Viterra Operations Pty Ltd

Response to Draft Determination

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 its port terminals in South Australia

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Public version

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Executive Summary

Viterra Operations Pty Ltd (**Viterra**) welcomes the opportunity to respond to the draft determination made by the Australian Competition and Consumer Commission (**ACCC**) on 6 October 2020 in relation to Viterra's application for exemption from the application of Parts 3 to 6 of the *Port Terminal Access (Bulk Wheat) Code of Conduct* (**Code**) in respect of the bulk wheat port terminal facilities it owns and operates in South Australia at Port Lincoln, Port Adelaide Outer Harbor (**OHB**), Port Adelaide Inner Harbour (**IHB**), Wallaroo, Port Giles and Thevenard (**Draft Determination**).

As set out in Viterra's application and further submissions, Parts 3 to 6 of the Code—and, in particular, the requirement to have port loading protocols (**PLPs**) approved by the ACCC—hinders Viterra's flexibility to respond to changes in market conditions and exporter requirements. The inefficiency of this regulation has placed South Australia at a disadvantage in international grain markets as compared to other states in Australia where there is far less regulatory interference.

Viterra therefore welcomes the ACCC's draft decision to exempt OHB and IHB from Parts 3 to 6 of the Code. However, the ACCC's draft decision not to exempt Port Lincoln, Wallaroo, Port Giles and Thevenard is disappointing. Viterra considers that a properly balanced application of the criteria in clause 5(2) of the Code favours the granting of an exemption in relation to each of these port terminals.

The exemption criteria support exemptions at each of Viterra's port terminals

Viterra has provided the ACCC with a significant amount of information during this process, which shows that:

(a) Exemptions across all of Viterra's port terminals will increase Viterra's operational flexibility, which is in both its and exporters' interests. Operational flexibility provides a port terminal service provider (**PTSP**) with the ability to more effectively and quickly respond to changes in market conditions or customer requirements which, in turn, improves the efficiency and competitiveness of its operations as well as the experience of its customers.

(b) Viterra is constrained from exercising any market power in the provision of port terminal services to the detriment of other market participants because:

   i. South Australia and, therefore, Viterra is a price taker in the global grain market – as such, Viterra is incentivised to operate an efficient supply chain, the benefits of which it passes through to other market participants;

   ii. pricing and terms of access at Viterra's port terminals are constrained by competition within South Australia and in regional growing regions, and are also constrained by the credible threat of new entry in each of these regions given planned developments and low barriers to entry;

   iii. there is significant excess port terminal capacity at each of Viterra's port terminals;

   iv. Viterra's export port terminals compete with domestic demand for grain (including on the East Coast) with new supply chains to the East Coast established in recent years making this a continuing competitive constraint;

   v. Viterra's port terminals do not have a competitive advantage sourcing grain over their competitors due to different transportation methods as most of Viterra's facilities receive grain by road, the costs of which are highly competitive;

vi. Viterra's upcountry storage facilities in South Australia and in its growing regions are subject to competition and the credible threat of new entry given the low barriers to entry; and

vii. a number of Viterra's port terminals—in particular, IHB, Thevenard and Wallaroo—export a very small proportion of the wheat produced in Australia and a small proportion of the wheat produced in South Australia.

It is therefore not surprising that the Essential Services Commission of South Australia (**ESCOSA**) has previously found there to be no evidence of Viterra exercising market power to the detriment of competition.

(c) Notwithstanding that Viterra is vertically integrated in the supply chain, Viterra has provided open access to its port terminals since well before the introduction of access regulation and will continue to provide fair and transparent access in the event that exemptions are granted. As explained in independent expert reports provided to the ACCC, Viterra does not have an economic incentive to deny access to Viterra's port terminals or to provide exporters who are not related with less favourable terms of access. The application of Parts 3 to 6 of the Code is therefore not necessary to ensure fair and transparent access to Viterra's port terminal services.

It is important that the ACCC has regard to all the information provided to it and does not subjugate one or more of the exemption criteria to another. As the High Court has stated, where there is a range of criteria that the ACCC must have regard to, it cannot simply "*ignore some of those factors or give them cursory consideration only in order to put them to one side*".[1] It is critical that the ACCC gives proper, genuine and realistic consideration to Viterra's legitimate business interests and not relegate this as inferior, or dependent on, other criteria that it considers.

