost savings to a lesser extent) can reasonably be expected to allow Viterra to better respond to the needs of its customers (i.e. exporters). However the added flexibility (and cost savings) resulting from an exemption must be balanced against the potential for access to be provided on favourable terms to certain exporters, which could have a significant impact on other exporters and competition more broadly. As discussed further in relation to subclause 5(3)(d) the presence of sufficient competitive alternatives likely limits the ability of Viterra to favour certain exporters. The added flexibility associated with an exemption therefore may be appropriate.

As such the ACCC’s draft view is that, given the greater operational flexibility and the limited ability of Viterra to discriminate in the access provided to third party exporters, an exemption

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<sup>332</sup> Charles River Associates, *Charles River Associates Report on the Benefits of Code Exemption on Viterra Grain Export Terminals*, 7 November 2019, p. 23.

<sup>333</sup> The ACCC notes that in practice, while certain third party exporters may have a limited presence in relation to SA bulk grain, they are often related to large multi-national companies. As such, when referring to the size of an exporter the ACCC is referring to the size of an exporter’s presence in the SA market, specifically the volume of exports.



from Parts 3 to 6 of the Code in respect of IHB would, on balance, also be in the best interests of third party exporters.

### ***The competitiveness of SA's bulk wheat exports***

In considering the interests of exporters, the ACCC also notes that concerns have been raised in regard to the impact of the Code on the competitiveness of SA's grain exports in international markets.

As discussed in relation to subclause 5(3)(b) and (g) of the Code, Viterra has submitted that the SA grain supply chain is significant to the SA economy, and that exemptions for its facilities would contribute to the efficient operation of the supply chain.<sup>334</sup> A number of stakeholders also submitted that the uneven application of the Code affects SA's competitiveness in global markets.<sup>335</sup>

The ACCC considers that the competitiveness of SA's exports is also relevant to the interests of exporters, and that it is reasonable to expect that exporters' interests generally align with the public interest in this regard (i.e. that the international competitiveness of SA's bulk grain exports is in both the public interest and exporters' interests).

As such, the ACCC's draft view is that, given the ACCC considers Viterra's IHB facility is subject to sufficient competitive constraint, an exemption may assist in improving SA's position in international bulk grain markets. An exemption is therefore, on balance, likely in the interests of exporters in this regard.

### ***Conclusion***

Given the above, the ACCC's draft view is that an exemption from Parts 3 to 6 of the Code will be in the interests of exporters.

In reaching its draft view the ACCC notes that an exemption is expected to provide Viterra with greater flexibility to respond to their customers' needs, which the ACCC considers is in the interests of exporters.

The ACCC also considers that an exemption will ensure that unnecessary costs are not imposed upon Viterra, which, in the presence of sufficient competitive alternatives, can reasonably be expected to be passed onto other industry participants to a certain extent. Consequently, given the ACCC's draft view is that Viterra's IHB facility is subject to sufficient competitive constraints, an exemption at IHB may improve the international competitiveness of SA bulk grain exports, and is therefore in the interests of industry participants (including exporters) in this regard.

The ACCC's draft view is that the increased operational flexibility and potential for improvement in SA's competitiveness in international bulk grain markets associated with an exemption from Parts 3 to 6 of the Code in relation to IHB is in the interests of exporters.

### ***(d) the likelihood that exporters of bulk wheat will have fair and transparent access to port terminal services***

In deciding whether to exempt a PTSP subclause 5(3)(d) requires the ACCC to consider the likelihood that exporters of bulk wheat will have fair and transparent access to port terminal services.

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<sup>334</sup> Viterra, *Exemption Application 2019*, 2 July 2019, p. 2.

<sup>335</sup> See: SAFC supplementary submission, 6 September 2019, p. 1; GPSA submission, 27 September 2019, p. 5; Mr Geoff Ryan submission, 18 June 2020, p. 1.

The ACCC considers that, in circumstances where the demand for port terminal services exceeds supply (i.e. capacity at a port terminal facility is constrained), a vertically integrated PTSP will have stronger incentives to provide favourable access to certain exporters.

The ACCC notes that Viterra has acknowledged it is vertically integrated with an exporter:

*Viterra is an associated entity of an exporter, Glencore Agriculture Pty Ltd (Glencore Agriculture). However, vertical integration in and of itself is not anti-competitive and a corporation should not be subject to regulation only because of its vertical integration.*<sup>336</sup>

While the ACCC acknowledges that the complete foreclosure of access is unlikely, the ACCC considers that Viterra, as a vertically integrated PTSP, has an incentive to favour its associated entity exporter over other exporters at its facilities under certain circumstances. It is particularly likely that during periods when capacity is constrained (which typically occurs during the Australian peak shipping period when grain from the northern hemisphere is less available and premium prices can be obtained in downstream markets (i.e. international bulk wheat markets<sup>337</sup>)) Viterra faces incentives to provide favourable access to certain exporters, notably its associated entity exporter.

Conversely, the ACCC generally considers that spare capacity at its port terminal facility provides a vertically integrated PTSP with an incentive to provide access on fair and transparent terms: with a greater level of spare capacity likely providing a stronger incentive. In this regard the ACCC notes that PTSPs generally demonstrate greater flexibility in their engagement with access seekers during periods of greater spare capacity, such as in low production or export years. Under such circumstances the ACCC expects that Viterra would face incentives to facilitate third party access in order to maximise throughput at its facilities.

In considering port terminal facility capacity constraints during the peak period, the ACCC notes that it may not be economically efficient to have sufficient port terminal infrastructure to accommodate the entire annual export task within a six month window, given that this infrastructure is likely to be under-utilised for the remainder of the shipping season. While acknowledging that an exporter's preference is likely to be able to export the majority of grain within the peak period, spreading the export task across a broader timeframe (i.e. into the non-peak period) could potentially represent a more efficient outcome in relation to infrastructure investment. However the ACCC has not formed a particular view in relation to this matter as part of this assessment.

The presence of competing PTSPs, as well as the credible threat of the entry of new participants into the market, can also be expected to provide a level of competitive constraint and promote third party exporters' access to Viterra's services.

Similarly, the ability to access viable third party port terminal services is expected to increase the relative bargaining power of third party exporters and their ability to secure fair and transparent access to Viterra's port terminal facilities. In this regard, the ACCC notes that larger third party exporters (i.e. those more likely to deliver greater throughput) are likely to have a greater ability to bargain with Viterra, relative to smaller exporters.

The ACCC also considers that the expected level of throughput at an existing port terminal facility to be relevant when considering the case for an exemption. When considering the expected level of competitive constraint faced by a facility, the ACCC notes that a larger facility (i.e. facility with higher capacity) will likely need to face greater absolute levels of alternate capacity (whether at competing facilities or in alternate markets, such as

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<sup>336</sup> Viterra, *Exemption Application 2019, 2 July 2019*, p. 1.

<sup>337</sup> SA grain production is counter cyclical to the northern hemisphere. As discussed in ESCOSA's *inquiry into the SA bulk wheat export supply chain* (p17) SA grain producers have a window (December to May) where there is less global supply in international markets, typically resulting in higher prices being available for grain exported from SA during this period.

containers) in order to impose the same level of competitive constraint as would be the case with a smaller facility.

Although a small or large port terminal facility may face the same absolute level of alternate capacity, the effect of these competitive alternatives is dependent on their size relative to the port. That is, the competitive alternatives are less able to take on the higher level of throughput from third party exporters in the event discriminatory or favourable access occurs at a larger port terminal facility. However, the competitive alternatives will have greater ability to take on the effected amount of third party exporter grain, should the same access issue occur at a smaller port terminal facility. As such the credibility of third party exporters using the competitive alternatives are greater at a smaller port terminal facility. Therefore a higher absolute level of competitive constraint is likely required at larger port terminal facilities in order for third party exporters to be able obtain the same standard of access they would otherwise receive at a smaller port terminal facility.

In considering these matters, the ACCC notes that Viterra's Port Adelaide IHB facility is one of four port terminal facilities at Port Adelaide. As such the ability of exporters to obtain fair and transparent access at IHB must be considered with regard to the other facilities located at Port Adelaide. In relation to this, the ACCC understands that it may be possible for Viterra to operate its IHB and OHB facilities in conjunction with one another to some extent (for example in relation to storage capacity). While the extent to which this occurs in practice is unclear, the ACCC notes that Viterra has previously indicated that IHB and OHB are best managed operationally as a single port terminal facility (in 2013).<sup>338</sup> As set out in section 2.1 the ACCC also notes there are significant differences in the scale of Viterra's operation at Port Adelaide, when compared to third party PTSPs.

Viterra's IHB facility has a (stated annual capacity) of 918 972 tonnes,<sup>339</sup> with an average capacity utilisation rate of 78 per cent and 99 per cent from an annual and peak period perspective respectively (excluding the drought-affected 2018-19 season). Viterra's associated entity exporter, Glencore, also performs the majority of shipments through IHB, with a market share of 58 per cent in peak periods and 53 per cent in off-peak periods.<sup>340</sup> While Glencore's peak period market share at IHB (58 per cent) is significantly higher than the next highest peak period market share at other Viterra facilities (the next highest is Port Giles, where Glencore performs 43 per cent of peak period shipments), the ACCC notes that third party exporters have historically had greater access to capacity at Viterra's more efficient OHB facility (where Glencore performs 40 per cent of peak period shipments).

In addition, and for comparison, the second largest exporter at IHB is CBH, with a peak and off-peak period market share of 10 and 5 per cent respectively (and 8 per cent annually).

In addition the ACCC notes that Viterra's current PLPs ensure that no single exporter can apply for more than 50 per cent of the initial long-term capacity at IHB. In the absence of the application of the full Code, Viterra will be able to vary capacity allocation system related terms in its PLPs without the need to seek ACCC approval.

The above indicates that IHB appears to have little extra spare capacity available, particularly during peak periods, and that most of IHB's current capacity is utilised by Glencore. As such, the ACCC considers that, absent competitive alternatives (or appropriate regulation), Viterra has an incentive to discriminate access in favour of certain exporters.

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<sup>338</sup> *Draft Decision Viterra Operations Limited Application to Extend and Vary 2011 Port Terminal Services Access Undertaking*, p.28.

<sup>339</sup> Viterra, *Attachment 1 – Response to 14/11/19 information request 2020 – Questions 1 and 2 – Viterra port terminal facility features*, 13 February 2020.

<sup>340</sup> Figures are averaged across the 2014-15 to 2018-19 seasons.

However, as previously noted, the ability of exporters' to obtain fair and transparent access at IHB must also be considered with regard the other Port Adelaide port terminal facilities (including Viterra's OHB facility).

Viterra's OHB facility is the largest bulk grain loading facility at Port Adelaide with a stated capacity of 2.23 million tonnes. When considered on an annual basis, there appears to be a significant amount of spare capacity available at this facility, with the maximum amount of exports from OHB being 1.82 million tonnes (which occurred during the 2016-17 season). Overall OHB's average capacity utilisation (excluding 2018-19) is 67 per cent, suggesting that spare capacity is likely available for third party exporters. However capacity at OHB is more constrained during peak periods, with an average utilisation of 78 per cent (excluding 2018-19) during these months. In particular, during the peak period in high grain output seasons it appears likely that there will be some capacity constraints at OHB: for example, Viterra performed 1.11 million tonnes of shipments at OHB in the peak period of the bumper 2016-17 season, which is just below the facility's peak period capacity of 1.22 million tonnes.<sup>341</sup> This suggests that, in the absence of sufficient competitive constraints, Viterra may have an incentive to provide discriminatory access during peak periods in high output seasons.

Nonetheless, the ACCC notes that third party exporters otherwise appear to be able to secure access at OHB during peak periods, with Glencore accounting for 40 per cent of OHB shipments (which represents 31 per cent of OHB's peak period capacity). However, and as discussed in section 2.2.4, the ACCC notes that the fact Glencore only currently accounts for a relatively small portion of OHB's shipments (or, more importantly, OHB's total capacity) during peak periods does not necessarily mean that this would continue to be the case absent the application of Parts 3 to 6 of the Code. In particular the ACCC notes that Viterra's current PLPs ensure that combined across Viterra's six facilities a minimum of 500 000 tonnes of capacity is reserved for short term capacity per quarter, and that no single exporter at OHB can apply for more than 40 per cent of the initial total long-term capacity in the first six months of the calendar year (and 50 per cent at all other times).<sup>342</sup> In the absence of the full application of the Code, terms such as this can be changed in the PLPs without the need for ACCC approval.

Consequently, the ACCC's draft view is that there is the potential for third party exporters to be able to access spare capacity at Viterra's OHB facility in the event that there are capacity constraints at IHB.<sup>343</sup> However, as indicated above, in the absence of sufficient competitive alternatives Viterra may have an incentive to discriminate in relation to the access it provides at OHB, particularly in periods of high demand.

Cargill's upcoming Berth 20, Inner Harbour facility is also relevant to the likelihood that exporters will be able to obtain fair and transparent access when considering the possible exemption of Viterra's IHB facility. As discussed in section 2.1.4 Cargill's facility has a 'nominal capacity' of 300 000 tonnes and a 'highest practical capacity' of 540 000 tonnes.<sup>344</sup> In its exemption application Cargill also stated that:

*Cargill's exports through Port Adelaide over the four years up to 2017-18 averaged at 238k tonnes per year. In 2018-19, Cargill did not export through Port Adelaide at all due to drought conditions.*

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<sup>341</sup> Viterra released 1.22 million tonnes of capacity in the peak period in the 2019-20 season. In the 2016-17 season Viterra released 1.08 million tonnes of capacity.

<sup>342</sup> The ACCC notes that it has defined the peak period in this document as December through to May.

<sup>343</sup> As discussed in section 2.1, OHB has more efficient infrastructure than IHB, and is therefore likely the more desirable facility to export from. However the ACCC understands that OHB is largely run on a Just in Time process, and it may be more efficient for exporters to store and load grain from Viterra's IHB facility. Furthermore, depending on contractual arrangements between the exporter and Viterra, the exporter may not always have choice of which port to use when using Export Select.

<sup>344</sup> Cargill, *Application for exemption under the Port Terminal Access (Bulk Wheat) Code of Conduct*, 30 October 2019, p. 3.

*Cargill therefore anticipates that it will likely have excess capacity in relation to its expected nominal annual tonnage of 300k tonnes through its new facility. That being the case, Cargill is committed to welcoming third parties to utilise any available capacity in its facility. All services would be offered and charged on a commercial basis.*<sup>345</sup>

The amount of spare available capacity available at Cargill's facility therefore likely ranges between 60 000 tonnes to 300 000 tonnes (assuming, as per above, Cargill performs 240 000 tonnes of exports). In considering the capacity available at Cargill's facility the ACCC notes that Cargill, as a vertically integrated PTSP, likely faces incentives to provide greater access to its associated entity exporter. In addition, as an exempt service provider in relation to its Berth 20, Inner Harbour facility, Cargill is also less constrained by the Code in this regard. However the ACCC also notes that Cargill is subject to significant competitive constraint, and has also indicated its intention to continue to use other facilities at Port Adelaide (including Viterra's port terminals).<sup>346</sup> The ACCC notes that should Cargill choose to export through Viterra's Port Adelaide facilities (over its own facility) slightly more spare capacity will be available to third party exporters at Cargill's facility. In addition, the ACCC also notes that Cargill's upcountry network provides an alternate (albeit limited in size) vertically integrated network through which third party exporters can export grain from Port Adelaide.

The ACCC also notes that Cargill's exports through Viterra's IHB and OHB facilities decreased significantly (from 280 000 tonnes to 16 000 tonnes) after it commenced using LINX's facility in 2015-16.<sup>347</sup> The changes in Cargill's exports have likely reduced demand for Viterra's IHB and OHB facilities.

Given the above, the ACCC expects that the presence of Cargill's Berth 20 facility at Port Adelaide's Inner Harbour will have two effects, both of which are likely to reduce Viterra's incentive to provide access to certain exporters on a favourable basis: firstly, Cargill's facility will give third party exporters a small amount of additional capacity and offer credible (though limited) competition to Viterra's IHB and OHB facilities; and secondly, that Cargill will be unlikely to choose to export large volumes of grain through IHB or OHB, reducing the potential for capacity constraints at these facilities (and also Viterra's incentive to discriminate in favour of certain exporters as a result).

Semaphore's Osborne facility is also relevant to the likelihood that exporters will be able to obtain fair and transparent access when considering whether to exempt Viterra from Parts 3 to 6 of the Code in relation to its IHB facility. The ACCC notes that Semaphore is not vertically integrated with an exporter<sup>348</sup> and has submitted that its facility has a capacity of 264 000 to 396 000 tonnes.<sup>349</sup> The ACCC considers that Semaphore's facility provides an alternative export path for third party exporters and, as Semaphore is not vertically integrated with an exporter, it appears unlikely that Semaphore faces strong incentives to favour, or unfairly discriminate against, certain exporters.

Given the above, the ACCC does not consider the level of competitive constraint imposed by the available spare capacity at Cargill's and Semaphore's Port Adelaide facilities sufficient to support an exemption in relation to Viterra's IHB facility in and of itself. However, as

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<sup>345</sup> Cargill, *Application for exemption under the Port Terminal Access (Bulk Wheat) Code of Conduct*, 30 October 2019, p. 10.

<sup>346</sup> *Ibid* p. 5.

<sup>347</sup> The ACCC note that Cargill have only loaded one vessel at Viterra's Port Adelaide facilities since the beginning of the 2015-16 season (which coincides with the entry of LINX). As such, the ACCC anticipates Cargill will likely continue to use its own facility for the majority of its shipments out of Port Adelaide,

<sup>348</sup> Semaphore exemption application, p. 6.

<sup>349</sup> Semaphore submitted to the ACCC it is able to load 33 000 tonnes per month, which equates to 396 000 tonnes over a whole year. However, given Australia is only competitive internationally for 8 to 9 months per year, this means practically Semaphore expect to load 264 000 to 297 000 tonnes per season. Semaphore note that in the 2016-17 season Australia was competitive internationally for a longer period, and therefore was able to facilitate more grain exports (370 000 tonnes).

discussed above in relation to subclauses 5(3)(b) and 5(3)(g) of the Code, PTSPs operating at Port Adelaide also face competitive constraint from the local domestic and container markets, as well as Victorian markets (for certain regions of SA). These markets also constrain the potential for Viterra to provide access to its IHB facility on a favourable or discriminatory basis.

On balance the ACCC considers the combination of competition from third party PTSPs located at Port Adelaide, the SA domestic and container markets, as well as Victorian markets, likely imposes sufficient competitive constraint on Viterra to ensure fair and transparent access will be provided to its IHB facility absent the full application of the Code.

As such the ACCC's draft view is that exempting Viterra from Parts 3 to 6 of the Code in respect of IHB will not be detrimental to exporters' ability to obtain fair and transparent access to port terminal services.

***The ACCC would welcome views from stakeholders in relation to the expected behaviours which would indicate that a PTSP is subject to sufficient competitive constraints.***

### **Conclusion**

In light of the above, the ACCC's draft view is an exemption from Parts 3 to 6 of the Code in relation to IHB is unlikely to be detrimental to the fair and transparent access of exporters.

In reaching its draft view the ACCC notes that the operational changes Viterra will make in response to an exemption are unclear, and that the ACCC has received limited views from third party exporters regarding Viterra's application for exemption in relation to IHB (or any other Viterra facilities).

Notwithstanding the above, the ACCC considers that the combination of competition from third party PTSPs located at Port Adelaide, the SA domestic and container markets, and Victorian markets, likely imposes sufficient competitive constraint on Viterra to ensure fair and transparent access will be provided to its IHB facility.

### ***(e) the promotion of the economically efficient operation and use of the port terminal facility; and (f) the promotion of efficient investment in port terminal facilities***

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

The ACCC considers the following factors will likely be relevant when having regard to the matters listed at subclauses 5(3)(e) and (f) of the Code:

- whether competition among port terminal service providers will drive the efficient operation and use of the port terminal facility in the absence of full regulation under the Code;
- whether a requirement to comply with Parts 3 to 6 of the Code would result in lesser uptake of the port terminal service than would otherwise be efficient; or
- whether the efficient investment in port terminal facilities will be influenced by a reduction in regulation.

### **Promotion of the efficient operation and use of Viterra's IHB facility**

The ACCC generally considers that it is in Viterra's interests to operate its facilities efficiently (i.e. to keep costs as low as possible) in order to provide a return to investors regardless of whether an exemption is granted in respect of its IHB (or any other) facility.

The ACCC also recognises that unnecessary regulation has the potential to affect the operational efficiency and level of investment in port terminal facilities.

As such, the ACCC considers that the level of regulation applied under the Code (including the capacity allocation systems approved pursuant to it) should be reduced in circumstances where exporters are otherwise able to access capacity on fair and transparent terms (as a result of competition), in order to ensure the regulation does not impose unnecessary operational constraints, and any other unnecessary burdens.

The ACCC also considers that the full Code provides Viterra with a level of flexibility to negotiate with exporters on key terms at its port terminal facilities. Significantly, while the Code requires PTSPs to publish standard terms and reference prices, it does not restrict how PTSPs set those terms and prices. The ACCC notes that the Code's non-discrimination obligation prevents PTSPs from inappropriately offering more favourable terms to related export businesses. As such, the non-discrimination obligation is not intended to, and does not, prevent PTSPs from offering different terms and conditions to different access seekers (as long as this is undertaken on a fair and transparent basis).

The ACCC also notes that Viterra's capacity allocation system (which includes relevant timeframes for releasing amounts of capacity) can be amended by Viterra, subject to ACCC approval. However Viterra has submitted that changing the PLPs in response to new operational situations is not a practical long-term solution, due to the difficulty of predicting what changes might be needed in the future and the timeframes involved in the approval of changes to the protocols:

*Viterra's PLPs set out detailed and prescriptive rules for allocating capacity, and any change to these rules must be approved by the ACCC...Simply amending the PLPs to respond to each and every new operational situation is not a long-term solution. This is because it is not possible to predict every situation that may require operational flexibility that is not provided for in the PLPs (e.g. vessel issues as a result of the coronavirus)...*

*...In addition, the introduction of increased flexibility through changes to the PLPs is not a simple or quick process, as illustrated by the variations to Viterra's PLPs in 2015. Following many months of consultation with its customers and the ACCC, Viterra submitted its formal application to vary the capacity allocation system in its Port Loading Protocols to the ACCC on 12 March 2015. Notwithstanding the significant level of prior consultation, it then took a further nine months of consideration and review by the ACCC for Viterra to obtain approval for the variations.*

*This process would have to be undertaken each time Viterra identified a need for variation – such need not always being apparent until newly varied protocols are implemented.<sup>350</sup>*

As previously noted Viterra also referenced a submission made by CBH in response to the then Department of Agriculture Water and Resources' 2018 draft Code review report which indicated that the delays associated with regulatory approval had caused significant frustration and uncertainty for exporters seeking to buy SA grain for international sales.<sup>351</sup> CBH also stated that exemption from the full application of the Code had provided significant flexibility:

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<sup>350</sup> Viterra, *Further Supplementary Submission on Exemption Application 2020*, 11 March 2020, p. 2.

<sup>351</sup> Viterra, *Exemption Application 2019*, 2 July 2019, pp. 22-23.

*Once CBH was exempted from the Code and was no longer subject to a regulatory drawn-out approval process, the LTAs CBH subsequently negotiated created considerably enhanced access certainty and flexibility of service for export customers.<sup>352</sup>*

SAFC submitted the below in relation to the need for Viterra to have changes to its capacity allocation system approved:

*SAFC does not consider Viterra's ability to apply to the ACCC to alter its [sic] capacity allocation system to be inherently indicative of 'flexibility'. With respect to the Commission, while it is known for comprehensive examination of competition issues, it is not known for swift responses/decisions. [Viterra's exemption application] has taken almost a year to reach this point; and page 25 of the supplementary paper indicates that the last attempt [by Viterra] to modify the capacity allocation system resulted in very significant delays.<sup>353</sup>*

The ACCC acknowledges the challenges associated with predicting future operational needs and accepts that changes to the PLPs are unlikely to be able to adequately address all potential issues ahead of time. In this regard the ACCC also notes that the PLPs likely need to balance operational needs across many elements of the supply chain (for example in grain transport and receipt, terminal facility operations and shipping industry needs).

The ACCC accepts that the regulatory process for approving changes to the PLPs imposes a greater burden on Viterra than if it were exempted from the full application of the Code and was not required to have proposed changes to its PLPs approved by the ACCC. However the ACCC notes that Viterra has not sought to change its capacity allocation system since its initial approval in 2015, and that Viterra is not required to change its PLPs in response to being made an exempt port terminal service provider at any of its facilities.

In forming its draft view in relation to IHB, the ACCC has considered whether greater flexibility would provide for the more economically efficient use of Viterra's IHB facility, as well as whether removing the requirement to comply with Parts 3 to 6 of the Code has the potential to drive stronger user demand for, and the uptake of, port terminal services.

The ACCC considers that removing the requirement to comply with Parts 3 to 6 of the Code will likely result in cost savings being passed onto exporters, driving stronger user demand for port terminal services when a PTSP is subjected to sufficient competitive constraint (which provides the PTSP with an incentive to provide fair and transparent access to third party exporters).

As discussed in relation to subclauses 5(3)(b) and (g) of the Code, the ACCC considers IHB is subject to sufficient competitive constraint to provide Viterra with an incentive to provide fair and transparent access to third party exporters. Consequently, the ACCC's draft view is that exempting Viterra's IHB facility from Parts 3 to 6 of the Code can reasonably be expected to result in the more efficient use of the port terminal facility.

### **Promotion of efficient investment in port terminal facilities**

It is in Viterra's interests to make investment decisions that ensure Viterra can maximise its return to its shareholders, irrespective of whether or not exemptions are granted in relation to any of Viterra's facilities. As previously noted, this primarily reflects the need to provide a return to shareholders.

Viterra has submitted that an exemption would allow for greater flexibility, which would result in greater investment in their facilities and a more efficient supply chain:

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<sup>352</sup> Viterra, *Exemption Application 2019*, 2 July 2019, p. 23.

<sup>353</sup> SAFC Supplementary Submission, p. 3.



*...an exemption would enable Vitterra to provide more competitive and flexible services to exporters for bulk grain exports and support lower supply chain costs and increased investment by allowing Vitterra to operate its port terminals with more flexibility and greater efficiency.<sup>354</sup>*

In contrast, T-Ports submit that reducing regulation will reduce the incentives for potential entrants to invest in the SA port terminal facilities:

*Future investment in port terminal facilities will depend upon the expectation of a fair and even playing field in the market. If there is a dominant provider in the market, with little or no regulation on pricing and access, the incentive to invest diminishes with the increased risk of retaliatory behaviour through differential service offerings to customers who may otherwise have supported the new investment.<sup>355</sup>*

The ACCC acknowledges that unnecessary regulation has the potential to discourage a PTSP from making otherwise efficient investments in its port terminal facilities (or the supply chain more broadly). However, the ACCC also considers that an inadequate level of regulation risks affecting efficient investment in port terminal services: this could result in either under investment (to the extent that the inadequate regulation reduces the incentives for current participants and/or new entrants to invest, due to their inability to gain access on fair and transparent terms); or over investment (to the extent the inadequate regulation encourages current participants and/or new entrants to unnecessarily duplicate existing infrastructure). The ACCC acknowledges that different parties will likely have different investment incentives and that these incentives will be influenced by a range of factors, including the level of regulation imposed on competing PTSPs

In addition, the ACCC notes that GPA submitted that investment in further port terminal facilities in SA may be inefficient and reflect concerns around access to existing facilities or the service offered.<sup>356</sup>

While the ACCC has not undertaken a detailed quantitative analysis of the appropriate level of investment in port terminal facilities in SA, significant consideration has been given to the effect of the Code and the related effects on the decision to exempt (or not exempt) each of Vitterra's port terminal facilities.

The ACCC considers that efficient investment decisions can generally be expected to occur in circumstances where adequate competition is present, or where there is sufficient regulatory intervention to ameliorate the absence of competition.

Consequently, when considering the investment effects which may result from an exemption from Parts 3 to 6 of the Code, the ACCC has considered the investment incentives of current and potential future market participants.

In the case of Port Adelaide, the ACCC notes that there has been an increase in the level of investment in low-capex port terminal service facilities, with LINX, Semaphore and Cargill all using (or intending to use) mobile ship loaders in recent (or upcoming) seasons.<sup>357</sup> However the ACCC notes that in April 2020 LINX announced that it has ceased providing bulk grain export services.<sup>358</sup> Additionally, the ACCC notes that Cargill has not yet commenced operations.

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<sup>354</sup> Vitterra, *Exemption Application 2019*, 2 July 2019, p. 2.

<sup>355</sup> T-Ports submission, 26 August 2019, p. 4.

<sup>356</sup> GPA submission, 4 October 2019, p. 3.

<sup>357</sup> Semaphore began operations in the 2016-17 season; LINX began operations in the 2015-16 season and on 8 April 2020 informed the ACCC that they had ceased bulk grain loading operations; Cargill, while not yet operational, were granted an exemption from their Port Adelaide facility on 2 July 2020.

<sup>358</sup> A letter confirming the suspension of LINX's operations at Port Adelaide, Inner Harbour is available at:

<https://www.accc.gov.au/system/files/LINX%20-%20letter%20confirming%20suspension%20of%20bulk%20grain%20services%20-%208%20April%202020.pdf>.

The ACCC notes that the competitive constraint imposed by mobile ship loaders (whether at Port Adelaide or elsewhere) may be viewed as the may only operate in high output years and/or are limited in the vessel size they can load.

The ACCC expects that Viterra will have significant spare capacity at IHB in low output seasons, and that Viterra's need to offset fixed costs will likely provide an incentive for it to maximise throughput at its facility. As such, the ACCC expects Viterra will have little incentive to favour certain exporters in low output seasons. Therefore, the possibility that third party PTSPs using mobile ship loaders will perform little to no exports in low output seasons is unlikely to reduce Viterra's incentives to provide access to a broad range of exporters.

Given their low capex and mobile nature, the ACCC considers that mobile ship loaders have the potential to provide a more flexible form of competitive constraint. That is, mobile ship loaders are able to provide additional capacity during periods of high demand without the significant capital investment, or substantial ongoing fixed costs, associated with conventional port terminal infrastructure.<sup>359</sup> The ACCC also notes that investment in conventional infrastructure may be inefficient and/or financially unviable in these circumstances (i.e. given additional port terminal capacity may only be needed for high output seasons the demand for additional services may be 'temporary' in nature).

As stated in section 2.1.5 ADM has performed a small number of coastal (i.e. domestic) shipments out of Port Pirie. However, it is not clear at this time if, or when, ADM will commence bulk export operations.<sup>360</sup> The ACCC notes that, should ADM commence bulk export operations there would likely be overlap in the grain catchment areas between PTSPs located at Port Adelaide and ADM's Port Pirie facility. However the ACCC understands that ADM's facility would likely be small in size, and limited in the vessel size it could accommodate. Consequently, should ADM commence export operations, the ACCC expects that the additional constraint placed upon IHB is expected to be limited.

The ACCC also notes that T-Ports is proposing to build a port terminal facility at Wallaroo. T-Ports has indicated that the site will take 18 months to build, and is planning to begin construction in 2020.<sup>361</sup> However the ACCC's understanding is that the proposed facility is currently still in the planning stage, and that T-Ports are still seeking relevant government approval and raising capital. Were T-Ports' Wallaroo facility to commence operations it would primarily place a competitive constraint on Viterra's Wallaroo facility, however it would also likely place a level of competitive constraint on Viterra's IHB (and OHB) facility (as discussed in relation to subclause 5(3)(i) of the Code, the ACCC considers there is some overlap between the Port Adelaide and Wallaroo catchment areas).

However, as discussed in section 2.1.5, while the ACCC acknowledges that the threat of competition has the potential to place a degree of competitive constraint upon Viterra, the ACCC does not consider the threat of competition to be as effective as actual competition.

The ACCC also notes that, in relation to the promotion of efficient investment in port terminal facilities, GPA has indicated that they consider there could be an over investment in infrastructure in SA:

*Given both Viterra has already pointed out there has been over-investment in facilities, this condition becomes problematic. The ACCC need to better explain their reasoning behind this*

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<sup>359</sup> However the ACCC also acknowledges there could be a number of factors that limit the flexibility with which a mobile ship loaders may be operated: these could include a range of physical, operational and regulatory constraints.

<sup>360</sup> The ACCC notes there has been some media reporting that suggests ADM could commence export operations from its Port Pirie facility: <https://www.graincentral.com/logistics/port-pirie-south-to-open-as-first-australian-adm-bulk-grain-site/>

<sup>361</sup> T-Ports website: <https://tports.com/wallaroo/>, (accessed 27 August 2020).

*condition. What do they believe is the appropriate outcome? GPA do not believe investment in multiple duplicative facilities is efficient investment.*<sup>362</sup>

While, as previously noted, the ACCC has not undertaken a detailed quantitative analysis of the appropriate level of investment in port terminal facilities in SA, the ACCC notes that it is not necessarily appropriate to conclude that all additional investment in port terminal infrastructure in SA is inefficient (i.e. can be considered 'over-investment'). The ACCC notes that a broad range of factors may influence different parties' investment decisions including, for example, an interest in having increased access to capacity at peak times.

## **Conclusion**

The ACCC considers that it is in Viterra's interests to make investment and operational decisions that ensure their profitable operation, and that Viterra can maximise return to their shareholders.

As discussed in relation to subclauses 5(3)(b) and (g) of the Code, the ACCC considers that the competitive constraint provided by Cargill's and Semaphore's facilities (as well as from the container, domestic and Victorian markets) are likely sufficient to encourage Viterra to make efficient investments (and/or deter inefficient investment) in its operations. An exemption in respect of IHB may also provide an incentive for Cargill and Semaphore to make efficient investment decisions in relation to their port terminal facilities at Port Adelaide, in order to respond to the increased competition with Viterra at port and/or in related markets.

More broadly, while the ACCC has not reviewed each of the investments that have been made in the SA port terminal facilities in specific detail, the ACCC generally considers that the removal of unnecessary regulation is unlikely to be detrimental to (and is likely to promote) efficient investment outcomes and operations.

With specific regard to operations at Viterra's IHB facility the ACCC considers that, given the level of competitive constraint IHB faces, it is reasonable to expect that the removal of unnecessary regulation will drive greater operational efficiency (in part because Viterra will be able to operate more flexibly).

Given the above, the ACCC's draft view is that exempting Viterra in relation to its Port Adelaide IHB facility may promote the economically efficient operation of and use of its facility, and the efficient investment in port terminal facilities.

### ***(h) whether the port terminal service provider is an exporter or an associated entity of an exporter***

Under subclause 5(3)(h) of the Code the ACCC generally considers the degree to which the PTSP is vertically integrated in grain exportation. As such, the ACCC has also given significant consideration to the level of vertical integration when considering subclause 5(3)(c) and (d) matters.

The extent to which a vertically integrated PTSP favours, or is likely to favour, its related entity exporter will influence the ACCC's decision on whether an exemption from Parts 3 to 6 of the Code should be granted.

Viterra has acknowledged it is vertically integrated across bulk grain export operations and port terminal services at its facilities:

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<sup>362</sup> GPA submission, 4 October 2019, p. 3.

*Viterra is an associated entity of an exporter, Glencore Agriculture Pty Ltd (Glencore Agriculture). However, vertical integration in and of itself is not anti-competitive and a corporation should not be subject to regulation only because of its vertical integration.*<sup>363</sup>

As a vertically integrated PTSP, the ACCC considers that Viterra has an incentive to provide favourable access to its associated entity exporter. A vertically integrated PTSP is also considered to have an incentive to provide favourable access to its associated entity exporter, particularly in circumstances where port terminal capacity is constrained. These actions are potentially to the detriment of competition and third party exporters seeking access to port terminal services.

In general, the ACCC considers there is a stronger case for full regulation in circumstances where the potential for a vertically integrated provider to exercise market power is not otherwise constrained. The ACCC notes that, in the absence of Parts 3 to 6 of the Code applying to Viterra's IHB facility, Viterra could more easily alter the terms and conditions of access for some or all third party exporters seeking to use the facility.

Accordingly, the ACCC considers that there would likely be a level of risk for third party exporters, if an exemption were granted to Viterra at its IHB facility absent the presence of sufficient competitive alternates. However, as noted above when considering subclauses 5(3)(b) and (g), the ACCC considers that the degree of competition Viterra's IHB facility faces is likely sufficient to limit the ability of Viterra to favour certain exporters, including its vertically integrated trading arm, Glencore.

#### ***(i) whether there is already an exempt service provider within the grain catchment area for the port concerned***

Subclause 5(3)(i) of the Code requires the ACCC to have regard to whether there is already an exempt service provider within the grain catchment area for the port concerned. The ACCC generally considers that, in circumstances where there is already an exempt service provider within a grain catchment area, or where the Code does not otherwise apply to a service provider in a catchment area, this supports the case for an exemption. However, the ACCC also considers this matter on a case-by-case basis, taking into account the full extent of competitive constraint operating on each facility.

The ACCC notes that, at a broad level, Viterra has submitted that:

*Traditional "catchment zones" for grain grown in South Australia are fluid and increasingly outdated constructs. Traders purchase grain from, and traders and growers move grain to, the locations where it is most profitable having regard to the price of grain that can be obtained in domestic and export markets, the cost of freight to port terminals (or to domestic customers), the cost of sea freight, and the cost of using a particular port terminal.*<sup>364</sup>

In relation to Port Adelaide Viterra has submitted that:

*Port terminals at Port Adelaide have traditionally sourced grain from a large grain growing region that encompasses the Yorke Peninsula and a large area surrounding Adelaide, which stretches to Dooen in the west of Victoria, to Werrimull in north Victoria, and north-west to Port Pirie and Melrose in South Australia. Competition for grain grown in this area is not limited to the various port terminals run by various operators at Port Adelaide. It is often delivered to Wallaroo in South Australia and to port terminals in Victoria operated by GrainCorp, Emerald and Riordan.*<sup>365</sup>

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<sup>363</sup> Viterra, *Exemption Application 2019*, 2 July 2019, p. 1.

<sup>364</sup> Viterra, *Exemption Application 2019*, 2 July 2019, p. 1.

<sup>365</sup> Viterra, *Exemption Application 2019*, 2 July 2019, p. 48.

Viterra also submits that its IHB (and OHB) facility exports grain from the same region as Cargill's and Semaphore's Port Adelaide facilities:

*Semaphore's Berth 29 and LINX's Osborne port terminals are situated at Port Adelaide and export grain that is grown in the same region as grain exported from Viterra's Port Adelaide terminals.*<sup>366</sup>

T-Ports, noted that there is some fluidity to catchment areas though not to the extent implied by Viterra:

*T-Ports supports Viterra comments that catchment zones are fluid, however not to the extent implied. There are some terminals where catchment zones overlap and fluctuate with market conditions, but in general terms, road distances and associated freight costs between competing terminals is a limiting factor in the flexibility to move outside catchment zones.*

*If a PTSP is inefficient or its terms of access-including fees-are unreasonable, and in the absence of a competing PTSP in the same catchment zone, grain from that catchment zone is unlikely to move to other port terminals (as the Viterra application suggests).*<sup>367</sup>

T-Ports also submitted that the Victorian and Port Adelaide PTSPs compete for grain on the south eastern border regions of SA to a minor extent.<sup>368</sup> CRA also indicated that Port Adelaide competes for grain with Victorian markets.<sup>369</sup>

As discussed in section 3.2 the ACCC acknowledges that catchment areas are not necessarily fixed and are likely influenced by a range of factors. However the ACCC continues to consider that distance remains a significant factor when considering which port terminals facilities are available to exporters seeking to export grain from different growing areas (see section 3.2.1 for an analysis of distance and freight costs). As such, the ACCC considers that catchment areas generally remain relevant to the assessment of exemption applications, including for the purposes of discussing the presence, or otherwise, of competing exempt service providers.

With respect to exempt port terminal service providers in SA:

- Semaphore was determined to be an exempt service provider in respect of its facility at Osborne Berth 1, Inner Harbour, Port Adelaide in July 2017.
- Cargill was determined to be an exempt service provider in respect of its facility at Port Adelaide, Inner Harbour on 2 July 2020;<sup>370</sup> and
- T-Ports was determined to be an exempt service provider in respect of its facility at Lucky Bay on 3 April 2020.

The ACCC does not consider T-Ports' Lucky Bay facility to be in the Port Adelaide catchment area (see section 3.2).

As discussed in relation to subclauses 5(3)(b) and (g) the ACCC considers that as Cargill's, Semaphore's facilities and Viterra's IHB and OHB facilities all operate out of Port Adelaide they have largely the same catchment area. The ACCC therefore considers there to be two exempt service providers in IHB's catchment area (Cargill and Semaphore), and that the relevant facilities impose a level of competitive constraint on IHB (and OHB).

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<sup>366</sup> Ibid p. 52.

<sup>367</sup> T-Ports submission, 26 August 2019, p. 3.

<sup>368</sup> Ibid p. 3.

<sup>369</sup> Charles River Associates, *Charles River Associates Report on the Benefits of Code Exemption on Viterra Grain Export Terminals*, 7 November 2019, p. 19.

<sup>370</sup> On 21 May 2020 the ACCC also published a letter from LINX Cargo Care confirming it has ceased grain loading operations at its mobile ship loader at Flinders Port Berth 29, Port Adelaide.

However, the ACCC considers that the presence of rail receival facilities at IHB and OHB (and their absence at Cargill's and Semaphore's facilities) gives Viterra an advantage in sourcing grain from distances further from port. As noted in section 3.2.1 rail is considered more efficient than road for grain located over 200 km from port. As such, given Viterra's IHB and OHB facilities are able to facilitate rail receivals, whereas Cargill and Semaphore's facilities can only receive grain via road services, the ACCC's draft view is that IHB (and OHB) is likely be able to source grain from distances further away from port than Cargill and Semaphore, and therefore have a somewhat larger (though overlapping) catchment area.<sup>371</sup>

The ACCC's also considers that the Port Adelaide catchment area is likely to overlap with Victorian PTSPs on and near the SA and Victorian border. As noted in section 3.2 and in relation to subclauses 5(3)(b) and (g) GTA's Location Differentials indicate that grain can be economically advantaged to travel to Victorian PTSPs over Port Adelaide facilities, with sites closer to the south of the Victorian and SA border being more likely to move to Victorian PTSPs, and sites on the northern border being more likely to move grain to Port Adelaide.

While acknowledging the potential for some level of competitive constraint under certain conditions, particularly at the margin of catchment areas along the Victorian and SA border, the ACCC does not consider that the Victorian ports generally share the same catchment area as Viterra's IHB facility. Furthermore, the ACCC notes that grain grown near the Victoria and SA border only represents a small portion of grain in the larger Adelaide catchment area.

In addition, the ACCC notes that the Port Adelaide catchment area is likely to overlap with Wallaroo's catchment area in the Mid and Upper North regions. As noted in section 3.2 the relative at-port efficiency of Viterra's OHB facility, and its ability to receive grain via rail (which is not available to the Cargill, Semaphore or Wallaroo facilities), offers an advantage to OHB over the other ports in this region.<sup>372</sup> However, the ACCC notes Cargill and Semaphore's facilities cannot receive grain via rail (and are generally less efficient than OHB, see table 2.1), which likely places them at a disadvantage when sourcing grain from upcountry sites with rail access.

Given the ACCC's draft view that the Wallaroo and Port Adelaide catchment areas overlap the ACCC notes that should T-Ports' proposed Wallaroo facility commence operations, its catchment area would likely overlap with IHB's (and OHB's). However, as previously noted, the ACCC understands that T-Ports' Wallaroo facility is currently still in the planning stage.

The ACCC also notes that ADM performed a small number of coastal shipments from its Port Pirie facility during the 2018-19 season. Port Pirie lies within the Upper North region. As discussed in section 3.2 the ACCC considers that Port Pirie falls within the Port Adelaide catchment area, and therefore could potentially represent a competitive constraint on IHB (and OHB). However the ACCC notes that it is not currently clear if ADM intend to perform export services in the near future from Port Pirie (or if ADM intends to continue to perform coastal shipments given the expected increase in NSW production).

The ACCC considers that should ADM's Port Pirie facility and T-Ports' Wallaroo facility commence export services they would provide a level of competitive constraint on Viterra's IHB (and OHB), as they fall within the Port Adelaide catchment area.

Given the above, the ACCC's draft view is that the catchment area for IHB currently contains two exempt port terminal service providers: both Cargill's and Semaphore's facilities at Port

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<sup>371</sup> The ACCC acknowledges that catchment areas are fluid and grain can and will move to where it is most economically advantaged, however the ACCC still considers that distance remains an important factor in determining the movement of grain.

<sup>372</sup> Viterra's IHB facility is also able to receive grain via rail services.