An exemption at each port terminal will improve South Australia's position in global grain markets

As recognised by the ACCC, Viterra is a price taker in the global grain market. As such, Viterra is incentivised to operate an efficient supply chain, and passes through any improvements in efficiencies—whether they be in terms of quality or fee reductions, or investments back into the supply chain—to its customers. It follows that the operational benefits (including increased efficiency) that will ensue from an exemption at each of its port terminals will be of benefit to not only Viterra but also to other market participants. An exemption will therefore improve South Australia's position in the global grain market, to the benefit of all market participants.

Each of Viterra's port terminals is subject to competition in a global and regional context

Viterra's port terminals are competitively constrained by competition in the global grain market, and more locally by port terminal operators in Australia.

To the extent that the concept of a grain catchment area—which Viterra considers to be a fluid and outdated concept—is used by the ACCC in its assessment, it is important that the ACCC does not overlook competitive constraints by defining too small a catchment area. As recognised by the Australian Export Grains Innovation Centre (**AEGIC**), grain growing regions in South Australia are relatively large due to distances to port in the state being short, and road transport costs being competitive. In addition, freight differentials (which appears to be the primary—if not sole— factor used by the ACCC to define a grain catchment area) are not the sole indicator of where grain will be delivered – other factors, including the grain price that can be achieved at a site and slot availability

[1] *East Australian Pipeline Pty Ltd v ACCC* (2007) 233 CLR 229 at [52] (Gleeson CJ, Heydon and Crennan JJ).

and timing, are also very relevant. Based on these factors and historical grain movements, Viterra considers the following to be the narrowest potential grain catchment areas for the purposes of the ACCC's assessment:

- the grain growing region on the Eyre Peninsula; and
- the grain growing region that encompasses the Yorke Peninsula and a large area surrounding Adelaide, stretching from Dooen in the west of Victoria, to Werrimull in north Victoria, and north-west to Port Pirie and Melrose in South Australia.

Each of Viterra's port terminals is constrained by a competitive and exempt PTSP in these regions, with new developments also planned in each of these regions.

In addition, the barriers to entry for port terminal operators are not prohibitive as indicated by the number of new terminals and planned developments. New infrastructure set ups, such as mobile ship loaders and transhipment vessels, have further lowered entry costs. The threat of new entry is a significant constraint in circumstances where barriers to entry are low and new developments are well developed and needs to be given due consideration by the ACCC.

Viterra is subject to competition in upcountry storage and handling markets

Viterra's upcountry storage sites can be, and are, bypassed by producers and exporters (either by using third party storage facilities or on-farm storage) in respect of a substantial proportion of annual grain production in South Australia.

Viterra competes with at least 15 alternative upcountry storage providers and significant on-farm storage (9-14% of the harvest) in South Australia. Competitor storage capacity in South Australia (upcountry and at-port) represented more than 48.1% of the 2019-20 harvest (52.5% of the 2018-19 harvest and 41.3% of the 2017-18 harvest). This level of competitor storage will likely increase as barriers to entering the market are very low and new competitors, such as T-Ports, are encouraging direct deliveries from on-farm storage.

Viterra does not have an incentive to deny fair and transparent access or to favour Glencore Agriculture in the provision of access to its port terminals

Viterra has demonstrated that it is committed to providing fair and open access to exporters, and to responding to exporter needs. There are currently 11 exporters (including Glencore Agriculture) using Viterra's port terminals and, over the past 10 years, each change to Viterra's capacity allocation system has been in response to customer feedback.

If an exemption is granted, exporters will continue to be provided with fair and transparent access to Viterra's port terminals. Viterra has a strong commercial incentive to maximise throughput at its ports and, given its high fixed cost structure, Viterra needs a diversity of customers as it would put its investment at risk to rely on a small number of customers. This is particularly the case given that exporters have a strong commercial incentive to diversify their source of grain and would not take on the financial risk of buying the entire or majority of the South Australian crop.