Adelaide compete for grain within IHB (and OHB's) catchment area and, further, these facilities impose a level of competitive constraint on IHB (and OHB).

The ACCC notes it has also proposed to exempt Viterra's OHB facility as part its assessment of Viterra's exemption application. As both IHB and OHB are located at Port Adelaide the ACCC considers that OHB lies within IHB's catchment area, and therefore if OHB is exempted in the ACCC's final determination (as proposed in the Draft Determinations), then Viterra will also be an exempt service provider in relation to its OHB facility, which is within IHB's catchment area.

#### ***(j) any other matters the ACCC considers relevant***

The ACCC's draft decision whether to determine Viterra to be an exempt service provider in relation to its IHB facility involves its balancing of the relevant considerations referred to in subclause 5(3) of the Code. In making its decision the ACCC considered the power to revoke an exemption as relevant to its assessment.

The ACCC has the ability under subclause 5(6) of the Code to review an exemption determination with a view to revoking it in certain circumstances. Similar to the process for granting an exemption, the ACCC may revoke an exemption determination if, after having regard to matters (a) to (j) of subclause 5(3) of the Code, it is satisfied that the reasons for granting the exemption/s no longer apply.

As such, given the nature of the decision in relation to Viterra's IHB facility the ACCC considers the ability to review (and potentially revoke) an exemption determination relevant to its decision.

While acknowledging the significance of a revocation, the ACCC considers that its future ability to revoke an exemption if the reasons for granting the exemption no longer apply supports its draft determination to grant an exemption in relation to IHB.

## **4.2. Port Adelaide Outer Harbor**

#### ***(a) the legitimate business interests of the port terminal service provider***

The ACCC's draft findings about Viterra's legitimate business interests are the same in relation to Port Adelaide OHB as they are for Viterra's other port terminal facilities.

Section 4.1 (IHB) subclause (a) sets out the ACCC's draft views on Viterra's legitimate business interests.

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

The ACCC's draft findings about the public interest in relation to OHB are the same as they are in relation to Viterra's other port terminal facilities.

Section 4.1 (IHB) sets out the ACCC's draft views in relation to subclauses 5(3)(b) and (g).

To the extent the ACCC has views on these matters that specifically relate to Viterra's OHB facility, these are set out below.

### **Competition in bulk wheat export operations**

The ACCC notes that there is a total of four port terminal facilities at Port Adelaide: two Viterra-owned facilities (the smaller IHB facility and the larger deep water OHB facility), and two third party facilities (Cargill's Inner Harbour Berth 20 facility, and Semaphore's Osborne facility).

While the ACCC has previously recognised increasing competition between port terminal services at Port Adelaide,<sup>373</sup> overall the ACCC continues to view Viterra as the dominant PTSP at Port Adelaide, where it has two port operations (the smaller IHB facility and the larger deep water OHB facility).

The ACCC also considers it likely that Viterra will remain the dominant provider of port terminal services at Port Adelaide for the foreseeable future: Viterra's port terminal facilities at Port Adelaide are significantly larger than the alternate facilities, and Viterra is an associated entity of SA's largest exporter (Glencore).<sup>374</sup>

Given this relationship, it appears unlikely that Glencore would transfer significant volumes of bulk grain exports to alternative suppliers of port terminal services at Port Adelaide. It is also likely that Viterra, as part of a vertically-integrated PTSP/exporter has an incentive to favour Glencore over other exporters at its OHB facility (particularly during peak periods, when capacity is constrained, and favourable grain prices are available in international markets).

In contrast the ACCC notes that Viterra's incentive to maximise profits (in order to provide a return to investors), likely also provides an incentive to ensure significant throughput at its IHB (and OHB) facility. This is because high levels of throughput are typically needed to ensure the viability of large conventional port terminal facilities, which have relatively high fixed-costs when compared to facilities that use mobile ship loaders. However the ACCC also notes that it is not clear that Viterra's incentive to maximise throughput will necessarily promote access for smaller third party exporters, relative to larger exporters.

On balance, the ACCC's draft view is that Viterra's OHB facility is likely sufficiently competitively constrained to support an exemption from Parts 3 to 6 of the Code.

In forming this view, the ACCC considers it important to note that OHB faces competition from a number of sources (in addition to other PTSPs at Port Adelaide). This includes containerised bulk grain exports and domestic demand for grain, as well as (to a lesser extent) competing PTSPs in Victoria.

The ACCC's draft view is based on the analysis of the port terminal services markets presented in chapter 2, and the consideration of upcountry and related markets presented in chapter 3. These, indicate the following:

- (c) **OHB is competitively constrained by third party PTSPs at Port Adelaide:** While the ACCC considers Viterra's IHB and OHB facilities to be significantly larger than alternate Port Adelaide PTSPs, the ACCC acknowledges that Cargill's and Semaphore's facilities place a level of competitive constraint on Viterra's facilities.<sup>375</sup> However the level of constraint is limited by the comparative difference in the scale of operations: since the

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<sup>373</sup> See: [ACCC final determination – Port Adelaide wheat code exemption assessment – Cargill Australia Limited](#).

<sup>374</sup> Average shipment figures at Port Adelaide excluding the 2018-19 drought season are: IHB 720 000 tonnes, OHB 1.49mt, LINX 280 000 tonnes, and Semaphore 320 000 tonnes.

<sup>375</sup> Both Cargill's and Semaphore's Port Adelaide facilities are exempt from Parts 3 to 6 of the Code.



2016-17 season (i.e. the first shipping season both LINX<sup>376</sup> and Semaphore were operational at Port Adelaide) Viterra has performed 80 per cent of all bulk export shipments out of Port Adelaide (25 per cent from IHB, and 55 per cent from OHB). In addition, the extent to which mobile ship loader facilities provide a reliable and ongoing competitive constraint remains unclear; for example, recent events suggest that such operations are less likely to operate during low production seasons. However, the ACCC also acknowledges this may result in mobile ship loaders providing a form of flexible and responsive competition.

- **OHB is competitively constrained by Victorian markets in certain regions:** The ACCC considers that Viterra's OHB facility also faces competitive constraints near the SA and Victorian border from markets in Victoria (e.g. container, domestic, and bulk grain export markets). In forming this draft view the ACCC notes that GTA's Location Differentials indicate that grain can be economically advantaged to travel to facilities located in Victoria over facilities located at Port Adelaide; in particular, sites closer to the south of the Victorian and SA border are advantaged to Victorian PTSPs, while sites on the northern border are advantaged to Port Adelaide PTSPs. The ACCC also notes that T-Ports submitted that Viterra faces minor competition from Victorian PTSPs along the SA-Victorian border.<sup>377</sup>
- **OHB's catchment area overlaps with third party (and exempt) PTSPs:** Given that Viterra's IHB and OHB facilities and Cargill's and Semaphore's facilities are all located at Port Adelaide the ACCC considers that these PTSPs can reasonably be expected to compete for grain within the same general catchment area. However the ACCC notes that catchment areas can be influenced by the mode of transport to port (amongst a range of other factors). As noted in section 3.1.2 rail is generally considered more efficient than road when transporting grain located over 200 km from port. Given that Viterra's OHB facility is able to facilitate rail receivals, whereas Cargill's and Semaphore's facilities can only receive grain via road services, the ACCC considers that OHB has an advantage in drawing grain located further from port than either Cargill's or Semaphore's facilities.<sup>378</sup>
- **OHB's infrastructure:** The ACCC considers that Viterra's OHB facility has several infrastructure advantages over third party PTSPs at Port Adelaide:
  - OHB is a deep water port and can therefore load larger vessels than Cargill's and Semaphore's facilities, which are only able to accommodate smaller vessels.
  - In addition to being able to receive grain via rail (which neither Cargill's nor Semaphore's facilities are able to do), the rate at which OHB can receive grain from rail receivals is significantly higher than the rate at which Cargill's and Semaphore's facilities can receive road receivals (as shown in table 2.1 OHB can receive grain via rail at 2 400 tonnes per hour, whereas Cargill's and Semaphore's facilities receive grain via road at 1 000 tonnes per hour and 375 tonnes per hour respectively).<sup>379</sup>

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<sup>376</sup> Given Cargill was LINX's only customer, the ACCC expects that Cargill will likely perform a similar amount of bulk exports through its Cargill facility as was performed through LINX.

<sup>377</sup> T-Ports submission, 26 August 2018, p. 3.

<sup>378</sup> The ACCC acknowledges that catchment areas are fluid and that grain can and will move to where it is most economically advantaged, however the ACCC still considers that distance remains an important factor in determining the movement of grain.

<sup>379</sup> The ACCC notes that Viterra's OHB facility can receive grain via road receipt at 800 tonnes per hour.

- OHB (2 200 tonnes per hour) is able to load grain onto vessels significantly quicker than either Cargill's or Semaphore's facilities (1 000 tonnes per hour<sup>380</sup> and 300 tonnes per hour respectively).
- Viterra's OHB facility only has 65 000 tonnes of at-port storage, and appears to largely run on a Just in Time basis. However, the ACCC notes that Viterra's IHB facility has a significant amount of at-port storage (366 500 tonnes) which could potentially be used to support operations at OHB.<sup>381</sup> The ACCC therefore considers that OHB likely has greater flexibility in managing its operations compared to Semaphore's and Cargill's facilities (which have 16 500 tonnes and no at-port storage capacity respectively).
- **Spare port terminal facility capacity:** The ACCC notes that Viterra's OHB facility appears to experience some degree of capacity constraint during peak periods in high output seasons. However, the OHB facility appears to have ample spare capacity available during less desirable periods. It therefore appears there may be some scope to ease peak period capacity constraint concerns at OHB by spreading exports more broadly across the year where possible (see discussion below in relation to subclauses 5(3)(c) and (d)). The ACCC notes that the presence of third party PTSPs at Port Adelaide (and Victoria to a lesser extent), as well as the container and domestic markets (discussed below) likely serves to limit Viterra's incentive to offer favourable access to certain exporters in periods of high demand.
- **Proposed port terminal facilities:** The ACCC notes that T-Ports has proposed building a port terminal facility at Wallaroo. This facility would compete most closely with Viterra's Wallaroo facility, though the catchment area of T-Ports' Wallaroo facility would likely overlap with that of PTSPs located at Port Adelaide to some extent. It is therefore likely the facility would compete for the same grain as Viterra's OHB facility (in certain regions). In addition, ADM has also recently completed a small number of domestic coastal shipments out of Port Pirie: however the ACCC understands that ADM does not have appropriate exporter accreditation to provide export-related services at this time.<sup>382</sup> While the ACCC considers that the threat of entry by other PTSPs can be expected to place some level of constraint on Viterra (to the extent it is considered credible), the ACCC generally does not consider the threat of competition to be as effective as actual competition. Proposed port terminal facilities are discussed further below in relation to subclauses 5(3)(e) and (f).

### ***Competition in upstream and downstream markets***

The ACCC generally considers that matters relating to competition in upstream and downstream markets are likely the same in relation to OHB as they are in relation to Viterra's other port terminal facilities.

Section 4.1 (IHB) subclauses (b) and (g) sets out the ACCC's draft views on these matters in detail.

### ***Conclusion***

In light of the above, the ACCC's draft view is that, on balance, there is sufficient competitive constraint on Viterra's OHB facility such that competition at port and upcountry will likely be

<sup>380</sup> Cargill submit that while their road intake system is designed to load at 1 000 tonnes per hour, operationally due to truck availability Cargill expect to load at 400 tonnes per hour.

<sup>381</sup> Viterra, *Attachment 1 – Response to 14/11/19 information request – Questions 1 and 2 – Viterra port terminal facility features*, 13 February 2020.

<sup>382</sup> The ACCC notes there has been some media reporting that suggests ADM could commence export operations from its Port Pirie facility: <https://www.graincentral.com/logistics/port-pirie-south-to-open-as-first-australian-adm-bulk-grain-site/>.

maintained if an exemption were granted to Viterra in relation to this facility. The ACCC considers this to be relevant to subclauses 5(3)(b) and 5(3)(g) of the Code.

In reaching its draft view the ACCC notes that the operational changes Viterra will make in response to an exemption are unclear and that the ACCC has received limited views from third party exporters regarding Viterra's application for exemption in relation to OHB (or any other Viterra facilities).

Significantly, while the ACCC considers the competitive constraint placed upon Viterra's OHB facility by third party PTSPs (at Port Adelaide and, to a lesser extent in Victoria), the container market, and domestic demand, to be relatively limited when viewed individually, their combined effect likely imposes sufficient constraint on OHB to support an exemption.

The ACCC notes the potential for capacity constraints at OHB during the peak period, and understands Viterra owns the majority of upcountry storage in the Port Adelaide region (though there appears to be some credible alternatives in the Mid and Upper North regions). However the ACCC considers the level of competitive constraint is likely sufficient to ensure exporters will have fair and transparent access absent the application of the full Code in relation to Viterra's OHB facility.

While the ACCC considers it is not clear that granting an exemption to Viterra in respect of its OHB facility would necessarily promote a significant increase in competition in the port terminal services markets and in upstream or downstream markets, the ACCC does not expect an exemption to be detrimental to competition in these markets.

Given the above the ACCC's draft view is that exempting Viterra from the full application of the Code in relation to its OHB facility is likely to be in the public interest, and unlikely to be detrimental to competition in upstream and downstream markets.

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

The ACCC's draft finding about matters relating to the interests of exporters who may require access to port terminal services are the same in relation to OHB as they are in relation to Viterra's IHB facility.

Section 4.1 (IHB) subclause (c) sets out the ACCC's draft views on these matters in detail.

### ***(d) the likelihood that exporters of bulk wheat will have fair and transparent access to port terminal services***

Section 4.1 (IHB) subclause (d) sets out the ACCC's draft views on the likelihood that exporters will have fair and transparent access to port terminal services. ACCC views that specifically relate to these matters and Viterra's OHB facility are set out below.

In considering these matters, the ACCC notes that Viterra's Port Adelaide OHB facility is one of four port terminal facilities at Port Adelaide. As such the ability of exporters to obtain fair and transparent access at OHB must be considered with regard to the other facilities located at Port Adelaide. In relation to this, the ACCC understands that it may be possible for Viterra to operate its IHB and OHB facilities in conjunction with one another to some extent (for example in relation to storage capacity). While the extent to which this occurs in practice is unclear, the ACCC notes that Viterra has previously indicated that IHB and OHB are best managed operationally as a single port terminal facility (in 2013).<sup>383</sup> As set out in section 2.1

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<sup>383</sup> ACCC, *Draft Decision Viterra Operations Limited Application to Extend and Vary 2011 Port Terminal Services Access Undertaking*, 2013, p.28.

the ACCC also notes there are significant differences in the scale of Viterra's operation at Port Adelaide, when compared to third party PTSPs.

Viterra's OHB facility is the largest bulk grain loading facility at Port Adelaide, with capacity of 2.23 million tonnes per annum. When considered on an annual basis there appears to be a significant amount of spare capacity available at this facility, with the maximum amount of exports from OHB being 1.82 million tonnes per annum (which occurred during the 2016-17 season). Overall OHB's average annual capacity utilisation (excluding 2018-19) is 67 per cent, suggesting that spare capacity is likely available for third party exporters. However capacity at OHB is more constrained during peak periods, with an average utilisation of 78 per cent (excluding 2018-19) during these months. In particular, during the peak period in high grain output seasons it appears likely that there will be some capacity constraints at OHB: for example, Viterra performed 1.11 million tonnes of shipments at OHB in the peak period of the bumper 2016-17 season, just below the facility's peak period capacity of 1.22 million tonnes.<sup>384</sup> This suggests that, in the absence of sufficient competitive constraint, Viterra may have an incentive to provide certain exporters with more favourable access than others during peak periods in high output seasons.

In addition, Viterra's associated entity exporter, Glencore, is the largest exporter at OHB by throughput, performing 40 per cent of shipments in peak periods and 45 per cent in off-peak periods.<sup>385</sup> By comparison the largest third party exporters at OHB during the peak period, CBH, Bunge and COFCO, represent 16, 12 and 10 per cent of peak period shipments respectively (and 19, 3 and 6 per cent in the off-peak period respectively). As such it appears third party exporters have historically been able to access similar (or greater) levels of capacity during the peak period compared to the off-peak period at Viterra's OHB facility.

As such, third party exporters appear to be able to secure access at OHB during peak periods, with Glencore accounting for 40 per cent of OHB's shipments (or 31 per cent of OHB's capacity<sup>386</sup>) during peak periods. However, and as discussed in section 2.2.4, the fact Glencore only currently accounts for a relatively small portion of OHB's shipments (or total capacity) during peak periods does not necessarily mean that this would continue to be the case absent the application of Parts 3 to 6 of the Code. In particular the ACCC notes that Viterra's current PLPs ensure that combined across Viterra's six facilities a minimum of 500 000 tonnes of capacity is reserved for short term capacity per quarter. In addition no single exporter can apply for more than 40 per cent of the initial long-term capacity in the first six month period of the calendar year at OHB (or 50 per cent at all other times).<sup>387</sup> In the absence of the full application of the Code, terms such as this can be changed in the PLPs without the need for ACCC approval.

The above appears to indicate that, while OHB likely has spare capacity available on an annual basis, it may experience some capacity constraints during peak periods in high output seasons. As such, the ACCC considers that, absent competitive alternatives (or appropriate regulation), Viterra likely has an incentive to favour certain exporters in periods of high demand.

As previously noted the ability of exporters to obtain fair and transparent access at OHB must be also be considered with regard to the other port terminal facilities at Port Adelaide.

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<sup>384</sup> Viterra released 1.22 million tonnes of capacity in the peak period in the 2019-20 season. In the 2016-17 season Viterra released 1.08 million tonnes of capacity.

<sup>385</sup> The portion of shipments performed at OHB by exporters is taken from 2014-15 to 2018-19 data.

<sup>386</sup> Excluding shipment data from the 2018-19 season.

<sup>387</sup> The ACCC notes that it has defined the peak period in this document as December through to May.

Viterra's IHB facility has a (stated annual capacity) of 918 972 tonnes per annum,<sup>388</sup> with an average capacity utilisation rate of 78 per cent and 99 per cent, from an annual and peak period perspective respectively (excluding the drought-affected 2018-19 season). Viterra's associated entity exporter, Glencore, also performs the majority of shipments through IHB, with a market share of 58 per cent in peak periods and 53 per cent in off-peak periods.<sup>389</sup>

While Glencore's peak period market share at IHB (58 per cent) is significantly higher than the next highest peak period market share at other Viterra facilities (the next highest is Port Giles, where Glencore performs 43 per cent of peak period shipments), the ACCC notes that third party exporters have historically had greater access to capacity at Viterra's more efficient OHB facility (where Glencore performs 40 per cent of peak period shipments). In addition, and for comparison, the second largest exporter at IHB is CBH, with a peak and off-peak period market share of 10 and 5 per cent respectively (and 8 per cent annually).

In addition the ACCC notes that Viterra's current PLPs ensure that no single exporter can apply for more than 50 per cent of the initial long-term capacity at IHB.<sup>390</sup> In the absence of the full application of the Code, terms such as this can be changed in the PLPs without the need for ACCC approval.

Given the above, the ACCC's considers that IHB appears to have limited extra spare capacity available, particularly during peak periods, and that most of IHB's current capacity is typically utilised by Glencore. The ACCC therefore considers that, while it is possible that third party exporters could access some level of spare capacity at Viterra's IHB facility in the event that there are capacity constraints at OHB, this seems unlikely given IHB generally experiences greater capacity constraints than OHB.<sup>391</sup>

The ACCC notes that Cargill's Berth 20, Inner Harbour facility is also relevant to the likelihood that exporters will be able to obtain fair and transparent access when considering the possible exemption of Viterra's OHB facility. As discussed in section 2.1.4 Cargill's forthcoming mobile ship loader facility has a 'nominal capacity' of 300 000 tonnes per annum and a 'highest practical capacity' of 540 000 tonnes per annum.<sup>392</sup> In its exemption application Cargill also stated that:

*Cargill's exports through Port Adelaide over the four years up to 2017-18 averaged at 238k tonnes per year. In 2018-19, Cargill did not export through Port Adelaide at all due to drought conditions. Cargill therefore anticipates that it will likely have excess capacity in relation to its expected nominal annual tonnage of 300k tonnes through its new facility. That being the case, Cargill is committed to welcoming third parties to utilise any available capacity in its facility. All services would be offered and charged on a commercial basis.*<sup>393</sup>

The amount of spare available capacity available at Cargill's facility therefore likely ranges between 62 000 tonnes per annum to 302 000 tonnes per annum (assuming, as per above, that Cargill performs 238 000 tonnes of exports per annum). In considering the capacity available at Cargill's facility the ACCC notes that Cargill, as a vertically integrated PTSP, is likely has an incentive to provide greater access to its associated entity exporter. In addition, as an exempt service provider in relation to its Berth 20, Inner Harbour facility, Cargill is also

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<sup>388</sup> Viterra, *Attachment 1 – Response to 14/11/19 information request – Questions 1 and 2 – Viterra port terminal facility features*, 13 February 2020.

<sup>389</sup> Figures are averaged across the 2014-15 to 2018-19 seasons.

<sup>390</sup> The ACCC notes that it has defined the peak period in this document as December through to May.

<sup>391</sup> As discussed in section 2.1, OHB has more efficient infrastructure than IHB, and is therefore likely more desirable the more desirable facility to export from. However the ACCC understands that OHB is largely run on a Just in Time process, and it may be more efficient for exporters to store and load grain from Viterra's IHB facility. Furthermore, depending on contractual arrangements between the exporter and Viterra, the exporter may not always have choice of which port to use when using Export Select.

<sup>392</sup> Cargill, *Application for exemption under the Port Terminal Access (Bulk Wheat) Code of Conduct*, 30 October 2019, p. 3.

<sup>393</sup> *Ibid* p. 10.

less constrained by the Code in this regard. However the ACCC also notes that Cargill is subject to significant competitive constraint, and has also indicated its intention to continue to use other facilities at Port Adelaide (including Viterra's port terminals).<sup>394</sup> The ACCC notes that should Cargill choose to export through Viterra's Port Adelaide facilities (over its own facility) slightly more spare capacity will be available to third party exporters at Cargill's facility. In addition, the ACCC also notes that Cargill's upcountry network provides an alternate (albeit limited in size) vertically integrated network through which third party exporters can export grain from Port Adelaide.

The ACCC also notes that Cargill's exports through Viterra's IHB and OHB facilities decreased significantly (from 280 000 tonnes to 16 000 tonnes per season) after it commenced using LINX's facility in 2015-16.<sup>395</sup> The changes in Cargill's exports has likely reduced demand for Viterra's IHB and OHB facilities.