Viterra commissioned Charles River Associates (**CRA**) to assess whether Viterra has an incentive to deny access to its port terminals or discriminate in favour of Glencore Agriculture in providing access to its port terminals. CRA's modelling showed that, even when using conservative assumptions, denial of access or discriminatory conduct in favour of Glencore Agriculture would result in a net loss to Viterra and Glencore Agriculture and therefore Viterra does not have an incentive to foreclose access to its port terminals.

The ACCC appears to have adopted an overly protectionist approach to its assessment which risks imposing unnecessary and inefficient regulation

Viterra is concerned that the ACCC has adopted an overly protectionist approach to its overall assessment of whether to grant the exemptions. By doing so, it relies on potential speculative risks to support its position without regard to the fact that there is no evidence to demonstrate the likelihood that such risks would in fact eventuate (with the evidence actually pointing to the opposite outcome), and despite the fact that the ACCC could, should such an unlikely risk eventuate, revoke its decision to exempt Viterra's port terminals. The ACCC appears to have made little (if any) attempt to weigh the benefits of exemption against the potential costs of exemption.

In particular, the ACCC seems intent on protecting small exporters regardless of their efficiency or competitiveness, relying on the fact that clause 2 of the Code states that the purpose of the Code is to "*regulate the conduct of port terminal service providers to ensure that exporters of bulk wheat have fair and transparent access to port terminal services*". However, this stated purpose must be considered in conjunction with each of the exemption criteria and the Explanatory Statement to the Code, which provides that the objectives of the Code include promoting the operation of an efficient and profitable bulk wheat export industry and reducing unnecessary regulatory burden on port terminal service providers.

In addition, it is important that the ACCC does not view fairness through a moral or protectionist lens. In Australia, the rationale for having competition laws is to protect the competitive process, not individual competitors. It would be uneconomical—and contrary to the fundamental principles of competition law and economics—if fairness were taken to mean propping up small but inefficient market participants or protecting the remote possibility of future market participants (the entry of which is uncertain and unknown) at the expense of efficient competitors.

It is important that in its Final Determination, the ACCC does not seek to protect smaller inefficient competitors at the expense of efficient competition. While an approach to protect each and every exporter (regardless of efficiency) may increase the number of exporters using South Australian port terminals, it reduces efficient competition for the purchase of grain from South Australian growers and the sale of that grain into export markets.

1 Introduction

Viterra welcomes the opportunity to respond to the Draft Determination. This response is structured as follows:

1. *Section 1* contains introductory comments, including a reminder that the ACCC has an obligation to consider all relevant information provided to it as part of this process.
2. *Sections 2 to 6* contains submissions on the key matters that are relevant to the ACCC's assessment of whether to grant exemptions at each of Viterra's port terminals:
   a. Section 2 – available capacity at port terminals in South Australia;
   b. Section 3 – competition in the supply of port terminal services;
   c. Section 4 – competition in the supply of upcountry storage services;
   d. Section 5 – foreclosure incentives; and
   e. Section 6 – the provision of fair and transparent access.
3. *Section 7* contains submissions in response to third party responses to the Draft Determination.
4. *Annexures 1 to 6* provide a terminal-by-terminal analysis of the clause 5(3) criteria.

Based on a thorough consideration of the information provided—and in light of the low barriers to entry at port and upcountry, as well as the increasing amount of competition to which Viterra is subject to in South Australia—a considered and balanced application of the criteria in clause 5(3) of the Code supports the ACCC granting an exemption for each of Viterra's port terminals in its Final Determination.

Throughout this process, Viterra has provided a substantial amount of information to the ACCC in support of granting exemptions at each of its six port terminal facilities. However, Viterra is concerned that the ACCC has not provided sufficient weight to all the relevant information that it has provided to date, including the reports and information prepared by CRA. Viterra provides examples of the ACCC's failure to have proper regard to relevant considerations in its Draft Determination throughout this response.

It is important that the ACCC affords Viterra due process and takes account of all relevant considerations in its Final Determination.

2 Available capacity at port terminals in South Australia

In the Draft Determination, the ACCC acknowledges that:

- when there is spare export capacity at a Viterra port terminal facility, Viterra may have an incentive to provide access to exporters to increase throughput; and
- the amount of capacity available at competitor port terminals in South Australia is a significant factor in determining the level of competitive constraints on Viterra.