Given the above, the ACCC expects that the presence of Cargill's Berth 20 facility at Port Adelaide Inner Harbour will have two effects, both of which are likely to reduce Viterra's incentive to provide access to certain exporters on a favourable basis: firstly, Cargill's facility will give third party exporters a small amount of additional capacity and offer credible (though limited) competition to Viterra's IHB and OHB facilities; and secondly, that Cargill will be unlikely to choose to export large volumes of grain through IHB or OHB, reducing the potential for capacity constraints at these facilities (and also Viterra's incentive to favour certain exporters as a result).

Semaphore's Osborne facility is also relevant to the likelihood that exporters will be able to obtain fair and transparent access when considering whether to exempt Viterra from Parts 3 to 6 of the Code in relation to its OHB facility. The ACCC notes that Semaphore is not vertically integrated with an exporter<sup>396</sup> and has submitted that its facility has a capacity of 264 000 to 396 000 tonnes per annum.<sup>397</sup> The ACCC considers that Semaphore's facility provides an alternative export path for third party exporters. As Semaphore is not vertically integrated with an exporter, it appears unlikely that Semaphore faces strong incentives to favour, or unfairly discriminate against, certain exporters.

Given the above, the ACCC does not consider the level of competitive constraint imposed by the available spare capacity at Cargill's and Semaphore's Port Adelaide facilities sufficient to support an exemption in relation to Viterra's OHB facility in and of itself. However, as discussed above in relation to subclauses 5(3)(b) and 5(3)(g) of the Code, PTSPs operating at Port Adelaide also face competitive constraint from the local domestic and container markets, as well as Victorian markets (for certain regions of SA). These alternative markets constrain the potential for Viterra to provide access to its OHB facility on a favourable basis.

## **Conclusion**

In light of the above, the ACCC's draft view is an exemption of Viterra's OHB facility from Parts 3 to 6 of the Code is unlikely to be detrimental to fair and transparent access for exporters.

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<sup>394</sup> Ibid p. 5.

<sup>395</sup> The ACCC notes that Cargill have only loaded one vessel at Viterra's Port Adelaide facilities since the beginning of the 2015-16 season (which coincides with the entry of LINX). As such, the ACCC anticipates Cargill will likely continue to use its own facility for the majority of its shipments out of Port Adelaide.

<sup>396</sup> Semaphore exemption application, p. 6.

<sup>397</sup> Semaphore submitted to the ACCC it is able to load 33 000 tonnes per month, which equates to 396 000 tonnes over a whole year. However, given Australia is only competitive internationally for 8 to 9 months per annum, this means practically Semaphore expect to load 264 000 to 297 000 tonnes per annum. Semaphore note that in the 2016-17 season Australia was competitive internationally for a longer period, and therefore was able to facilitate more grain exports (370 000 tonnes).

In reaching its draft view the ACCC notes that the operational changes Viterra will make in response to an exemption are unclear and that the ACCC has received limited views from third party exporters regarding Viterra's application for exemption in relation to OHB (or any other Viterra facilities).

Notwithstanding the above, the ACCC considers that the combination of competition from third party PTSPs located at Port Adelaide, the SA domestic and container markets, and Victorian markets, likely imposes sufficient competitive constraint on Viterra to ensure fair and transparent access will be provided to its OHB facility.

***(e) the promotion of the economically efficient operation and use of the port terminal facility; and (f) the promotion of efficient investment in port terminal facilities***

The ACCC considers that matters relating to the promotion of the economically efficient operation and use of the port terminal facility, and the promotion of efficient investment in port terminal facilities are the same in relation to OHB as they are in relation to Viterra's other port terminal facilities.

Section 4.1 (IHB) subclauses (e) and (f) sets out the ACCC's draft views on these matters in detail.

***(h) whether the port terminal service provider is an exporter or an associated entity of an exporter***

The ACCC's consideration of whether Viterra is an exporter (or an associated entity of an exporter) is the same in relation to Port Adelaide OHB as it is in relation to Viterra's other port terminal facilities.

Section 4.1 (IHB) subclause (h) sets out the ACCC's draft view in relation to these matters.

***(i) whether there is already an exempt service provider within the grain catchment area for the port concerned***

The ACCC considers Port Adelaide IHB and OHB to have the same catchment area. As such section 4.1 (IHB) subclause (i) sets out the ACCC's draft view in relation to these matters.

The ACCC notes it has also proposed to exempt Viterra's IHB facility as part of its assessment of Viterra's exemption application. As both IHB and OHB are located at Port Adelaide the ACCC considers that IHB lies within OHB's catchment area, and therefore if IHB is exempted in the ACCC's final determination (as proposed in the Draft Determinations), then Viterra will also be an exempt service provider in relation to its IHB facility, which is within OHB's catchment area.

***(j) any other matters the ACCC considers relevant***

The ACCC's draft decision whether to determine Viterra to be an exempt service provider in relation to its OHB facility involves its balancing of the relevant considerations referred to in subclause 5(3) of the Code. In making its decision the ACCC considered the power to revoke an exemption as relevant to its assessment.

The ACCC has the ability under subclause 5(6) of the Code to review an exemption determination with a view to revoking it in certain circumstances. Similar to the process for



granting an exemption, the ACCC may revoke an exemption determination if, after having regard to matters (a) to (j) of subclause 5(3) of the Code, it is satisfied that the reasons for granting the exemption/s no longer apply.

As such, given the nature of the decision in relation to Viterra's OHB facility the ACCC considers the ability to review (and potentially revoke) an exemption determination relevant to its decision.

While acknowledging the significance of a revocation, the ACCC considers that its future ability to revoke an exemption if the reasons for granting the exemption no longer apply supports its draft determination to grant an exemption in relation to OHB.

### 4.3. Port Lincoln

#### ***(a) the legitimate business interests of the port terminal service provider***

The ACCC's draft findings about Viterra's legitimate business interests are the same in relation to Port Lincoln as they are in relation to Viterra's other port terminal facilities.

Section 4.1 (IHB) subclause (a) sets out the ACCC's draft views on Viterra's legitimate business interests.

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

The ACCC's draft findings about the public interest in relation to Port Lincoln are the same as they are in relation to Viterra's other port terminal facilities.

Section 4.1 (IHB) sets out the ACCC's draft views in relation to subclauses 5(3)(b) and (g).

To the extent the ACCC has views on these matters that specifically relate to Viterra's Port Lincoln facility, these are set out below.

#### ***Competition in bulk wheat export operations***

Viterra's Port Lincoln facility is one of three port terminal facilities currently in operation on the Eyre Peninsula and on average ships 1.89 million tonnes of grain per season. Viterra owns one of the other facilities which is located at Thevenard, and T-Ports recently commenced operations at its Lucky Bay facility. Since commencing operations in March 2020, Lucky Bay has only completed seven shipments, totalling 119 000 tonnes of grain.<sup>398</sup>

The ACCC's draft view is that Viterra's Port Lincoln facility does not face sufficient competitive constraint to support an exemption from Parts 3 to 6 of the Code at this time.

The ACCC's draft view is based on the analysis of the port terminal services markets in chapter 2, as well as the consideration of upcountry and related markets in chapter 3. These indicate the following:

- **Port Lincoln's catchment area:** Port Lincoln has traditionally sourced grain from the Lower and Eastern Eyre Peninsula, as well as some areas of the Western Eyre Peninsula to a lesser extent. As discussed in section 3.2, it appears T-Ports' Lucky Bay facility will primarily compete for grain with Port Lincoln on the Eastern Eyre

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<sup>398</sup> As of 18 September 2020.



Peninsula, and to a lesser extent on the Lower and Western Eyre Peninsula. The shorter distances to port appear likely to offer T-Ports' Lucky Bay facility a freight advantage in these regions.

- **Viterra's infrastructure:** The ACCC considers that Viterra's Port Lincoln facility has several advantages in terms of its infrastructure over T-Ports' Lucky Bay facility:
  - Port Lincoln is able to receive grain via road services at a substantially higher rate than Lucky Bay (4 000 tonnes per hour compared to 1 000 tonnes per hour). However the ACCC notes that rail services have now ceased on the Eyre Peninsula, and Port Lincoln no longer receives grain via rail (see section 3.1.2).
  - Port Lincoln is able to load grain onto vessels more quickly than Lucky Bay (3 000 tonnes per hour vs 1 800 tonnes per hour). The ACCC also notes that T-Ports' transshipment operation necessarily requires the double handling of grain: it is possible this may mitigate the freight advantages offered to the Lucky Bay facility to some extent.
  - Both Port Lincoln and Lucky Bay have substantial at-port storage (395 600 tonnes and 360 000 tonnes respectively) as well as the ability to load large vessels (i.e. Panamax class).
- **The competitive constraint imposed by Lucky Bay is currently uncertain:** The ACCC notes that T-Ports only recently began operations at its Lucky Bay facility (in March 2020). In addition, the Lucky Bay facility uses a transshipment approach which has not previously been used in the context of the Australian bulk grain market and may be subject to operational constraints in practice.<sup>399</sup> Lucky Bay also appears to be heavily reliant on grower direct-to-port deliveries and does not appear to have established a large number of arrangements with third party exporters to date. While acknowledging that T-Ports' direct-to-port arrangements have the potential to provide a level of competitive advantage, Viterra currently owns the vast majority of upcountry storage sites on the Eyre Peninsula, and the Lucky Bay operation remains relatively unproven at this time. As such the ACCC considers that the competitive constraint T-Ports' Lucky Bay facility will impose upon Port Lincoln in practice, while potentially material, remains unclear at this time.
- **Spare capacity:** As discussed in section 2.2 Port Lincoln appears to have previously experienced significant capacity constraints from both a peak and annual capacity perspective. However the ACCC considers it reasonable to expect that T-Ports' Lucky Bay facility will draw grain away from Port Lincoln. This is likely to alleviate the capacity constraints at Port Lincoln to some extent although, as discussed above, the extent to which this will occur is currently uncertain. The ACCC generally considers that the presence of spare capacity and/or the presence of third party PTSPs (as well as container and domestic markets) potentially to provide incentives for a vertically integrated PTSP to provide fair and transparent access to third party exporters. Exporters ability to access capacity is discussed further in relation to subclauses 5(3)(c) and (d).
- **Proposed port terminal facilities:** The ACCC notes that there are a number of proposals to construct additional port terminal facilities on the Eyre Peninsula. However the ACCC notes that these proposals generally have a number of barriers to overcome before entering the market and commencing operations. Nonetheless the ACCC considers that the threat of entry of new facilities on the Eyre Peninsula, if

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<sup>399</sup> For example, the PLPs for T-Ports' Lucky Bay facility appear to suggest that certain weather conditions may limit loading operations.

sufficiently credible, may serve as a competitive constraint on Port Lincoln.<sup>400</sup> The ACCC's view on proposed port terminals is discussed in section 2.1.5, and in relation to Port Lincoln in the subclause 5(3)(e) and (f) draft findings.

### **Competition in upstream and downstream markets**

The ACCC has considered whether the level of competition in upcountry storage, handling, and transport markets might provide Viterra with market power. Absent the full application of the Code, the potential exists for any market power to affect competition in the port terminal services market by, for example, limiting the ability of third party exporters to participate in upstream grain acquisition.

In addition to upstream and downstream markets, the ACCC also considered the potential for related markets, such as container exports and domestic demand for grain, to affect the promotion of competition in bulk wheat port terminal services.

As discussed in section 3.1.1 Viterra owns the majority of storage on the Eyre Peninsula. In the 2020-21 season Viterra is expected to operate 21 out of 22 upcountry storage sites on the Eyre Peninsula. The remaining storage site is operated by T-Ports at Lock and has a storage capacity of 150 000 tonnes.<sup>401</sup>

The ACCC notes that T-Ports has previously submitted that the vast majority of deliveries to Viterra upcountry sites typically move to Port Lincoln:

*The catchment zone area is estimated to include the entire Eastern Eyre region where the cost of transporting grain from farm to Lucky Bay would be notably less than transporting to Port Lincoln (Noting that the vast majority est. 95% of any deliveries to Viterra up-country sites will ultimately be moved to Port Lincoln (at grower cost)).<sup>402</sup>*

T-Ports also submitted that its Lucky Bay port terminal facility will largely rely on growers delivering grain direct to its port terminal facility, which has 360 000 tonnes of at-port storage.<sup>403</sup> Relatedly the ACCC also understands from ESCOSA's 2018 inquiry that on-farm storage is relatively limited on the Eyre Peninsula.<sup>404</sup> While the limited availability of on-farm storage could somewhat restrict the ability of growers to deliver grain directly to Lucky Bay (potentially limiting throughput at the facility), T-Ports' use of a grower direct delivery model may also serve to provide incentives for growers to invest in more on-farm storage, potentially increasing the amount of grain able to move to its Lucky Bay facility.<sup>405</sup>

The ACCC notes that Viterra also has significant at-port storage at both its Port Lincoln and Thevenard facilities (395 600 tonnes and 335 925 tonnes respectively)<sup>406</sup> which, in addition to providing Viterra with operational flexibility, could also enable Viterra to compete for grain directly from farm (should, for example, on-farm storage increase as a result of T-Ports' Lucky Bay facility).

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<sup>400</sup> The ACCC notes that, if these facilities were to become operational, they would likely compete for the same grain as Viterra's Port Lincoln facility.

<sup>401</sup> T-Ports, *Application for exemption from the Competition and Consumer (Industry Code – Port Terminal Access (Bulk Wheat)) Regulation 2014*, 28 March 2019, p. 3.

<sup>402</sup> Ibid.

<sup>403</sup> Ibid pp. 3, 6.

<sup>404</sup> See ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report*, December 2018, pp. 24-25.

<sup>405</sup> T-Ports submitted on page 6 of their exemption application that: "The proximity of [Lucky Bay] to the growing areas enables [on-farm storage] to be viable. This service completes the link of providing competition in provision of services in the entire length of the supply chain for a significant portion of eastern [Eyre Peninsula] growers."

<sup>406</sup> Viterra, *Attachment 1 – Response to 14/11/19 information request – Question 1 and 2 – Viterra port terminal facility features*, 13 February 2020.

Given that Viterra owns the vast majority of storage on the Eyre Peninsula, and that the current level of on-farm storage appears to be limited, the ACCC considers that there is the potential for Viterra's position upcountry to interact with its position at port to affect competition.

The ACCC notes that SA PTSPs may also face competitive constraints from the local SA domestic market. While the ACCC does not receive data on where grain is processed or consumed within a state, the ACCC notes that SA as a whole has the smallest domestic market of any mainland state in Australia (at 1.2 million tonnes of grain). The ACCC also understands that SA's domestic consumption is largely located within the east of the state (see section 3.3.2).

The ACCC notes that SA's domestic consumption has been fairly constant since the 2014-15 season.<sup>407</sup> The domestic market also generally offers a reliable and stable source of demand for grain, and typically involves lower supply chain costs (relative to export markets) making it a relatively attractive (but limited) option. As such grain typically moves to the export market once opportunities in the domestic market have been met.

In addition, the ACCC notes, that, as has been demonstrated by the poor growing conditions along the east coast in recent seasons, grain can also move in large quantities for interstate domestic consumption in certain market conditions. However, it seems grain from the Eyre Peninsula largely moved to the east coast via coastal shipment in response to the drought conditions (see section 3.2.2). Demand for port terminal capacity would therefore likely not be reduced by domestic demand in these circumstances.

As discussed in section 3.3.2, the ACCC understands that grain grown on the Eyre Peninsula has limited access to SA's domestic market. As such grain grown on the Eyre Peninsula appears to be largely reliant on access to the export market. The domestic market therefore likely imposes limited competitive constraint on Viterra's Port Lincoln facility.

The ACCC also notes that the container market can also impose a competitive constraint on PTSPs. However, the SA container market is located at Port Adelaide and it appears highly unlikely that grain will move from the Eyre Peninsula to Port Adelaide (due to the significant distances involved). As such the ACCC's draft view is that SA's container market imposes a very limited competitive constraint on Viterra's Port Lincoln facility.

## **Conclusion**

Given the limited access to container and domestic markets, grain grown on the Eyre Peninsula is largely reliant on access to bulk export markets. As such the ACCC considers that T-Ports' Lucky Bay facility likely provides the only significant and direct competitive constraint on the Eyre Peninsula to Viterra's Port Lincoln facility. Noting that Viterra owns the vast majority of upcountry services, and that the level of competitive constraint imposed by T-Ports is uncertain, the ACCC's draft view is that Viterra's Port Lincoln facility is unlikely to be subjected to sufficient competitive constraint to support an exemption from Parts 3 to 6 of the Code.

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<sup>407</sup> SA domestic consumption has varied between 1.11 and 1.24 million tonnes per annum since the 2014-15 season.

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

The ACCC's draft findings about matters relating to the interests of exporters who may require access to port terminal services are the same in relation to Port Lincoln as they are in relation to Viterra's IHB facility.

Section 4.1 (IHB) subclause (c) sets out the ACCC's draft views on these matters in detail.

***(d) the likelihood that exporters of bulk wheat will have fair and transparent access to port terminal services***

Section 4.1 (IHB) subclause (d) sets out the ACCC's draft views on the likelihood that exporters will have fair and transparent access to port terminal services. ACCC views that specifically relate to Viterra's Port Lincoln facility are set out below.

The ACCC notes that Viterra's Port Lincoln facility has a stated capacity of 2.41 million tonnes per annum.<sup>408</sup> As stated in relation to subclauses 5(3)(b) and (g) there appears to have been significant capacity constraints at Port Lincoln, with an average annual and peak period capacity utilisation rate of 79 and 88 per cent respectively. However the ACCC considers it reasonable to expect that the introduction of T-Ports' Lucky Bay facility will draw grain away from Port Lincoln (as well as Thevenard to a lesser extent). This is expected to reduce the potential for capacity constraints at Port Lincoln in future seasons, however the extent to which this will occur is unclear at this time (given the relatively recent commencement of operations at Lucky Bay).

As such, the ACCC considers that the extent to which Port Lincoln will experience capacity constraints will depend heavily on the volume of grain that is facilitated through T-Ports' Lucky Bay facility. To the extent T-Ports' facility offers a credible (or advantageous) alternate for the export of grain grown on the Eyre Peninsula the ACCC expects that Viterra's incentive to favour certain exporters at its Port Lincoln facility will be reduced. This reflects: the reduction in capacity constraints at Port Lincoln as a result of grain moving to T-Ports' facility; and the constraint imposed by a competing facility.

The ACCC notes that Viterra's associated entity exporter, Glencore, is the largest exporter through its Port Lincoln facility, with a market share of 41 per cent in the peak period, and 38 per cent in the off-peak period. On average, 10.25 exporters per season secure access to Port Lincoln's facilities; the largest third party exporters at Port Lincoln are CBH, Cargill, ADM and COFCO, who perform 14, 11, 7 and 6 per cent of annual shipments respectively. As shown in figure 2.10 historically third party exporters appear to have been able to access similar levels of capacity in both the peak and off-peak period at Port Lincoln.

In considering historical exporter market shares, the ACCC notes that Viterra's current PLPs ensure that combined across Viterra's six facilities a minimum of 500 000 tonnes of capacity is reserved for short term capacity per quarter. In addition no single exporter at Port Lincoln can apply for more than 40 per cent of the initial long-term capacity in the first six months of the calendar year (or 50 per cent at all other times).<sup>409</sup> In the absence of the full application of the Code, terms such as this can be changed in the PLPs without the need for ACCC approval. Consequently, the historical level of access from third party exporters was likely influenced by the current PLPs.

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<sup>408</sup> Viterra, *Attachment 2 – Response to 14/11/19 information request – question 3 – Viterra published available capacity estimates*, 13 February 2020.

<sup>409</sup> The ACCC notes that it has defined the peak period in this document as December through to May.

The ACCC's view is that it is appropriate to consider whether the current level of competition among exporters is likely to be affected if an exemption from Parts 3 to 6 of the Code was granted in relation to Port Lincoln.

While exporters appear to have historically been able to access shipping services at Port Lincoln, the ACCC considers the level of competitive constraint faced by Port Lincoln is uncertain at this time. Consequently, the ACCC's draft view is that if an exemption from Parts 3 to 6 of the Code were granted there is a risk it would be detrimental to the likelihood that exporters would have fair and transparent access to Viterra's Port Lincoln facility.

***(e) the promotion of the economically efficient operation and use of the port terminal facility; and (f) the promotion of efficient investment in port terminal facilities***

Section 4.1 (IHB) subclauses (e) and (f) sets out the ACCC's draft findings on the promotion of the economically efficient operation and use of the port terminal facility, and the promotion of efficient investment in port terminal facilities. ACCC views specifically relating to these matters and Viterra's Port Lincoln facility are set out below.

**Promotion of the efficient operation and use of Viterra's Port Lincoln facility**

As discussed in relation to the assessment of section 4.1 (IHB) subclauses (e) and (f) the ACCC considers that exemptions from Parts 3 to 6 of the Code for Viterra's port terminal facilities (including Port Lincoln) would allow Viterra to provide greater flexibility for their customers. However, as previously discussed, in circumstances where capacity is constrained and/or sufficient competition is not present, Viterra may have an incentive to favour certain exporters. The ACCC considers that this could lead to inefficient market outcomes more broadly, despite the individual exempt port terminal facility being able to operating more flexibly.

As set out in the analysis relating to subclauses 5(3)(c) and (d) the ACCC's draft view is that, if an exemption were granted to Viterra in relation to Port Lincoln facility, there is a risk Viterra would have an incentive to provide favourable access to certain exporters. This is largely due to the uncertainty regarding the competitive constraint imposed by T-Ports' Lucky Bay facility.

However, the ACCC considers that it is generally in Viterra's interests to make operational decisions that ensure the efficient and profitable operation of its port terminal facilities irrespective of whether or not exemptions are granted in relation to any of its facilities. This is primarily due to the need to provide a return to investors.

**Promotion of efficient investment in port terminal facilities**

It is in Viterra's interests to make investment decisions which ensure Viterra can maximise its return to its shareholders, irrespective of whether or not exemptions are granted in relation to any of Viterra's facilities.

In considering the investment in port terminal services, the ACCC notes that T-Ports' decision to enter the PTSP market represents a significant investment on the Eyre Peninsula (and the SA bulk grain export supply chain more broadly). As previously discussed, the Lucky Bay facility has the potential to provide a credible alternative export pathway for grain grown on the Eyre Peninsula. However, the ACCC notes that T-Ports' decision to invest in

Lucky Bay has already been made and, as such, is unlikely to be significantly affected by the ACCC's decision to exempt, or not exempt, Viterra's Port Lincoln facility.<sup>410</sup>

T-Ports has also proposed to develop a facility at Wallaroo using the same transshipment vessel as its Lucky Bay facility.<sup>411</sup> T-Ports anticipates that the location of the Wallaroo and Lucky Bay facilities, and the shared use of the same transshipment vessel will deliver greater efficiencies and cost savings for their Wallaroo facility:

*There are efficiencies and cost savings in building this port on the opposite side of the Spencer Gulf to Lucky Bay as we will utilise the same transshipment vessel, the 'Lucky Eyre'.<sup>412</sup>*

In addition, the ACCC notes that the location and operational interaction between T-Ports' proposed Wallaroo and existing Lucky Bay facilities may provide significant operational flexibility; for example by facilitating split shipments between the two facilities. However, the ACCC also notes that the use of a single transshipment vessel between two ports may also result in operational challenges and possibly affect the amount of throughput that can be delivered from each facility.

The ACCC also notes there a number of proposals to develop additional port terminal facilities in SA, including at Port Spencer and Cape Hardy (which are both located approximately halfway between Port Lincoln and Lucky Bay). The ACCC understands that the Port Spencer and Cape Hardy proposals are still in the process of raising capital and/or receiving various forms of government approval.<sup>413</sup>

In particular the ACCC notes that Peninsula Ports has recently gained approval for its revised Public Environmental Report from the SA government for a port terminal facility at Port Spencer.<sup>414</sup> However the ACCC understands a number of other approvals and pre-work must be completed before Peninsula Ports construction can begin and/or be completed.<sup>415</sup> Peninsula Ports estimates that the proposed facility will have a capacity 1 million tonnes per annum,<sup>416</sup> and will be able to accommodate Panamax sized vessels, and will have 800 000 tonnes of at-port storage.<sup>417</sup> While it is uncertain if, or when, construction will begin, the ACCC notes that Peninsula Ports anticipates Port Spencer's construction will take 18 months to complete.<sup>418</sup>

The ACCC expects that, in the event either (or both) of these facilities proceed, they will materially increase the level of port terminal services competition on the Eyre Peninsula. As discussed in section 2.1.5, while the ACCC considers that a (sufficiently credible) threat of competition can impose a level of competitive constraint, the threat of competition is unlikely to be as effective as actual competition.

In considering investment in port terminal facilities, the ACCC notes that some stakeholders have raised concerns around port terminal investment decisions in SA. In particular:

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<sup>410</sup> The ACCC acknowledges the possibility that the decision could have some influence on T-Ports' decisions on whether to make further investments in its Lucky Bay facility.

<sup>411</sup> The use of a transshipment model would allow the proposed Wallaroo site to load larger Panamax sized vessels.

<sup>412</sup> T-Ports website: <https://tports.com/wallaroo/> (accessed 27 August 2020).

<sup>413</sup> The ACCC notes that Port Spencer has gained approval from the SA Government, though the ACCC understands that before Free Eyre can begin construction there still need to obtain further approval for various factors (such as coastal and environmental concerns, as well as the upgrading of road access).

<sup>414</sup> See: <https://www.premier.sa.gov.au/news/media-releases/news/port-spencer-grain-facility-approved>.

<sup>415</sup> Ibid.

<sup>416</sup> Jacobs, *Port Spencer Grain Export Facility – Peninsula Ports – Amendment to Public Environment Report*, 8 November 2019, p. 45.

<sup>417</sup> Peninsula Ports, *Media Release – Work to begin on \$230m Port Spencer grain port after public environmental report amendment approved*, 13 August 2020, p. 2.

<sup>418</sup> Jacobs, *Port Spencer Grain Export Facility – Peninsula Ports - Amendment to Public Environment Report*, 8 November 2019, p. 45.

- GPA submitted that investment in additional port terminal facilities in SA may be inefficient and reflect concerns around access to existing facilities or the service offered.<sup>419</sup>
- T-Ports submitted that future investment decisions depend on expectations of a fair and transparent playing field, and the absence of sufficient regulation in the presence of a dominant PTSP risks affecting investment:

*Future investment in port terminal facilities will depend upon the expectation of a fair and even playing field in the market. If there is a dominant provider in the market, with little or no regulation on pricing and access, the incentive to invest diminishes with the increased risk of retaliatory behaviour through differential service offerings to customers who may otherwise have supported the new investment.*<sup>420</sup>

While the ACCC has not undertaken a detailed quantitative analysis of the appropriate level of investment in port terminal facilities in SA, significant consideration has been given to the effect of the Code and the related effects on the decision to exempt (or not exempt) each of Viterra's port terminal facilities.

The ACCC considers that efficient investment decisions can generally be expected to occur in circumstances where adequate competition is present, or where there is sufficient regulatory intervention to ameliorate the absence of competition.

The ACCC also acknowledges that unnecessary regulation has the potential to discourage a PTSP from making otherwise efficient investments in its port terminal facilities (or the supply chain more broadly). However, the ACCC also considers that an inadequate level of regulation risks affecting efficient investment in port terminal services which could result in either: under investment (to the extent the inadequate regulation reduces the incentives for current participants and/or new entrants to investment, due to their inability to gain access on fair and transparent terms); or over investment (to the extent the inadequate regulation encourages current participants and/or new entrants to unnecessarily duplicate existing infrastructure). The ACCC also notes that different parties are likely to have different investment incentives and that these incentives will be influenced by a range of factors, including the level of regulation imposed on a competing PTSPs.

As previously noted, the ACCC considers that it is in Viterra's interests to make investment (and operational) decisions that ensure its profitable operation, and that Viterra can maximise returns to shareholders. Consistent with this view, the ACCC expects that T-Ports (and other proposed third party PTSPs) will also generally face incentives to make investment (and operational) decisions which maximise returns to shareholders (or profits), irrespective of whether Port Lincoln is exempted from Parts 3 to 6 of the Code.

As discussed in relation to subclause 5(3)(d), the ACCC considers that the level of competitive constraint faced by Viterra in relation to Port Lincoln is 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.

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).

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<sup>419</sup> GPA submission, 4 October 2019, p. 3.

<sup>420</sup> T-Ports submission, 26 August 2019, p. 34.



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.

***(h) whether the port terminal service provider is an exporter or an associated entity of an exporter***

The ACCC's consideration of whether Viterra is an exporter (or an associated entity of an exporter) is the same in relation to Port Lincoln as it is in relation to Viterra's other port terminal facilities.

Section 4.1 (IHB) subclause (h) sets out the ACCC's draft view in relation to these matters.

***(i) whether there is already an exempt service provider within the grain catchment area for the port concerned***

Refer to section 4.1 (IHB) subclause (i) or section 3.2 for the ACCC's draft findings on catchment areas in SA. ACCC views specific to Viterra's Port Lincoln facility are set out below.

The ACCC notes that, while Viterra submitted that catchment areas are fluid and that grain will move to where it is most economically viable,<sup>421</sup> Viterra has also indicated that Port Lincoln has traditionally sourced grain from growers on the Eyre Peninsula.<sup>422</sup>

T-Ports, the other PTSP operating on the Eyre Peninsula, has submitted that it expects its Lucky Bay facility to source grain from the Eastern Eyre Peninsula, though it also noted that the relevant catchment area extends into the Lower and Western Eyre Peninsula:

*The catchment zone area is estimated to include the entire Eastern Eyre region where the cost of transporting grain from farm to Lucky Bay would be notably less than transporting to Port Lincoln (Noting that the vast majority est. 95% of any deliveries to Viterra up-country sites will ultimately be moved to Port Lincoln (at grower cost)). The zone extends into Western Eyre region as far west as Cungenena / Poochera at which point the freight advantage to northern sites begins favouring the Thevenard port and southern sites begins favouring Port Lincoln. The Lower Eyre region freight advantage primarily favours Port Lincoln, however on the northern most parts of this region there will be farms that are physically closer to Lucky Bay and as such would be freight advantaged to deliver to Lucky Bay.<sup>423</sup>*

SAFC submitted that T-Ports' Lucky Bay facility is likely to change/restrict the catchment area of Viterra's Port Lincoln facility:

*SAFC notes that T-Ports facility at Lucky Bay is likely to significantly change/restrict the catchment area for Viterra's Port Lincoln facility. There will be significant new competition for [Eyre Peninsula] grain, particularly on the eastern side of the peninsula.<sup>424</sup>*

SAFC also submitted that the closure of rail transport along the Eyre Peninsula will decrease the Port Lincoln facility's catchment area:

*The cessation of grain transport by rail on the Eyre Peninsula will also change catchment areas. Where previously rail lines funnelled grain towards Pt Lincoln, increasing its catchment area, now trucking distance (and cost) will be a greater factor.<sup>425</sup>*

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<sup>421</sup> Viterra, *Exemption Application 2019*, 2 July 2019, p. 1.

<sup>422</sup> *Ibid* p. 41

<sup>423</sup> T-Ports, *Application for exemption from the Competition and Consumer (Industry Code – Port Terminal Access (Bulk Wheat)) Regulation 2014*, 28 March 2019, pp. 3-4.

<sup>424</sup> SAFC submission, 6 September 2019, p. 2.



In contrast, T-Ports submitted that the closure of rail is unlikely to affect the Port Lincoln facility's catchment area:

*It is hard to argue rail provides any advantage in drawing grain from different regions ...Port Lincoln only draws its grain from the Eyre Peninsula. T-ports does not consider the use of or discontinuation of rail on the [Eyre Peninsula] affecting the ability to source grain from other growing regions.<sup>426</sup>*

As discussed in section 3.2 and in subclauses 5(3)(b) and (g) above, the ACCC considers that Port Lincoln sources grain from across the Eyre Peninsula, though some grain in the north-western Eyre Peninsula will be freight advantaged to move to Thevenard (see section 4.6 subclause (i)).

Given T-Ports' facility at Lucky Bay is likely to draw grain from across the Eyre Peninsula, and in particular the Eastern Eyre Peninsula, the ACCC considers that the catchment area for Port Lincoln contains an exempt port terminal service provider and, further, that this can be expected to impose a (somewhat uncertain) level of competitive constraint on Viterra's Port Lincoln facility.

As discussed in section 3.1.2, the ACCC does not expect closure of rail transport to have a pronounced impact on catchment areas on the Eyre Peninsula (given that road and rail freight rates on the Eyre Peninsula appear to have been relatively evenly matched) and does not consider the catchment area of the exempt port terminal services at Port Adelaide to overlap with Port Lincoln's catchment area.

#### ***(j) any other matters the ACCC considers relevant***

The ACCC's draft decision whether to determine Viterra to be an exempt service provider in relation to its Port Lincoln facility involves its balancing of the relevant considerations referred to in subclause 5(3) of the Code. In doing so the ACCC has given significant regard to the uncertainty around the level of competitive constraint that T-Ports' Lucky Bay facility can be expected to impose.

In making its draft decision the ACCC considered the power to revoke an exemption as relevant to its assessment. The ACCC has the ability under subclause 5(6) of the Code to review an exemption determination with a view to revoking it in certain circumstances. Similar to the process for granting an exemption, the ACCC may revoke an exemption determination if, after having regard to matters (a) to (j) of subclause 5(3) of the Code, it is satisfied that the reasons for granting the exemption/s no longer apply.

On balance, while acknowledging that the ACCC is able to revoke an exemption determination if satisfied that the reasons for granting an exemption no longer apply, the ACCC's draft view is that Viterra's Port Lincoln facility is unlikely to be subjected to sufficient competitive constraint to support an exemption from Parts 3 to 6 of the Code at this time.

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<sup>425</sup> Ibid.

<sup>426</sup> T-Ports supplementary submission, 19 June 2020, p. 2.

## 4.4. Wallaroo

### ***(a) the legitimate business interests of the port terminal service provider***

The ACCC's draft findings about Viterra's legitimate business interests are the same in relation to Wallaroo as they are in relation to Viterra's other port terminal facilities.

Section 4.1 (IHB) subclause (a) sets out the ACCC's draft views on Viterra's legitimate business interests.

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

The ACCC draft findings about the public interest in relation to Wallaroo are the same as they are in relation to Viterra's other port terminal facilities.

Section 4.1 (IHB) sets out the ACCC's draft views in relation to subclauses 5(3)(b) and (g).

To the extent the ACCC has views on these matters that specifically relate to Viterra's Wallaroo facility, these are set out below.

#### ***Competition in bulk wheat export operations***

Wallaroo is one of two port terminal facilities located on the Yorke Peninsula, and is located on the northern end of the peninsula. The other port terminal facility is Viterra's Port Giles facility (which is located on the south east coast of the peninsula). On average Wallaroo facilitates 680 000 tonnes of grain shipments per season (excluding the drought affected 2018-19 season).

The ACCC's draft view is that Viterra's Wallaroo facility does not face sufficient competitive constraint to support an exemption from Parts 3 to 6 of the Code.

The ACCC's draft view is based on the ACCC's analysis of port terminal services market as set out in chapter 2, as well as the consideration of upcountry and related markets set out in chapter 3. This indicated the following:

- **Wallaroo catchment area:** The ACCC's analysis of Wallaroo's catchment area indicates that it extends between the Yorke Peninsula and the Mid and Upper North regions of SA: as set out in section 3.2.3, the ACCC understands that Wallaroo sources the majority of its grain from the Yorke Peninsula. Grain stored on the Yorke Peninsula has a significant freight advantage to move to Wallaroo over PTSPs located at Port Adelaide (see table 3.2). As such the ACCC considers it unlikely that the Port Adelaide catchment area extends to the Yorke Peninsula in general, however there appears to be some competition between Wallaroo and PTSPs located at Port Adelaide for grain grown in the Mid and Upper North regions of SA (see table 3.1).
- **Wallaroo faces limited competition from third party PTSPs:** Given the above, the ACCC's draft view is that PTSPs located at Port Adelaide likely only compete with Viterra's Wallaroo facility for grain grown in the Mid and Upper North regions of SA. Consequently, Cargill's and Semaphore's Port Adelaide facilities are expected to impose limited competitive constraint on Viterra's Wallaroo facility.

- **Wallaroo has several infrastructure advantages over third party PTSPs at Port Adelaide:** The ACCC considers that Wallaroo has several advantages in terms of its port infrastructure over Cargill's and Semaphore's Port Adelaide facilities:
  - Wallaroo is able to receive grain at significantly higher rates than either Cargill's or Semaphore's facilities (see table 2.1).
  - Wallaroo has a significant amount of at-port storage (757 500 tonnes)<sup>427</sup> whereas Cargill's and Semaphore's facilities have little to no at-port storage.<sup>428</sup> This likely provides Wallaroo with greater operational flexibility.
- **Spare capacity:** As indicated in figure 2.9 and in table 2.4, Wallaroo appears to have faced significant capacity constraints, on both an annual and peak period basis. The ACCC generally considers that, in the absence of sufficient competitive alternatives, a vertically integrated PTSP will be incentivised to favour certain exporters (such as its associated entity exporter) in circumstances when supply is constrained. Exporter access to capacity is discussed further in the consideration of subclauses 5(3)(c) and (d).
- **Proposed port terminal facilities:** The ACCC notes T-Ports has proposed building a port terminal facility at Wallaroo.<sup>429</sup> In addition, ADM has also recently completed a small number of domestic coastal shipments out of Port Pirie: however the ACCC understands that ADM does not have appropriate exporter accreditation to perform export services at this time. While the ACCC considers that the credible threat of entry by other PTSPs can be expected to place some level of constraint on Viterra, it does not consider the threat of competition to be as effective as actual competition. Proposed port terminal facilities are discussed further below in relation to subclauses 5(3)(e) and (f).

### **Competition in upstream and downstream markets**

The ACCC has considered whether the level of competition in upcountry storage, handling, and transport markets might provide Viterra with market power. Absent the full application of the Code, the potential exists for any market power to affect competition in the port terminal service market by, for example, limiting the ability of third party exporters to participate in upstream grain acquisition.

In addition to upstream and downstream markets, the ACCC also considered the potential for related markets, such as container exports and domestic demand for grain, to affect the promotion of competition in bulk grain export port terminal services.

As discussed in section 3.2.3, the ACCC considers that Wallaroo's catchment area likely encompasses the Yorke Peninsula (where it appears to source the majority of its grain), and Mid and Upper North regions of SA:

- **Yorke Peninsula:** The ACCC notes that there appears to be a relatively limited number of upcountry storage options on the Yorke Peninsula: of the five upcountry storage sites, two are owned by Viterra.<sup>430</sup> A significant proportion of storage on the Yorke Peninsula appears to be located at port, with Viterra's Port Giles and Wallaroo facilities able to store 514 100 tonnes and 757 500 tonnes of grain at port

<sup>427</sup> Viterra, *Attachment 1 – Response to 14/11/19 information request – Questions 1 and 2 – Viterra port terminal facility features*, 13 February 2020.

<sup>428</sup> Cargill has no at-port storage, while Semaphore has just 16 500 tonnes of at-port storage (see table 2.1).

<sup>429</sup> The ACCC notes that given the Port Adelaide and Wallaroo catchment areas likely overlap (to some extent), T-Ports' proposed Wallaroo facility would likely compete for grain with Port Adelaide PTSPs (in certain regions).

<sup>430</sup> In its exemption application Viterra submitted that there are five upcountry sites on the Yorke Peninsula: Ardrossan (Viterra), Bute (Viterra), Kadina (AGT Foods Australia), Kulpara (San Remo), and Maitland (Cargill). GTA did not include the Kadina and Kulpara sites in their 2019-20 list of upcountry storage sites.

respectively.<sup>431</sup> This suggests that Viterra likely owns the majority of storage on the Yorke Peninsula, and that a relatively large portion of grain grown on the Yorke Peninsula is delivered direct to Port Giles or Wallaroo.

- **Mid and Upper North regions of SA:** as discussed in section 3.1.1 the Mid and Upper North regions of SA contain the greatest number of alternative upcountry storage sites, with Viterra expected to operate 12 out of a total of 21 upcountry sites in this region in the 2020-21 season. The ACCC notes that determining the extent to which this storage is likely to competitively constrain Viterra's services is difficult, due to the lack of information around the size of non-Viterra storage sites. However the ACCC understands that most of these third party sites are relatively small stand-alone facilities, which deliver predominantly to domestic and container markets.
- **On-farm storage:** The ACCC notes that publicly available and/or detailed information around the specific location of on-farm storage in SA appears to be limited. While the ACCC understands that the majority of SA's estimated 1 million tonnes of on-farm storage is located in eastern SA, the ACCC is not aware of the extent to which on-farm storage is available on the Yorke Peninsula. The ACCC would welcome stakeholder views on the presence of on-farm storage on the Yorke Peninsula.

While the ACCC is not aware of the size of third party storage sites, or the extent to which on-farm storage is used/available across specific regions, the ACCC notes that Viterra appears to own the majority of total storage on the Yorke Peninsula as well as in the Mid and Upper North regions (though the Mid and Upper North regions appears to contain credible alternatives to Viterra's upcountry system). As such, the ACCC considers that there is the potential for Viterra's position upcountry to interact with its position at port to affect competition.

The ACCC notes that PTSPs can also be competitively constrained by the domestic market. While the ACCC does not have detailed data on where grain is processed or consumed within a state, the ACCC notes that SA as a whole has the smallest domestic market of any mainland state in Australia (at 1.2 million tonnes of grain).

The ACCC also notes that SA's domestic consumption has been fairly consistent since the 2014-15 season.<sup>432</sup> The domestic market generally offers a reliable and stable source of demand for grain, and typically involves lower supply chain costs (relative to export markets) making it a relatively attractive (but limited) option. As such grain typically moves to the export market once opportunities in the domestic market have been met.

In addition, the ACCC notes that, as demonstrated during the poor growing conditions along the east coast in recent seasons, grain can also move in large quantities for domestic consumption in other states under certain market conditions.

As discussed in section 3.3.2, the ACCC understands that SA's domestic demand is largely located within the east of the state and likely draws grain from the same catchment area as Viterra's Wallaroo facility. However, the ACCC also understands that the majority of grain grown on the Yorke Peninsula is exported through either Port Giles or Wallaroo. This suggests that the domestic market in eastern SA draws its grain predominantly from outside the Yorke Peninsula.

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<sup>431</sup> Viterra, *Attachment 1 – Response to 14/11/19 information request – questions 1 and 2 – Viterra port terminal facility features*, 13 February 2020.

<sup>432</sup> SA domestic consumption has varied between 1.11 and 1.24 million tonnes per annum since the 2014-15 season.

As such the ACCC expects that, while Wallaroo may experience some competition from the SA domestic market, in large part this is likely limited to the Mid and Upper North regions of SA.

Based on the information available at this time, the ACCC considers that the domestic market in SA only places a limited competitive constraint on Viterra's Wallaroo facility. The ACCC would welcome views from stakeholders on the extent to which SA's domestic market draws grain from the Yorke Peninsula or otherwise affects competition at Wallaroo.

The ACCC also notes that the containerised grain export market can impose a competitive constraint on PTSPs. However as the SA container market is located at Port Adelaide the ACCC's considers it unlikely that significant volumes of grain will move from the Yorke Peninsula to Port Adelaide. In addition, as discussed in section 3.3.1, the SA containerised export market is relatively small, with only 5.3 per cent of grain in SA being exported via containers since the 2014-15 season.<sup>433</sup> However it appears feasible that grain grown in the Mid and Upper North regions of SA can move to PTSPs at Port Adelaide (and by extension to the container market at Port Adelaide), or to Viterra's Wallaroo facility. As such, while small in size, the container market likely offers a limited alternative export market for grain grown in this region. Consequently, the ACCC considers that the SA container market likely imposes a limited degree of competitive constraint on certain regions within the Wallaroo catchment area.

***The ACCC would welcome views from stakeholders in relation to the interaction between the SA container, domestic and bulk export markets.***

## **Conclusion**

The ACCC's considers that Viterra's Wallaroo facility likely faces a degree of competitive constraint (albeit limited) in relation to grain grown in SA's Mid and Upper North regions as a result of the presence of: third party PTSPs at Port Adelaide; the SA domestic market; and the containerised market at Port Adelaide. However, grain sourced from the Yorke Peninsula (where the ACCC understands the majority grain exported through Wallaroo is sourced from) appears to have limited access to these alternate markets, and typically needs to be exported via Viterra's Wallaroo (or Port Giles) facility.

In light of the above, the ACCC's draft view is that there is insufficient competitive constraint imposed on Viterra's Wallaroo facility to ensure that competition at port and upcountry will be maintained (or promoted) if an exemption from Parts 3 to 6 of the Code were granted.