It follows that the ACCC's assessment of Viterra's and others' capacity is a critical aspect of its analysis as to whether Viterra is incentivised to provide fair and transparent access to its port terminals. It is therefore important that the ACCC does not underestimate the amount of capacity available at port terminals in South Australia. To this end, Viterra is concerned that the ACCC's approach to calculating capacity contains a number of flaws, which results in South Australia's port terminal capacity being underestimated.

2.1 Capacity at Viterra's port terminals

In the Draft Determination, the ACCC considers that Viterra's maximum published available capacity is the best estimate of capacity at Viterra's port terminal facilities.

This approach underestimates the maximum capacity at Viterra's port terminals because, as previously explained to the ACCC, Viterra's *published* available capacity estimates provided to the ACCC in Viterra's response to the information request dated 14 November 2019 do not account for tolerance (i.e. +10%). This tolerance factor was included in Viterra's capacity estimates provided in its Application. It is important that this is included as the practical capacity of each of Viterra's port terminals takes this into account – i.e. Viterra will always be able to expand capacity to meet the +10% tolerance allowance.

Table 1 below sets out the ACCC's estimate of available capacity compared with Viterra's estimate which allows for the 10% tolerance and actual maximum seasonal throughput at each of Viterra's port terminals.

Table 1: Estimates of capacity at Viterra's port terminals (mtpa)

	ACCC estimate based on published capacity	**ACCC estimate + 10% tolerance (which is not published)**	**Viterra's estimate of maximum shipping capacity in a season between 2013-20[1]**
IHB	0.92	1.01	1.01 (2016/17)
OHB	2.23	2.45	2.53 (2019/20)
Giles	1.07	1.18	1.17 (2017/18)
Lincoln	2.41	2.65	2.66 (2019/20)
Thevenard	0.69	0.76	0.76 (2016/17)
Wallaroo	0.77	0.85	0.84 (2016/17)

Source: Draft Determination.
Note 1: These figures represent the maximum capacity for a particular season, as indicated in Viterra's Application. Viterra notes that these figures differ from the maximum season figures in Table 2.2 of the Draft Determination.

For completeness, Table 1.1 sets out Viterra's estimate of maximum shipping capacity at each of its ports, for each season between 2013 and 2020 (including 10% tolerance).

Table 1.1: Viterra's estimate of maximum shipping capacity, including 10% tolerance (tpa)

	2013 / 2014	**2014 / 2015**	**2015 / 2016**	**2016 / 2017**	**2017 / 2018**	**2018 / 2019**	**2019 / 2020**
IHB	742,500	847,000	863,500	1,010,869	869,650	876,700	965,140
OHB	2,123,000	2,315,500	2,326,500	2,210,336	2,298,560	2,279,200	2,534,829
Giles	918,500	946,000	1,012,000	1,059,300	1,173,700	1,056,000	1,102,200
Lincoln	2,156,000	2,211,000	2,288,000	2,337,500	2,248,290	2,340,305	2,658,700
Thevenard	605,000	671,000	671,000	755,700	748,000	748,000	656,700
Wallaroo	643,500	709,500	759,000	842,872	744,700	744,700	768,900

Source: Viterra

It is clear that the ACCC's estimates using "maximum available published capacity" without including the 10% tolerance level underestimate the actual maximum practical capacity that can be achieved because actual maximum seasonal throughout at most of Viterra's port terminals exceeds this estimate. Allowing for +10% tolerance (which Viterra is required to make available under the PLPs) ensures that the capacity estimate for each port terminal is realistic as it is similar to or higher than actual historical seasonal volumes (rather than lower, which would simply be illogical).

2.2 Capacity at competing port terminals

Table 2 sets out the maximum practical capacity at competing port terminals in South Australia, as estimated by Viterra/CRA and the ACCC. Table 2 also explains how the ACCC and Viterra have calculated maximum capacity.