As such the ACCC's draft view is that exempting Viterra from the full application of the Code in relation to Wallaroo is unlikely to be in the public interest, and is likely be detrimental to competition in upstream and downstream markets.

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

The ACCC's draft findings about matters relating to the interests of exporters who may require access to port terminal services are the same in relation to Wallaroo as they are in relation to Viterra's IHB facility.

Section 4.1 (IHB) subclause (c) sets out the ACCC's draft views on these matters in detail.

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<sup>433</sup> ACF Export report.

***(d) the likelihood that exporters of bulk wheat will have fair and transparent access to port terminal services***

Section 4.1 (IHB) subclause (d) sets out the ACCC's draft views on the likelihood that exporters will have access to fair and transparent access to port terminal facilities. ACCC views specifically relating to Viterra's Wallaroo facility are set out below.

The ACCC notes that Viterra's Wallaroo facility has a stated annual capacity of 766 247 tonnes.<sup>434</sup> As discussed in the analysis relating to subclauses 5(3)(b) and (g) there appears to be significant capacity constraints at Wallaroo, with an average annual and peak capacity utilisation rate of 88 per cent and 101 per cent respectively (excluding the drought-affected 2018-19 season). Furthermore, as indicated in figure 2.9, capacity constraints appear to occur at Wallaroo during the peak period on a consistent basis across different shipping seasons.

Despite these capacity constraints third party exporters appear to be able to secure access to Wallaroo: since 2011-12 Glencore, Viterra's associated entity exporter, has only performed 35 per cent of shipments during the peak period, and 38 per cent in the off-peak period (or 36 per cent annually on average). In comparison, the largest third party exporters at Wallaroo (since 2011-12) have been CBH, Bunge, ADM, and Cargill<sup>435</sup> which have performed 12.4, 11.1, 10.4 and 10.1 per cent of annual shipments respectively.

In considering historical exporter market shares, the ACCC notes that Viterra's current PLPs ensure that combined across Viterra's six facilities a minimum of 500 000 tonnes of capacity is reserved for short term capacity per quarter. In addition, no single exporter can apply for more than 50 per cent of the initial long-term capacity at Wallaroo.<sup>436</sup> In the absence of the full application of the Code, terms such as this can be changed in the PLPs without the need for the ACCC's approval. Consequently, the ACCC considers that the recent historical level of access by third party exporters was likely influenced by the current PLPs.

Given the above the ACCC considers that third party exporters have been able to access some level of capacity at Wallaroo during the peak period. However, while this has been the case historically, as explained in section 2.2.4, the ACCC's view is that it is appropriate to consider whether the current level of competition among exporters (and access) is likely to be maintained if an exemption from Parts 3 to 6 of the Code were to be granted in relation to Wallaroo.

The ACCC considers it reasonable to expect that, given the relative absence of competitive alternatives and likely presence of capacity constraints at its Wallaroo facility, Viterra is likely to have an incentive to provide favourable access to certain exporters (in particular its associated entity exporter) absent the application of the full Code. However the ACCC notes that grain on the Yorke Peninsula has the potential to move to either Port Giles or Wallaroo to some extent.<sup>437</sup> As such, in the event of capacity constraints at Wallaroo, the potential likely exists for Viterra (and/or exporters) to seek to move grain to Viterra's Port Giles facility to some extent (subject to spare capacity being available at that facility).<sup>438</sup>

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<sup>434</sup> Viterra, *Attachment 2 – Response to 14/11/19 information request – Question 3 – Viterra published available capacity estimates*, 13 February 2020

<sup>435</sup> The ACCC notes that Cargill have not exported out of Wallaroo since the 2014-15 season. Over the 2011-12 to 2014-15 period, Cargill performed 17 per cent of Wallaroo shipments annually.

<sup>436</sup> The ACCC notes that it has defined the peak period in this document as December through to May.

<sup>437</sup> The ACCC notes that there are relatively limited upcountry options on the Yorke Peninsula, however as shown in table 3.2 there appears to be a degree of substitutability between Port Giles and Wallaroo for grain stored at Ardrossan and Maitland. However the ACCC considers it unlikely that grain stored in at-port storage at Port Giles would move to export via Wallaroo.

<sup>438</sup> The ACCC notes that grain on the Yorke Peninsula has the potential to move between Wallaroo and Port Giles (to some extent). There are relatively limited upcountry options on the Yorke Peninsula, however as shown in table 3.2 there appears to be a degree of substitutability between Port Giles and Wallaroo for grain stored at Ardrossan and Maitland. \

The ACCC's draft view is that, given the observed lack of competitive constraint and significant capacity constraints, an exemption from Parts 3 to 6 of the Code would likely be detrimental to exporters' ability to secure fair and transparent access at Viterra's Wallaroo facility.

***(e) the promotion of the economically efficient operation and use of the port terminal facility; and (f) the promotion of efficient investment in port terminal facilities***

Section 4.1 (IHB) subclauses (e) and (f) sets out the ACCC's draft findings on the promotion of economically efficient operation and use of the port terminal facility, and the promotion of efficient investment in port terminal facilities. The ACCC's further views relating to these matters which are specific to Viterra's Wallaroo facility are set out below.

**Promotion of the efficient operation and use of Viterra's Wallaroo facility**

As discussed in the section 4.1 (IHB) subclauses (e) and (f) the ACCC considers that an exemption from Parts 3 to 6 of the Code would assist Viterra to provide greater flexibility for their customers at the exempt facility. The ACCC also considers that it is generally in Viterra's interests to make operational decisions that ensure the efficient and profitable operation of its port terminal facilities irrespective of whether or not exemptions are granted in relation to any of its facilities. This is primarily due to the need to provide a return to investors.

However, as previously discussed, in circumstances where capacity is constrained and/or sufficient competition is not present, Viterra may be incentivised to favour certain exporters. The ACCC considers that this could lead to inefficient market outcomes more broadly, despite the individual exempt port terminal facility being able to operate more flexibly.

As set out in its draft findings relating to subclauses 5(3)(c) and (d), the ACCC's draft view is that if an exemption were granted to Viterra in relation to its Wallaroo facility, Viterra would likely be incentivised to provide favourable access to certain exporters (largely due to the lack of competitive constraint and capacity constraints at the facility).

**Promotion of efficient investment in port terminal facilities**

The ACCC considers that it is in Viterra's interests to make investment decisions which ensure Viterra can maximise its return to its shareholders, irrespective of whether or not exemptions are granted in relation to any of Viterra's facilities.

In considering the investment in port terminal services, the ACCC notes there are two port terminal operations in addition to those already discussed which have the potential to impose a competitive constraint upon Wallaroo: ADM's Port Pirie facility and T-Ports' proposed Wallaroo facility.

As stated in section 2.1.5 the ACCC understands that ADM has performed a small number of coastal (i.e. non-export) shipments out of its Port Pirie facility. However, it is not currently clear if or when ADM will commence bulk export operations.<sup>439</sup> Should ADM commence export operations, the ACCC expects the level of constraint imposed upon Viterra's Wallaroo facility would likely be limited (though not insignificant), as Port Pirie would likely source its grain from the Mid and Upper North regions of SA, rather than the Yorke Peninsula.

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<sup>439</sup> The ACCC notes there has been some media reporting that suggests ADM could commence export operations from its Port Pirie facility: <https://www.graincentral.com/logistics/port-pirie-south-to-open-as-first-australian-adm-bulk-grain-site/>.



The ACCC also understands that T-Ports has proposed building a port terminal facility at Wallaroo using the same transshipment vessel model as its Lucky Bay facility. The ACCC notes that T-Ports expects the facility will take between 12 and 18 months to build, with construction planned to begin in 2020. It is the ACCC's understanding that the facility currently remains in the planning stage, and that T-Ports are still seeking relevant government approval and raising capital.<sup>440</sup>

T-Ports has indicated that its proposed Wallaroo facility will have 282 000 tonnes of storage and will be able to facilitate 500 000 tonnes of grain per annum.<sup>441</sup> In addition the facility will use (i.e. share) the same transshipment vessel used at T-Ports' Lucky Bay facility. T-Ports anticipates that the location of the Wallaroo and Lucky Bay facilities, and the shared use of the same transshipment vessel will deliver greater efficiencies and cost savings:

*There are efficiencies and cost savings in building this port on the opposite side of the Spencer Gulf to Lucky Bay as we will utilise the same transshipment vessel, the 'Lucky Eyre'.<sup>442</sup>*

The ACCC notes that the location and operational interaction between the Wallaroo and Lucky Bay facilities may provide T-Ports' with significant operational flexibility, e.g. by facilitating split shipments between the two facilities. However, the ACCC also notes that the use of a single transshipment vessel may also result in operational challenges and possibly affect the amount of throughput that can be delivered by each facility.

The ACCC expects that, should T-Ports' Wallaroo facility commence operations as intended, it will likely impose a significant level of competitive constraint on Viterra's Wallaroo facility (as well as on Viterra's Port Giles, IHB and OHB facilities, although to a lesser extent).<sup>443</sup>

While the ACCC also acknowledges that the threat of competition (to the extent it is considered credible) can be expected to impose a level of competitive constraint, the ACCC does not generally view the threat of competition as being as effective as actual competition.

In considering the promotion of efficient investment in port terminal facilities, the ACCC notes that some stakeholders have raised concerns around port terminal investment decisions in SA. In particular:

- GPA submitted that investment in additional port terminal facilities in SA may be inefficient and reflect concerns around access to existing facilities or the service offered.<sup>444</sup>
- T-Ports submitted that future investment decisions depend on expectations of a fair and transparent playing field, and the absence of sufficient regulation in the presence of a dominant PTSP risks affecting investment:

*Future investment in port terminal facilities will depend upon the expectation of a fair and even playing field in the market. If there is a dominant provider in the market, with little or no regulation on pricing and access, the incentive to invest diminishes with the increased risk of retaliatory behaviour through differential service offerings to customers who may otherwise have supported the new investment.<sup>445</sup>*

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<sup>440</sup> T-Ports website: <https://tports.com/wallaroo/>. Accessed 27 August 2020.

<sup>441</sup> Ibid.

<sup>442</sup> Ibid.

<sup>443</sup> As discussed in section 4.3 (Port Lincoln) subclause (e) and (f) the interaction between T-Ports' proposed Wallaroo facility on the Yorke Peninsula and its existing Lucky Bay facility on the Eyre Peninsula may provide significant operational flexibility. However this may affect the amount of throughput either of these facilities could individually achieve (as these facilities will share a single transshipment vessel).

<sup>444</sup> GPA submission, 4 October 2019, p. 3.

<sup>445</sup> T-Ports submission, 26 August 2019, p. 34.



While the ACCC has not undertaken a detailed quantitative analysis of the appropriate level of investment in port terminal facilities in SA, significant consideration has been given to the effect of the Code on investment incentives and the related effects of the decision to exempt (or not exempt) each of Viterra's port terminal facilities.

The ACCC considers that efficient investment decisions can generally be expected to occur in circumstances where adequate competition is present, or where there is sufficient regulatory intervention to ameliorate the absence of competition.

The ACCC also acknowledges that unnecessary regulation has the potential to discourage a PTSP from making otherwise efficient investments in its port terminal facilities (or the supply chain more broadly). However, the ACCC also considers that an inadequate level of regulation risks affecting efficient investment in port terminal services which could result in either: under investment (to the extent the inadequate regulation reduces the incentives for current participants and/or new entrants to investment, due to their inability to gain access on fair and transparent terms); or over investment (to the extent the inadequate regulation encourages current participants and/or new entrants to unnecessarily duplicate existing infrastructure). The ACCC also notes that different parties are likely to have different investment incentives and that these incentives will be influenced by a range of factors, including the level of regulation imposed on a competing PTSP.

As previously noted, the ACCC considers that it is in Viterra's interests to make investment (and operational) decisions that ensure its profitable operation, and that Viterra can maximise returns to shareholders. Consistent with this view, the ACCC expects that T-Ports (and any other proposed third party facilities) will also generally be incentivised to make investment (and operational) decisions which maximise returns to shareholders (or profits), irrespective of whether Wallaroo is exempted from Parts 3 to 6 of the Code.

As discussed in relation to subclause 5(3)(d), the ACCC considers that the level of competitive constraint faced by Viterra in relation to Wallaroo is likely insufficient at this time to ensure that Viterra would not be incentivised to provide favourable access to certain exporters at its facility (in particular its associated entity exporter).

Consequently while there is the potential for the more 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 Wallaroo'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 Wallaroo facility on the investment in port terminal facilities is unclear.

#### ***(h) whether the port terminal service provider is an exporter or an associated entity of an exporter***

The ACCC's consideration of whether Viterra is an exporter (or an associated entity of an exporter) is the same in relation to Wallaroo as it is in relation to Viterra's other port terminal facilities.

Section 4.1 (IHB) subclause (h) sets out the ACCC's draft view in relation to these matters.

***(i) whether there is already an exempt service provider within the grain catchment area for the port concerned***

Section 4.1 (IHB) subclause (i) sets out the ACCC's draft findings on catchment areas. To the extent the ACCC holds views that specifically relate to these matters and Viterra's Wallaroo facility, these are set out below.

The ACCC notes that, while submitting that catchment areas are fluid and that grain will move to where it is most economically viable,<sup>446</sup> Viterra also submitted that:

*Wallaroo has traditionally sourced grain from a region that extends from above Melrose down to the Yorke Peninsula.*

*Grain grown in the region from which Wallaroo has traditionally sourced grain is often delivered to Port Adelaide. Therefore, containers from Port Adelaide, and each of LINX and Semaphore at Port Adelaide, are strong competitors to Wallaroo.<sup>447</sup>*

Viterra further submitted that grain grown in the Yorke Peninsula can be delivered to Adelaide:

*Grain is commonly delivered or outturned from the Yorke Peninsula to sites outside of what has been considered the traditional Yorke Peninsula catchment zone. This includes delivering grain to the Adelaide region and/or outturning grain to Port Adelaide (where Viterra faces competition from LINX and Semaphore), as well as, more recently, delivering to the east coast, for domestic consumption.<sup>448</sup>*

The ACCC also notes that T-Ports submitted that third party Port Adelaide PTSPs potentially compete with Wallaroo:

*The only current competitive alternatives are the mobile loader operations offered at Port Adelaide. These services provide an alternative to Viterra Port Adelaide (Inner harbour and Outer Harbor) and potentially to Wallaroo.<sup>449</sup>*

**ACCC draft view**

As stated in section 3.2 and in relation to the analysis relating to subclauses 5(3)(b) and (g) above, the ACCC considers that Wallaroo's catchment area extends from the Yorke Peninsula to the Mid and Upper North regions of SA.

As set out in section 3.2.3, Wallaroo has a significant freight advantage for storage sites on the Yorke Peninsula compared to Viterra's OHB facility (and by extension other PTSPs located at Port Adelaide).

In addition the ACCC notes that, on average, 1.37 million tonnes of grain is grown on the Yorke Peninsula per season,<sup>450</sup> with Port Giles and Wallaroo on average exporting 690 000 tonnes and 610 000 tonnes of grain per season respectively (as noted in section 3.2.3 the ACCC understands the vast majority of grain exported by Port Giles is also grown on the Yorke Peninsula).<sup>451</sup> Furthermore, Viterra has submitted that in 2017-18 [c-i-c] of grain grown on the Yorke Peninsula was exported via its Wallaroo and Port Giles facilities, indicating that grain grown on the Yorke Peninsula is generally unlikely to move to alternate markets.

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<sup>446</sup> Viterra, *Exemption Application 2019*, 2 July 2019, p. 1.

<sup>447</sup> *Ibid* p. 58

<sup>448</sup> Viterra, *Response to 14/11/19 information request – Question 9 – Catchment Zones*, 13 January 2020.

<sup>449</sup> T-Ports submission, 26 August 2019, p. 4.

<sup>450</sup> PIRSA, *Crop and pasture reports – final summary and estimates*, 2012-13 to 2018-19.

<sup>451</sup> Excluding the drought affected 2018-19 season.

As such the ACCC considers it likely that the majority of grain exported through Wallaroo is sourced from the Yorke Peninsula.

***The ACCC would welcome stakeholder views on where, and to what extent, Wallaroo sources grain to assist in the finalisation of its assessment.***

In contrast the ACCC considers that Wallaroo and PTSPs located at Port Adelaide likely compete for grain in the Mid and Upper North regions. As shown in table 3.1 Viterra's Wallaroo facility likely has a small freight advantage over transportation to IHB and OHB, both of which are able to receive grain via rail.<sup>452</sup> However, the ACCC notes that the freight advantage to the Wallaroo facility is likely larger when compared to Cargill's and Semaphore's Port Adelaide facilities (neither of which can facilitate rail receipts) for storage sites which are able to facilitate grain via rail.<sup>453</sup>

Despite this, the ACCC considers that Cargill's and Semaphore's facilities are likely still competitive options for the export of grain from within this region to some extent. As such, the ACCC considers that the catchment area for Viterra's Wallaroo facility and the Port Adelaide PTSPs overlaps in the Mid and Upper North regions. Consequently, the ACCC's draft view is that while there are no exempt PTSPs that lie within Wallaroo's catchment area, there are two exempt PTSPs (Cargill and Semaphore) whose catchment areas likely overlap with Wallaroo's catchment area. However, the level of competitive constraint imposed by these facilities is likely limited.

In addition, and as discussed in the context of IHB and OHB above, the ACCC notes that ADM has performed a small number of coastal shipments from Port Pirie in the 2018-19 season. As discussed in section 3.2.3 the Port Pirie facility (which is a part of the Upper North region) falls within Wallaroo's catchment area and therefore could impose an additional level of competitive constraint were it to expand its operations or commence export operations.

However, as mentioned in section 2.1.5 it is not yet clear if ADM intend to perform export services (as opposed to just coastal shipments) in the near future from Port Pirie or if ADM would apply to be (or be determined) an exempt provider of port terminal service were it to commence exports. Furthermore the ACCC notes that the expected increase in NSW's production is likely to significantly reduce the economic viability of coastal shipments in the 2020-21 season. However the ACCC's draft view is that ADM's facility would provide a level of competitive constraint on Viterra's Wallaroo facility should they begin performing export services.

The ACCC notes it has not proposed to exempt Viterra's Port Giles facility as part of its assessment of Viterra's exemption application. However, as there is the potential that Port Giles lies within Wallaroo's catchment area, if Port Giles were to be exempted in the ACCC's final determination (which is not proposed in the Draft Determinations), then Viterra would be an exempt service provider in relation to its Port Giles facility (which is potentially within Wallaroo's catchment area).

***(j) any other matters the ACCC considers relevant***

The ACCC's consideration of any other relevant matters is generally the same in relation to Wallaroo as it is in relation to Viterra's Port Lincoln facility. To the extent the ACCC has

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<sup>452</sup> As indicated in section 3.2.3 although Wallaroo has a freight advantage for most sites in this region, when port charges are considered it is cheaper for most grain to be exported through OHB.

<sup>453</sup> This is because Viterra's Export Select rates (and therefore GTA's Location Differentials) are likely to take into account that grain in storage sites with rail access can be transported to IHB or OHB via rail services. As such the cost of transporting grain to Cargill's or Semaphore's facilities from these rail accessible upcountry sites via road services would likely be higher than the freight costs to the IHB and OHB (which can receive grain via rail services).

views on these matters that specifically relate to Viterra's Wallaroo facility, these are set out below.

While acknowledging that the ACCC is able to revoke an exemption determination if satisfied that the reasons for granting an exemption no longer apply, the ACCC's draft view is that Viterra's Wallaroo facility is unlikely to be subject to sufficient competitive constraint to support an exemption from Parts 3 to 6 of the Code at this time.

## 4.5. Port Giles

### ***(a) the legitimate business interests of the port terminal service provider***

The ACCC's draft findings about Viterra's legitimate business interests are the same in relation to Port Giles as they are in relation to Viterra's other port terminal facilities.

Section 4.1 (IHB) subclause (a) sets out the ACCC's draft views on Viterra's legitimate business interests.

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

The ACCC's draft findings about the public interest in relation to Port Giles are the same as the public interest in relation to Viterra's other port terminal facilities.

Section 4.1 (IHB) sets out the ACCC's draft views in relation to subclauses 5(3)(b) and (g).

To the extent the ACCC has views on these matters that specifically relate to Viterra's Port Giles facility, these are set out below.

### ***Competition in bulk wheat export operations***

The ACCC notes that Port Giles (located in the southern Yorke Peninsula) is one of two port terminal services located on the Yorke Peninsula: the other being Viterra's Wallaroo port terminal facility (located in the northern Yorke Peninsula). Port Giles on average facilitates 740 000 tonnes of grain shipments, per season (excluding the 2018-19 drought affected season), and due to its location on the southern Yorke Peninsula is likely relatively isolated from competing markets (as discussed below).

The ACCC's draft view is that Viterra's Port Giles facility does not face sufficient competitive constraint to support an exemption from Parts 3 to 6 of the Code.

The ACCC's draft view is based on the analysis of the port terminal services markets in chapter 2, as well as the consideration of upcountry and related markets set out in chapter 3. This indicated the following:

- **Port Giles' catchment area:** The ACCC's analysis of the Port Giles catchment area indicates that it appears to largely be limited to the Yorke Peninsula. In addition, there appears to be limited opportunity for grain grown in Port Giles' catchment area to move to third party PTSPs at Port Adelaide. In particular GTA's Location Differentials indicate that grain on the Yorke Peninsula has a significant freight advantage to move to Port Giles over port terminal facilities located at Port Adelaide (see table 3.2). While there appears to be some competition between Port Giles and Adelaide in the northern Yorke Peninsula (on the basis of freight costs), grain located on the northern Yorke Peninsula has a large freight advantage to move to Wallaroo

over either Port Giles or facilities located at Port Adelaide. As such, the ACCC expects the majority of grain grown on the Yorke Peninsula to be exported via either Port Giles or Wallaroo.

- **Port Giles' infrastructure:** The ACCC considers that Port Giles has several port infrastructure advantages over third party PTSPs located at Port Adelaide (i.e. Cargill and Semaphore):
  - Port Giles is a deep water port, which allows it to load larger vessels than Cargill's and Semaphore's facilities (which are only able to accommodate shallower draft vessels).
  - Port Giles' infrastructure means it is able to receive and load grain at significantly faster rates than either Cargill or Semaphore (see table 2.1).
  - Port Giles has a significant volume of at-port storage (514 100 tonnes) compared to Cargill's and Semaphore's facilities which have no and 16 500 tonnes of at-port storage respectively. This is expected to offer Viterra greater flexibility to manage operations at Port Giles (see table 2.1).
- **Port Giles faces limited competition from alternate PTSPs:** Given the above noted freight advantages for grain on the Yorke Peninsula and port infrastructure advantages, the ACCC considers that Port Adelaide facilities likely only place a limited competitive constraint on Viterra's Port Giles facility.
- **Spare capacity:** As indicated in figure 2.6 and table 2.4, Port Giles generally appears to have excess capacity available both on an annual and peak period basis. However there appears to be some potential for capacity constraints at Port Giles during the peak period in high output seasons (see section 2.2.3). In addition, spare capacity may not provide a sufficient incentive for a vertically integrated PTSP to offer reasonable access to third party exporters, absent the presence of sufficient competitive alternatives. Exporters' ability to access capacity is discussed further in relation to subclauses 5(3)(c) and (d).

### ***Competition in upstream and downstream markets***

The ACCC has considered whether the level of competition in upcountry storage, handling, and transport markets might provide Viterra with market power. Absent the full application of the Code, the potential exists for any market power to affect competition in the port terminal services market by, for example, limiting the ability of third party exporters to participate in upstream grain acquisition.

In addition to upstream and downstream markets, the ACCC also considered the potential for related markets, such as container exports and domestic demand for grain, to affect the promotion of competition in bulk wheat port terminal services.

As discussed in section 3.1.1 Viterra appears to own the majority of total storage on the Yorke Peninsula. A significant proportion of storage on the Yorke Peninsula appears to be located at port, with Viterra's Port Giles and Wallaroo facilities being able to store 514 100 tonnes and 757 500 tonnes of grain at port respectively.<sup>454</sup> In addition there appears to be a relatively limited number of upcountry storage options on the Yorke Peninsula, with only five upcountry storage sites (two of which are owned by Viterra).<sup>455</sup> This appears to suggest that

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<sup>454</sup> Viterra, *Attachment 1 – Response to 14/11/19 information request – Questions 1 and 2 – Viterra port terminal facilities*, 13 February 2020.

<sup>455</sup> In its exemption application Viterra submitted that there are five upcountry sites on the Yorke Peninsula: Ardrossan (Viterra), Bute (Viterra), Kadina (AGT Foods Australia), Kulpara (San Remo), and Maitland (Cargill). GTA did not include the Kadina and Kulpara sites in their 2019-20 list of upcountry storage sites.

a relatively large proportion of grain grown on the Yorke Peninsula is delivered directly to Viterra's Port Giles and Wallaroo facilities.

The ACCC understands that the majority of SA's estimated 1 million tonnes of on-farm storage is located in eastern SA. However the ACCC is not aware of the extent to which this on-farm storage is available on the Yorke Peninsula.

***The ACCC would welcome stakeholder views on this matter.***

Notwithstanding the uncertainty around the presence of on-farm storage, the ACCC considers that the above factors suggest it is likely that Viterra owns the large majority of storage on the Yorke Peninsula. As such the ACCC considers that there is potential for Viterra's position upcountry to interact with its position at port and affect competition.

The ACCC considers that PTSPs can also be competitively constrained by the domestic market. While the ACCC does not have data on where domestic consumption is processed or consumed within a state, the ACCC notes that SA as a whole has the smallest domestic market of any mainland state in Australia (at 1.2 million tonnes of grain).

The ACCC also notes that SA's domestic consumption has been fairly constant since the 2014-15 season.<sup>456</sup> The domestic market also generally offers a reliable and stable source of demand for grain, and typically involves lower supply chain costs (relative to export markets) making it a relatively attractive (but limited) option. As such grain typically moves to the export market once opportunities in the domestic market have been met.

In addition, the ACCC notes that, as demonstrated during the poor growing conditions along the east coast in recent seasons, grain can also move in large quantities for domestic consumption to other states under certain market conditions.

As discussed in section 3.3.2, the ACCC understands that SA's domestic consumption (which is largely located within the east of the state) likely draws grain from the same catchment area as Viterra's Wallaroo facility. However, the ACCC also understands that the majority of grain grown on the Yorke Peninsula is exported through either Port Giles or Wallaroo. This suggests that the domestic market in eastern SA draws its grain predominantly from outside the Yorke Peninsula.

In light of the above, the ACCC expects that the SA domestic market likely only places a limited competitive constraint on Viterra's Port Giles facility. The ACCC would welcome views on the extent to which SA's domestic market draws grain from the Yorke Peninsula.

The ACCC also notes that the container market can impose a competitive constraint on PTSPs. However the SA container market is located at Port Adelaide and, as discussed earlier in this section, the ACCC considers it unlikely that significant volumes of grain will move from the Port Giles catchment area to Port Adelaide. As such, the ACCC's draft view is that SA's container market likely imposes very little competitive constraint on Viterra's Port Giles facility.

***The ACCC would also welcome views from stakeholders in relation to the interaction between the SA container, domestic and bulk export markets.***

## **Conclusion**

In light of the above factors, the ACCC considers that there is insufficient competitive constraint imposed on Viterra's Port Giles facility to ensure that competition at port and

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<sup>456</sup> SA domestic consumption has varied between 1.11 and 1.24 million tonnes per annum since the 2014-15 season.



upcountry will be maintained (or promoted) if an exemption from Parts 3 to 6 of the Code were to be granted.

As such the ACCC's draft view is that exempting Viterra from the full application of the Code in relation to Port Giles is not in the public interest, and will likely also be detrimental to competition in upstream and downstream markets.

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

The ACCC's draft findings about that matters relating to the interests of exporters who may require access to port terminal services are the same in relation to Port Giles as they are in relation to Viterra's IHB facility.

Section 4.1 (IHB) subclause (c) sets out the ACCC's draft views on these matters in detail.

### ***(d) the likelihood that exporters of bulk wheat will have fair and transparent access to port terminal services***

Section 4.1 (IHB) subclause (d) sets out the ACCC's draft views on the likelihood that exporters will have fair and transparent access to port terminal services. ACCC views that specifically relate to Viterra's Port Giles facility are set out below.

The ACCC notes that Viterra's Port Giles facility has a stated capacity of 1.07 million tonnes.<sup>457</sup> As discussed in relation to subclauses 5(3)(b) and (g) there appears to be spare capacity at Port Giles, with an average annual and peak capacity utilisation rate of 70 per cent and 79 per cent (excluding the drought-affected 2018-19 season). This suggests that, in average throughput seasons, there is likely to be some spare capacity available to exporters during both peak and off peak periods. However, during high throughput seasons it appears that Port Giles could still experience capacity constraints: for example, the maximum amount of capacity released during the peak period at Port Giles since 2013-14 is 595 000 tonnes (in 2017-18),<sup>458</sup> while the amount of exports performed at Port Giles in 2011-12 and 2016-17 was 630 000 tonnes and 590 000 tonnes respectively.<sup>459</sup>

The ACCC notes that Viterra's associated entity exporter, Glencore, performed 43 per cent of shipments through Port Giles in the peak period and 32 per cent in the off-peak period (on average since 2011-12). In comparison, the largest third party exporters at Port Giles during the peak periods since 2015-16 have been Bunge, CBH and ADM, which have performed 16, 10, and 8 per cent of exports respectively (and 3, 9 and 12 per cent in the off-peak period).<sup>460</sup> While the ACCC notes that Glencore has performed a significantly higher share of peak shipments at Port Giles in the peak period compared to the off-peak period, the ACCC also notes that this appears to reflect Glencore's relatively low levels of off-peak shipments<sup>461</sup> i.e. Glencore has performed a similar proportion of peak period shipments at Port Giles as it has at OHB and Port Lincoln (43, 40 and 41 per cent respectively). Consequently, the ACCC considers that third party exporters have historically been able to access some level of capacity at Port Giles during the peak period.

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<sup>457</sup> Viterra, *Attachment 2 – Response to 14/11/19 information request – Question 3 – Viterra published available capacity estimates*, 13 February 2020.

<sup>458</sup> Ibid.

<sup>459</sup> The ACCC notes it does not have released capacity figures for Viterra's port terminal facilities prior to 2013-14.

<sup>460</sup> Since 2011-12 Cargill has been the largest third party exporter by volume. However, since 2015-16 Cargill have performed significantly less exports from Port Giles (prior to 2015-16 Cargill performed 21 per cent of shipments from Port Giles on average, and since then have performed just 4 per cent of shipments).

<sup>461</sup> The proportion of off-peak shipments performed by Glencore at each of Viterra's facilities is: Port Lincoln, 38 per cent; Thevenard, 22 per cent; IHB, 56 per cent; OHB, 46 per cent; Wallaroo, 39 per cent; Port Giles, 35 per cent.

In considering historical exporter market shares, the ACCC notes that Viterra's current PLPs, ensure that, combined across Viterra's six facilities, a minimum of 500 000 tonnes of capacity is reserved for short term capacity per quarter. In addition, no single exporter can apply for more than 50 per cent of the initial long-term capacity at Port Giles.<sup>462</sup> In the absence of the full application of the Code, terms such as this can be changed in the PLPs without the need for ACCC approval. Consequently, the recent historical level of access from third party exporters was likely influenced by the current PLPs.

The ACCC also notes that, in the event capacity constraints are experienced at Port Giles, Viterra (and/or exporters) may seek to move grain through Wallaroo. While the ACCC generally considers Wallaroo to be capacity constrained, the ACCC acknowledges that grain grown on the Yorke Peninsula has the potential to move to either Port Giles or Wallaroo to some extent.<sup>463</sup>

In addition to considering historical access levels, the ACCC has also considered whether the current level of access for third party exporters is likely to be affected if an exemption from Parts 3 to 6 of the Code was granted in relation to Port Giles.

While Port Giles appears to have some spare capacity available, the ACCC notes that there also appears to be the potential for capacity constraints during the peak period in high output seasons (i.e. when access to capacity is highly valued by exporters). As such, and given the relative absence of competitive alternatives, Viterra likely has an incentive to provide favourable access to certain exporters.

Given the above factors, the ACCC's draft view is that exempting Viterra from the full Code in relation to Port Giles risks detriment to the likelihood that third party exporters will be able to obtain fair and transparent access to the facility to export bulk grain (including wheat).

***(e) the promotion of the economically efficient operation and use of the port terminal facility; and (f) the promotion of efficient investment in port terminal facilities***

Section 4.1 (IHB) subclauses (e) and (f) sets out the ACCC's draft findings on the promotion of economically efficient operation and use of the port terminal facility, and the promotion of efficient investment in port terminal facilities.

ACCC views specifically relating to these matters and Viterra's Port Giles facility are set out below.

**Promotion of the efficient operation and use of Viterra's Port Giles facility**

As discussed in section 4.1 (IHB) subclause (e) and (f) the ACCC considers that an exemption from Parts 3 to 6 of the Code would assist Viterra to provide greater flexibility for their customers at the exempt facility. However, as previously discussed, in circumstances where capacity is constrained and/or sufficient competition is not present, Viterra may face incentives to favour certain exporters. The ACCC considers that this could lead to inefficient market outcomes more broadly, despite the individual exempt port terminal facility being able to operate more flexibly.

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<sup>462</sup> The ACCC notes that it has defined the peak period in this document as December through to May.

<sup>463</sup> The ACCC notes that there are relatively limited upcountry options on the Yorke Peninsula, however as shown in table 3.2 there appears to be a degree of substitutability between Port Giles and Wallaroo for grain stored at Ardrossan and Maitland. However the ACCC considers it unlikely that grain stored in at-port storage at Port Giles would move to export via Wallaroo.



As set out in the analysis relating to subclauses 5(3)(c) and (d) the ACCC's draft view is that, if an exemption were granted to Viterra in relation to Port Giles facility, Viterra would likely have an incentive to provide favourable access to certain exporters. This is largely due to the lack of competitive alternatives and the potential for capacity constraints at its Port Giles facility.

More broadly however, the ACCC considers that it is generally in Viterra's interests to make operational decisions that ensure the efficient and profitable operation of its port terminal facilities irrespective of whether or not exemptions are granted in relation to any of its facilities. This is primarily due to the need to provide a return to investors.

### **Promotion of efficient investment in port terminal facilities**

The ACCC draft findings about the promotion of efficient investment in port terminal facilities in relation to Port Giles are the same as they are in relation to Viterra's Wallaroo facility. Section 4.4 (Wallaroo) subclause (e) and (f) sets out the ACCC's draft views in relation to subclause 5(3)(f).

To the extent the ACCC has views on these matters that specifically relate to Viterra's Port Giles facility, these are set out below.

The ACCC's considers that it is in Viterra's interests to make investment decisions which ensure Viterra can maximise its return to its shareholders, irrespective of whether or not exemptions are granted in relation to any of Viterra's facilities.

In considering the investment in port terminal services, the ACCC notes there are two port terminal operations in addition to those already discussed which have the potential to impose competitive constraint on Port Giles: ADM's Port Pirie facility and T-Ports' proposed Wallaroo facility.

As discussed in section 2.1.5 the ACCC understands that ADM has performed a small number of coastal (i.e. non-export) shipments out of its Port Pirie facility. However, it is not currently clear if or when ADM will commence bulk export operations.<sup>464</sup> Should ADM commence export operations, the ACCC expects the level of constraint imposed upon Viterra's Port Giles facility would likely be highly limited as Port Pirie would likely source its grain from the Mid and Upper North regions of SA rather than the Yorke Peninsula.

In addition, the ACCC notes that T-Ports proposes to build a port terminal facility at Wallaroo using the same transshipment vessel model as its Lucky Bay facility.<sup>465</sup> The ACCC also notes that T-Ports expects the facility will take between 12 and 18 months to build, with construction planned to begin in 2020. It is the ACCC's understanding that the facility currently remains in the planning stage, and that T-Ports are still seeking relevant government approval and raising capital.<sup>466</sup>

T-Ports has indicated that its proposed Wallaroo facility will have 280 000 tonnes of storage and will be able to facilitate 500 000 tonnes of grain per annum.<sup>467</sup> In addition the facility will use (i.e. share) the same transshipment vessel used at T-Ports' Lucky Bay facility. T-Ports anticipates that the location of the Wallaroo and Lucky Bay facilities, and the shared use of the same transshipment vessel will deliver greater efficiencies and cost savings:

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<sup>464</sup> The ACCC notes there has been some media reporting that suggests ADM could commence export operations from its Port Pirie facility: <https://www.graincentral.com/logistics/port-pirie-south-to-open-as-first-australian-adm-bulk-grain-site/>

<sup>465</sup> The use of a transshipment vessel model would allow the proposed Wallaroo site to load larger Panamax sized vessels.

<sup>466</sup> T-Ports website: <https://tports.com/wallaroo/> (accessed 27 August 2020).

<sup>467</sup> Ibid.

*There are efficiencies and cost savings in building this port on the opposite side of the Spencer Gulf to Lucky Bay as we will utilise the same transshipment vessel, the 'Lucky Eyre'.<sup>468</sup>*

The ACCC notes that the location and operational interaction between the Wallaroo and Lucky Bay facilities may provide T-Ports' with significant operational flexibility, e.g. by facilitating split shipments between the two facilities. However, the ACCC also notes that the use of a single transshipment vessel may also result in operational challenges and possibly affect the amount of throughput that can be delivered by each facility.

The ACCC expects that, should T-Ports' Wallaroo facility commence operations as intended, it will likely to impose a material level of competitive constraint on Viterra's Port Giles facility (as well as on Viterra's Wallaroo, IHB and OHB facilities).<sup>469</sup>

While the ACCC also acknowledges that the threat of competition (to the extent it is considered credible) can be expected to impose a level of competitive constraint, the ACCC does not generally view the threat of competition as being as effective as actual competition.

Viterra have also submitted that they have made significant investment at Port Giles in recent years:

*... Viterra notes that it has made a number of significant investments at Port Giles in the five year period to 31 December 2018. In this period, it invested [c-i-c] at Port Giles, including:*

- *recladding the bulk loading facilities;*
- *installing a 40 metre weighbridge;*
- *silo roof sealing; replacing conveyor and elevator belts; and*
- *electrical switch room upgrades.*<sup>470</sup>

The ACCC considers that this indicates that Viterra is willing to make investments under the current regulatory arrangements. As previously noted, this likely reflects the need to generate a return for shareholders. However it is unclear how Viterra's investment decisions would be affected in relation to a decision to exempt or not exempt Viterra in relation to this facility.

As discussed in relation to subclause 5(3)(d), the ACCC considers that the level of competitive constraint faced by Viterra in relation to Port Giles is likely insufficient at this time to ensure that Viterra would not have an incentive to provide favourable access to certain exporters at its facility.

Consequently while there is the potential for the more 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 Giles 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 Giles facility on the investment in port terminal facilities is unclear.

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<sup>468</sup> Ibid.

<sup>469</sup> As noted in section 4.3 subclauses (e) and (f) in relation to Port Lincoln the interaction between T-Ports' proposed Wallaroo facility on the Yorke Peninsula and its existing Lucky Bay facility on the Eyre Peninsula may provide significant operational flexibility. However this may affect the amount of throughput either of these facilities could individually achieve (as these facilities will share a single transshipment vessel).

<sup>470</sup> Viterra, *Exemption Application 2019*, 2 July 2019, p. 63.

***(h) whether the port terminal service provider is an exporter or an associated entity of an exporter***

The ACCC's consideration of whether Viterra is an exporter (or an associated entity of an exporter) is the same in relation to Port Giles as it is in relation to Viterra's other port terminal facilities.

Section 4.1 (IHB) subclause (h) sets out the ACCC's draft view in relation to these matters.

***(i) whether there is already an exempt service provider within the grain catchment area for the port concerned***

Section 4.1 (IHB) subclause (i) sets out the ACCC's draft findings on catchment areas. To the extent the ACCC holds views that specifically relate to these matters and Viterra's Port Giles facility, these are set out below.

The ACCC notes that Viterra has submitted that its Port Giles facility competes for the same grain as port terminal operators at Port Adelaide.<sup>471</sup> As discussed in section 3.2.3, and above in relation to subclauses 5(3)(b) and (g), the ACCC expects the majority of grain grown on the Yorke Peninsula to be exported through Viterra's Port Giles or Wallaroo facilities, with grain in this area only likely to travel to other destinations (such as Port Adelaide) in large quantities in unusual market conditions. Furthermore, as discussed in section 3.2 the ACCC does not consider T-Ports' Lucky Bay facility to be in the Port Giles catchment zone.

As such, at the time of forming its draft view, the ACCC does not consider that the catchment area for Port Giles contains an exempt port terminal service provider.

The ACCC also notes it has not proposed to exempt Viterra's Wallaroo facility as part of its assessment of Viterra's exemption application. However, as there is the potential that Wallaroo lies within Port Giles catchment area, if Wallaroo is exempted in the ACCC's final determination (which is not proposed in the Draft Determinations), then Viterra will be an exempt service provider in relation to its Port Giles facility, which is potentially within Wallaroo's catchment area.

***(j) any other matters the ACCC considers relevant***

The ACCC's consideration of any other relevant matters is generally the same in relation to Port Giles as it is in relation to Viterra's Port Lincoln facility. To the extent the ACCC has views on these matters that specifically relate to Viterra's Port Giles facility, these are set out below.

While acknowledging that the ACCC is able to revoke an exemption determination if satisfied that the reasons for granting an exemption no longer apply, the ACCC's draft view is that Viterra's Port Giles facility is unlikely to be subject to sufficient competitive constraint to support an exemption from Parts 3 to 6 of the Code at this time.

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<sup>471</sup> Ibid, p. 62.

## 4.6. Thevenard

### ***(a) the legitimate business interests of the port terminal service provider***

The ACCC's draft findings about Viterra's legitimate business interests are the same in relation to Thevenard as they are in relation to Viterra's other port terminal facilities.

Section 4.1 (IHB) subclause (a) sets out the ACCC's draft views in relation to Viterra's legitimate business interests.

To the extent the ACCC has views on these matters that specifically relate to Viterra's Thevenard facility, these are set out below.

Gypsum Resources Australia (GRA) ships gypsum via Viterra's Thevenard facility. GRA submitted that its operations are impacted when Viterra shuts down the ship loader at Thevenard for planned maintenance and that this has resulted in GRA incurring hundreds of thousands of dollars in consequential costs.<sup>472</sup> GRA understands that Viterra's flexibility in this regard is limited due to the Code. As submitted by GRA:

- *According to Viterra its Port Loading Protocols and associated capacity allocation agreements with grain clients are a key factor in driving the shutdown length and timing. Viterra inform GRA they are:*
  - *unable to split planned shut downs into a more ideal two smaller blocks of 8 days due to the grain slots.*
  - *unable to load any non-grain vessels in slots that have been purposely unsold to grain clients and set aside for planned maintenance.*<sup>473</sup>

The ACCC is not aware of any requirement in the Code, or within an ACCC-approved capacity allocation system in Viterra's PLPs, which either directly limits Viterra's ability to schedule maintenance or requires Viterra to shut down its facility at certain times of the year (or for a certain length of time), for maintenance purposes.

In addition, as discussed in section 4.1 (IHB) subclauses (a), (e) and (f) the ACCC notes that Viterra is able to apply to the ACCC to vary the capacity allocation system in its PLP. While the ACCC acknowledges that not all operational challenges can be resolved via changing the PLPs, the ACCC considers that, to the extent the current arrangements may result in prolonged operational inflexibilities (such as in relation to maintenance), these could likely be addressed through changes to the PLPs.

The ACCC also notes that the last time Viterra's protocols were changed was in 2015, and that any changes to these arrangements must be initiated by Viterra. The PLPs are discussed further in the analysis relating to IHB (subclauses 5(3)(a)(e) and (f)).

In his submission to the Supplementary Issues Paper Mr Geoff Ryan, while generally supporting exemptions for all Viterra's port terminal facilities, submitted in relation to Thevenard that:

*Thevenard is a port that would benefit from an exemption from the wheat Code especially given that the majority of commodities that go through the port are non - wheat and yet are bound by the rules that govern wheat.*<sup>474</sup>

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<sup>472</sup> Gypsum Resources Australia submission, 5 September 2019, p. 2.

<sup>473</sup> Ibid.

<sup>474</sup> Mr Geoff Ryan submission, 18 June 2020, p. 1.

The ACCC recognises that bulk grain only accounts for a small proportion of the commodities shipped at the Port of Thevenard: as submitted by GRA wheat and barley only accounted for 5 per cent of total throughput at Thevenard in the 2018-19 shipping season.<sup>475</sup> However, the ACCC notes that Viterra ships 330 000 tonnes of grain annually from Thevenard. As discussed below in relation to subclauses 5(3)(b) and (g), Viterra has significant market power and an incentive to favour certain exporters in the absence of the application of the full Code at Thevenard.

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

The ACCC's draft findings about the public interest in relation to Thevenard are the same as they are in relation to Viterra's other port terminal facilities.

Section 4.1 (IHB) sets out the ACCC's draft views in relation to subclauses 5(3)(b) and (g).

To the extent the ACCC has views on these matters that specifically relate to Viterra's Thevenard facility, these are set out below.

***Competition in bulk wheat export operations***

There is a total of three bulk grain port terminal facilities currently in operation on the Eyre Peninsula.

Thevenard is one of two Viterra-operated port terminal services on the Eyre Peninsula (the other being the large deep water facility at Port Lincoln) and is the most remote port in SA. Historically Thevenard has only accounted for a relatively small proportion of bulk grain exports on the Eyre Peninsula, averaging just 330 000 tonnes per annum, or just 15 per cent of total Eyre Peninsula grain exports.<sup>476</sup>

In addition, as of March 2020 T-Ports commenced operations at its Lucky Bay facility. Since commencing operations in March 2020, Lucky Bay has only completed seven shipments, totalling 119 000 tonnes of grain.<sup>477</sup>

While acknowledging the potential significance of T-Ports' Lucky Bay operation, the ACCC's draft view is that Viterra's Thevenard facility does not currently face sufficient competitive constraint to support an exemption from Parts 3 to 6 of the Code, in large part due to its remote location and the large freight costs required to move grain to alternate markets.

The ACCC's draft view is based on the analysis of the port terminal services markets in chapter 2, and the consideration of upcountry and related markets in chapter 3. These indicate the following:

- **Thevenard's catchment area:** Thevenard is the most geographically remote port terminal facility in SA. Thevenard appears to source its grain predominantly from the Western Eyre Peninsula, in particular the north-western Eyre Peninsula. Although T-Ports' Lucky Bay facility has only recently commenced operations it appears likely

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<sup>475</sup> Gypsum Resources Australia submission, 5 September 2019, p. 1.

<sup>476</sup> The ACCC understands that the Port of Thevenard shut down in July 2017 in order to complete emergency works to the jetty structure to "ensure it remained safe and operational whilst a long-term solution was investigated" (see page 7 of the [Port Thevenard Jetty Restoration Report](#)). Thevenard was able to re-open in some capacity in [September 2017](#), however Flinders Ports was still working to find a long-term solution after re-commencing operations. [Flinders Ports announced](#) in June 2019 they would commence a restoration project which would ensure the jetty could continue to be used for commercial and recreational use well into the future. The ACCC understands these works will be completed in [October 2020](#).

<sup>477</sup> As of 18 September 2020.

that Lucky Bay will compete for grain with Thevenard in certain areas of the Western Eyre Peninsula.<sup>478</sup> However the extent of competition may be limited, as it seems unlikely that significant quantities of grain from the north-western Eyre Peninsula will move to Lucky Bay for export (given the shorter distances to port giving Thevenard a freight advantage over Lucky Bay for grain in these regions). As stated in section 4.3 (Port Lincoln) subclause (i), the ACCC also understands that Port Lincoln sources grain from the Western Eyre Peninsula, however grain grown on the north-western Eyre Peninsula appears to be freight advantaged to move to Thevenard.

- **The extent of the competitive constraint imposed by Lucky Bay is currently uncertain:** T-Ports' Lucky Bay facility has only recently commenced operations and uses a transshipment model which has not previously been used in the context of the Australian grain market. It is also not yet clear whether T-Ports' transshipment operation will be subject to other limitations in practice, such as weather conditions.<sup>479</sup> Furthermore, Viterra owns 10 out of 11 upcountry sites in the Western Eyre Peninsula,<sup>480</sup> likely giving Viterra an advantage in sourcing grain in this region. As such the ACCC considers that the degree of competitive constraint T-Ports' Lucky Bay facility will impose upon Thevenard, while currently uncertain, is likely limited in any event.
- **Spare capacity:** As discussed in section 2.2 there generally appears to be significant spare capacity available at Viterra's Thevenard facility. While there appears to be some potential for capacity constraints in high volume seasons, this would likely only occur infrequently. Furthermore the introduction of T-Ports' Lucky Bay facility has the potential to reduce demand at Thevenard (though this effect is likely to be limited as the ACCC considers Lucky Bay's and Thevenard's catchment areas to be largely separate – see subclause 5(3)(i)). The ACCC expects the existence of spare capacity to reduce the incentive Viterra has to favour certain exporters. Exporters' ability to access capacity on fair and transparent terms is discussed further in relation to subclauses 5(3)(c) and (d).
- **Proposed port terminal facilities:** The ACCC notes that a number of port terminal proposals on the Eyre Peninsula remain uncertain, though these proposals likely have a number of barriers to overcome before commencing operations. Nonetheless the ACCC acknowledges that the entry of new facilities on the Eyre Peninsula (or threat of entry if sufficiently credible) could impose some degree of competitive constraint on Thevenard.<sup>481</sup> However, given Thevenard's location, the ACCC considers that the currently proposed terminals are more likely to competitively constrain Viterra's Port Lincoln facility than Thevenard. The ACCC's views on proposed port terminals are discussed in more detail in section 2.1.5, as well as in its draft findings relating to subclauses 5(3)(e) and (f) below.

### ***Competition in upstream and downstream markets***

The ACCC has considered whether the level of competition in upcountry storage, handling, and transport markets might provide Viterra with market power. Absent the full application of the Code, the potential exists for any market power to affect competition in the port terminal service market by, for example, limiting the ability of third party exporters to participate in upstream grain acquisition.

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<sup>478</sup> T-Ports submit that its catchment area will extend as far west as Cungiya/Poochera. See page 3-4 of [T-Ports exemption application](#).

<sup>479</sup> The ACCC notes that the PLPs for T-Port's Lucky Bay suggest that certain weather conditions may limit loading operations.

<sup>480</sup> The third party storage site is T-Ports' Lock facility, which has 150 000 tonnes of storage capacity.

<sup>481</sup> If these facilities were to become operational they could compete for the same grain as Viterra's Thevenard facility.



In addition to upstream and downstream markets, the ACCC also considered the potential for related markets, such as container exports and domestic demand for grain, to affect the promotion of competition in bulk wheat port terminal services.

As discussed in section 4.3 (Port Lincoln) subclause (b) and (g) the ACCC considers that Viterra owns the vast majority of total storage on the Eyre Peninsula. This appears to also be the case when considering the Western Eyre Peninsula, with Viterra owning the 10 out of 11 upcountry sites (the one third party storage site on the Western Eyre Peninsula is T-Ports' Lock facility).

As discussed in relation to Viterra's Port Lincoln facility, the ACCC considers that grain grown on the Eyre Peninsula has limited access to SA's domestic and container markets.

## **Conclusion**

The ACCC considers that, given the lack of access to container and domestic markets, grain grown on the Eyre Peninsula is largely reliant on access to bulk grain export markets. As such T-Ports' Lucky Bay facility likely represents the most significant competitive constraint on Viterra's Thevenard facility.

However, the capacity (and hence level of competitive constraint) that T-Ports will deliver in practice remains uncertain at this time, particularly as its transshipment operation is not yet proven in the Australian grain context. The ACCC also notes that there is the potential for Viterra's position upcountry (i.e. ownership of the vast majority of upcountry storage sites on the Eyre Peninsula) to interact with its position at port to affect competition. As such the ACCC does not consider Viterra's Thevenard facility to be subjected to sufficient competitive constraint to support an exemption from Parts 3 to 6 of the Code at this time.

The ACCC's draft view is therefore that exempting Viterra from the full application of the Code in relation to Thevenard is not in the public interest, and will likely also be detrimental to competition in upstream and downstream markets.

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

The ACCC's draft findings about matters relating to the interests of exporters who may require access to port terminal services are the same in relation to Thevenard as they are in relation to Viterra's IHB facility.

Section 4.1 (IHB) subclause (c) sets out the ACCC's draft views on these matters in detail.

### ***(d) the likelihood that exporters of bulk wheat will have fair and transparent access to port terminal services***

Section 4.1 (IHB) subclause (d) sets out the ACCC's draft findings on the likelihood that exporters will have fair and transparent access to port terminal services. ACCC views that specifically relate to these matters and Viterra's Thevenard facility are set out below.

Thevenard is Viterra's smallest port terminal facility, with a stated capacity of 687 000 tonnes.<sup>482</sup> As discussed above in relation to the analysis relating to subclauses 5(3)(b) and (g) there appears to be a significant amount of excess capacity at Thevenard: the most Thevenard has shipped in a single season since at least 2011-12 is 520 000 tonnes (in the

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<sup>482</sup> Viterra, Attachment 2 – Response to 14/11/19 information request – Question 3 – Viterra published available capacity estimates, 13 February 2020.

bumper 2016-17 season).<sup>483</sup> On average Thevenard will facilitate 330 000 tonnes of shipments per season.

Thevenard also generally appears to have significant excess capacity available in the peak period in most seasons, with an average peak capacity utilisation rate of 55 per cent (since 2011-12). However, there appears to be the potential for capacity constraints during the peak period under certain circumstances: exports took up all of the available 350 000 tonnes of capacity in the bumper 2016-17 peak period.<sup>484</sup>

The ACCC considers it reasonable to expect that the introduction of T-Ports' Lucky Bay facility will draw grain away from Thevenard to some extent. However, the extent to which this will occur is likely limited given that Thevenard's and Lucky Bay's catchment areas appear relatively separate (see analysis relating to subclause 5(3)(i) below for a more detailed consideration of Thevenard's catchment area). As discussed in section 3.1.2, the ACCC does not expect that the closure of rail transport will have a pronounced impact on catchment areas in the Eyre Peninsula.

Given the above, the ACCC considers it unlikely that Thevenard will experience capacity constraints during the peak period in most seasons. As such this likely reduces the incentive Viterra has to provide favourable access to certain exporters (in particular its associated entity exporter) at Thevenard.

In addition the ACCC notes that, while Glencore is the largest exporter through Thevenard by volume, the share of Glencore's shipments is lower at Thevenard than at any other Viterra facility: Glencore has only accounted for 28 per cent of peak period shipments and 22 per cent of off-peak period shipments at Thevenard since 2011-12.<sup>485</sup> However, due to Thevenard's small throughput, only a small number of exporters are typically able to secure access each season: on average only 5.9 exporters' ship from Thevenard each season (compared to an average of 8.0 at Viterra's other facilities). For comparison, the largest third party exporters during peak periods at Thevenard since 2011-12 have been ADM, COFCO, and Emerald,<sup>486</sup> who have performed 20, 12 and 9 per cent of peak period shipments on average respectively. In addition figure 2.10 in section 2.2.4 suggests that third party exporters have historically been able to access similar levels of capacity in both the peak and off-peak period at Thevenard.

In considering historical exporter market shares, the ACCC notes that Viterra's current PLPs ensure that combined across Viterra's six facilities a minimum of 500 000 tonnes of capacity is reserved for short term capacity per quarter. In addition no single exporter can apply for more than 50 per cent of the initial long-term capacity at Thevenard.<sup>487</sup> In the absence of the full application of the Code, terms such as this can be changed in the PLPs without the need for the ACCC's approval. Consequently, the ACCC considers that the historical level of access by third party exporters was likely influenced by the current PLPs.

The ACCC's view is that it is appropriate for it to consider whether the current level of competition among exporters is likely to be affected if an exemption from Parts 3 to 6 of the Code was granted in relation to Thevenard.

The ACCCs acknowledges that there is likely to be spare capacity at Thevenard, and that exporters have historically have been able to secure access to the facility. However the

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<sup>483</sup> The ACCC does not have bulk export data prior to the 2011-12 season.

<sup>484</sup> Thevenard released their largest amount of peak period capacity in the bumper 2016-17 season, which the ACCC has therefore used to represent the peak period capacity of Thevenard (see section 2.1.4).

<sup>485</sup> Glencore has accounted for 26 per cent of shipments from Thevenard since 2011-12 on an annual basis.

<sup>486</sup> Emerald have not performed any shipments out of Viterra's Thevenard facility since the 2014-15 season.

<sup>487</sup> The ACCC notes that it has defined the peak period in this document as December through to May.



ACCC considers that Thevenard's remote location results in the facility being exposed to limited competitive constraint.

As such, the ACCC's draft view is that, given the facility's remote location, limited competition, and the variability of bulk export volumes, exempting Viterra from the full Code in relation to Thevenard risks detriment to the likelihood exporters will be able to obtain fair and transparent access to the facility to export bulk grain, particularly in the peak period in high throughput seasons.

***(e) the promotion of the economically efficient operation and use of the port terminal facility; and (f) the promotion of efficient investment in port terminal facilities***

Section 4.1 (IHB) subclauses (e) and (f) sets out the ACCC's draft findings on the promotion of economically efficient operation and use of the port terminal facility, and the promotion of efficient investment in port terminal facilities. Section 4.3 (Port Lincoln) subclause (e) and (f) sets out these matters with specific regard to the Eyre Peninsula. The ACCC's further views relating to subclauses 5(3)(e) and (f) which are specific to Viterra's Thevenard facility are set out below.

The ACCC notes that the location of the two proposed facilities for the Eyre Peninsula (Cape Hardy and Port Spencer) are located on the lower eastern coast of the Eyre Peninsula. As such commencement of operations at (or, to a lesser extent, the threat of entry of) either of these facilities appears more likely to impose a competitive constraint on Viterra's Port Lincoln facility, rather than its Thevenard facility (where any such constraint is expected to be quite limited due to the distances involved).

Given the factors discussed in Port Lincoln, the ACCC considers that the effect of a decision to exempt or not to exempt Viterra in relation to its Thevenard facility on the investment in port terminal facilities is unclear.

***(h) whether the port terminal service provider is an exporter or an associated entity of an exporter***

The ACCC's consideration of whether Viterra is an exporter (or an associated entity of an exporter) is the same in relation to Thevenard as it is in relation to Viterra's other port terminal facilities.

Section 4.1 (IHB) subclause (h) sets out the ACCC's draft view in relation to these matters.

***(i) whether there is already an exempt service provider within the grain catchment area for the port concerned***

Section 4.1 (IHB) subclause (i) sets out the ACCC's draft findings on catchment areas in SA. The ACCC's further views that specifically relate to these matters and Viterra's Thevenard facility are set out below.

The ACCC notes that Viterra has submitted that catchment areas are increasingly outdated and fluid, and that grain will move to where it is most economically viable.<sup>488</sup> However Viterra has also submitted that Thevenard has traditionally sourced grain from growers on the Eyre Peninsula.<sup>489</sup>

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<sup>488</sup> Viterra, *Exemption Application 2019*, 2 July 2019, p. 1.

<sup>489</sup> *Ibid*, p. 46.

As discussed in section 3.2 and above in relation to the analysis relating to subclauses 5(3)(b) and (g), the ACCC considers that Thevenard primarily draws grain from the north-western Eyre Peninsula region. In forming this view the ACCC has considered Viterra's 2019-20 Export Select freight rates (as set out below in table 4.2).

Table 4.2 includes those storage sites for which freight rates were available for both Port Lincoln and Thevenard. As shown, Thevenard typically has a large freight advantage for grain grown in the north-western Eyre Peninsula. However, as previously noted, the ACCC recognises that grain intended for export may not necessarily move to the closest port terminal facility, and that certain market conditions may result in it being more profitable for grain to move to more distant facilities. However, and as acknowledged by Viterra, distance is a relevant cost driver when outturning grain to a port terminal facility.<sup>490</sup>

The ACCC expects that factors such as available capacity, the ability to secure enough grain for shipment, and the relative efficiency of port terminal facilities likely also influences decisions around where grain is exported from. The ACCC notes that Port Lincoln is a much larger, and likely more efficient, facility than Thevenard.

In considering the movement of grain and Viterra's Export Select freight rates, the ACCC notes that these rates are not provided for Thevenard at 18 (out of 25) of Viterra's Eyre Peninsula upcountry storage sites in GTA's 2019-20 Location Differentials.<sup>491</sup> All seven sites which have Export Select freight rates are listed in table 4.2 (the sites listed are all located in the north-western region of the Eyre Peninsula). The absence of Thevenard freight rates at Viterra's other Eyre Peninsula upcountry sites suggests that grain in those regions is unlikely to move to Thevenard for export.

Given the above, and consistent with the freight advantages shown in table 4.2, the ACCC expects that grain exported from Thevenard is predominantly sourced from the north-western Eyre Peninsula.

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<sup>490</sup> Viterra, *Response to 14/11/19 information request – Question 9 – Catchment zones*, 13 January 2020, p. 3.

<sup>491</sup> Viterra does not propose to operate 3 of these 25 sites on the Eyre Peninsula in the 2020-21 season.

**Table 4.2: Viterra’s 2019-20 Export Select freight rates for selected Eyre Peninsula sites**

Site location	Port Lincoln	Thevenard	Percentage of grain that moves to Thevenard (tonnes)
Nunjikompita	35.10	9.86	[c-i-c]
Penong	44.00	9.93	[c-i-c]
Poochera	29.20	17.65	[c-i-c]
Streaky Bay	30.65	12.89	[c-i-c]
Wirrulla	33.60	11.95	[c-i-c]
Witera	25.37	18.55	[c-i-c]
Wudinna	21.59	25.15	[c-i-c]

Source: Viterra 2019-20 Export Select freight rates; GTA 2019/20 Location Differentials; and Viterra, *Response to 14/11/19 information request - Question 9 – Catchment zones*, 13 January 2020.

Notes: Viterra’s 2019/20 Export Select freight rates were used by GTA in their 2019/20 Location Differentials. Export Select freight rates and/or GTA Location Differentials are not available from Viterra’s upcountry sites to T-Ports’ Lucky Bay facility.

T-Ports, the other PTSP currently operating on the Eyre Peninsula, has submitted that Lucky Bay’s catchment area extends into the Western Eyre Peninsula. In particular, T-Ports has estimated Lucky Bay’s catchment area will extend as far west as Cungieng/Poochera:

*The catchment zone area is estimated to include the entire Eastern Eyre region where the cost of transporting grain from farm to Lucky Bay would be notably less than transporting to Port Lincoln (Noting that the vast majority est. 95% of any deliveries to Viterra up-country sites will ultimately be moved to Port Lincoln (at grower cost)). The zone extends into Western Eyre region as far west as Cungieng / Poochera at which point the freight advantage to northern sites begins favouring the Thevenard port and southern sites begins favouring Port Lincoln. The Lower Eyre region freight advantage primarily favours Port Lincoln, however on the northern most parts of this region there will be farms that are physically closer to Lucky Bay and as such would be freight advantaged to deliver to Lucky Bay.<sup>492</sup>*

Given the ACCC’s view that Thevenard’s catchment area is likely the north-western Eyre Peninsula, should grain move from as far west as Poochera to Lucky Bay then it appears that T-Ports’ catchment area will overlap with Thevenard’s to some extent. However, should this be the case, Thevenard will likely have a material freight advantage for grain in Poochera, given the influence of distance on grain movements (Poochera lies 144 km from Thevenard and 271 km from Lucky Bay).

On balance the ACCC considers that the catchment area for Thevenard likely overlaps with T-Ports’ Lucky Bay facility to a limited extent. As such, Lucky Bay will likely provide some (albeit limited) competition for grain located in the eastern part of Thevenard’s catchment area. In forming this view the ACCC notes, in terms of strict freight advantages, Wudinna is located roughly in the middle of Thevenard and Lucky Bay (a distance of 213 km and 200 km respectively). However the ACCC recognises that distance, while important, is only one

<sup>492</sup> T-Ports, *Application for exemption from the Competition and Consumer (Industry Code – Port Terminal Access (Bulk Wheat)) Regulation 2014*, 28 March 2019, pp. 3-4.

factor when deciding which port terminal to export from. As such, the ACCC considers that Lucky Bay's catchment area overlaps with Thevenard's to a limited extent.

In light of the above, the ACCC's draft view is that the catchment area for Viterra's Thevenard facility contains an exempt port terminal service provider (T-Ports) and, further, that the presence of the relevant facility (Lucky Bay) is likely to impose some competitive constraint on Viterra's operations at Thevenard.

***(j) any other matters the ACCC considers relevant***

The ACCC's consideration of any other relevant matters is generally the same in relation to Thevenard as it is in relation to Viterra's Port Lincoln facility. To the extent the ACCC has views on these matters that specifically relate to Viterra's Thevenard facility, these are set out below.

While acknowledging that the ACCC is able to revoke an exemption determination if satisfied that the reasons for granting an exemption no longer apply, the ACCC's draft view is that Viterra's Thevenard facility is unlikely to be subject to sufficient competitive constraint to support an exemption from Parts 3 to 6 of the Code at this time.

## 5. Draft Determinations

Based on the findings and reasons outlined in chapter 4, the ACCC has made the following draft determinations.

### *Viterra's Port Adelaide Inner Harbour port terminal*

The ACCC's draft determination is that Viterra should be an exempt provider of port terminal services provided by means of its port terminal facility at Port Adelaide IHB.

### *Viterra's Port Adelaide Outer Harbor port terminal*

The ACCC's draft determination is that Viterra should be an exempt provider of port terminal services provided by means of its port terminal facility at Port Adelaide OHB.

### *Viterra's Port Lincoln port terminal*

The ACCC's draft determination is that Viterra should not be an exempt provider of port terminal services provided by means of its port terminal facility at Port Lincoln.

### *Viterra's Wallaroo port terminal*

The ACCC's draft determination is that Viterra should not be an exempt provider of port terminal services provided by means of its port terminal facility at the port of Wallaroo.

### *Viterra's Port Giles port terminal*

The ACCC's draft determination is that Viterra should not be an exempt provider of port terminal services provided by means of its port terminal facility at Port Giles.

### *Viterra's Thevenard port terminal*

The ACCC's draft determination is that Viterra should not be an exempt provider of port terminal services provided by means of its port terminal facility at the port of Thevenard.

## **ACCC Future Monitoring and Assessments**

If the ACCC's Final Determinations result in Viterra being an exempt port terminal service provider in relation to any of those facilities, the ACCC will consider the exempted facilities in its ongoing monitoring activities, including:

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

If the ACCC's monitoring activities indicate that the exporters of bulk wheat do not have fair and transparent access to port terminal services at an exempt port terminal facility, the ACCC will consider whether it should examine revocation of the exemption.

Under subclause 5(6) of the Code, the ACCC may revoke an exemption determination if, after having regard to matters (a) to (j) of subclause 5(3) of the Code, it is satisfied that the reasons for granting the exemption no longer apply. In those circumstances, the ACCC will follow the procedure in its *Guidelines on the ACCC's process for making and revoking exemption determinations*.