Table 2: Highest practical capacity for competing export terminals in South Australia (tpa)

PTSP	ACCC estimate	CRA estimate[2]
Cargill, IHB (Berth 20)	540,000 *This estimate is based on Cargill's stated maximum monthly throughput achievable (60,000 tonnes) multiplied by 9 months. A 9 month period is used because of the practical limitations on the amount of capacity that may be provided through the proposed shiploader and the lack of port terminal storage.*[3]	540,000 *The approach taken is the same as adopted by the ACCC.*
Semaphore, IHB	396,000 *The ACCC multiplied Semaphore's monthly capacity estimate (33,000 tonnes) by 12 to get to an annual nominal capacity estimate of 396,000 tonnes. It noted that Semaphore shopped 370,000 tonnes of grain from its facility in 2016-17.*	615,000 *This is the based on the maximum monthly throughput previously achieved (68,336 tonnes in April 2017) multiplied by 9 months. A 9 month period is conservative, but is used to allow for maintenance and shutdowns.*
T-Ports, Lucky Bay	600,000 *The ACCC has used T-Ports' business case estimate of throughput.*	1.93 million (lower end of estimate) *T-Ports publicly stated that it has a maximum capacity of 3.6 million tonnes. However, CRA adopted a more conservative estimate. Its estimate was based on mean operational daily loading rates of 10,800 tonnes multiplied by 9 months on a 5 day week.*[4] *If a 7 day week was used, then the estimated capacity would be 2.7 million tpa.* Viterra notes that, in Attachment 1 to its Application, Viterra adopted an even more conservative estimate of 1.2 mtpa when considering spare capacity.
Total SA	**1,536,000**	**3,085,000 (excluding ADM)**

[2] See CRA RFI Response.

[3] Cargill Australia Limited, Application for Exemption, 30 October 2019, pp 3-4.

[4] For completeness, T-Ports states that its transhipment vessel has a nameplate loading capacity of up to 13,800 tonnes per day. https://tports.com/lucky-bay/

Source: Draft Determination, CRA Initial Report, CRA Supplementary Report, CRA RFI Response

For the following reasons, Viterra has significant concerns with the ACCC's approach to estimating the capacity of Semaphore's and T-Ports' port terminals.

(a) **Semaphore**

The ACCC relies on nominal capacity to estimate Semaphore's annual capacity and, by doing so, underestimates the actual annual capacity achievable by Semaphore.

In addition, its choice to use "nominal capacity" is inconsistent with its approach to estimating capacity at Cargill's Berth 20 (where nominal capacity is 300,000 tpa). It is unclear why the ACCC has chosen to use nominal capacity for Semaphore.

In Viterra's view, when considering what competitive constraint is imposed by Semaphore, one needs to consider how much grain it could export in the event of a shift in demand to it from Viterra's port terminals. As previously submitted, capacity is a flexible concept that changes (and can be deliberately changed) to meet demand. This occurs through moving operational levers such as working hours and staff numbers. Port terminals are constructed to be able to meet higher levels of demand in good harvest years. In these years, provided that they offer competitive terms, the port terminal will stretch capacity to the maximum to meet demand. It is this figure which is relevant to the assessment of competitor capacity.

In April 2017, Semaphore exported 68,336 tonnes of capacity. This shows that in a high demand year, it would be capable of exporting 615,000 tonnes over a nine month period. This shorter period is adopted to account for a number of factors including scheduled maintenance and shutdowns, as well as the fact that most grain is exported from Australia during a 9 month period.

In Viterra's view, 615,000 tonnes is, therefore, the highest capacity that Semaphore could practically achieve and take from Viterra if it had the opportunity to do so because, for example, Viterra raised its fees by an unacceptable amount.

(b) **Lucky Bay**

In its exemption application, T-Ports states that its "*commercial estimates are based on **securing up to** 600,000 mt per annum*" *(*emphasis added). It seems clear that this is a business plan estimate of what T-Ports is likely to secure under contracts (i.e. an estimate of grain that would actually move through its port terminal). It is not an estimate of, and in fact is nothing to do with, actual achievable annual capacity.

The port's highest achievable practical capacity (rather than commercial throughput estimates) should be the relevant figure for assessing what competitive constraint Lucky Bay imposes on Viterra. This is because, if Viterra foreclosed access to its port terminals or engaged in discriminatory conduct, exporter grain could and would switch to competitor ports, including Lucky Bay, and the throughput at Lucky Bay would also increase, likely well beyond the commercial estimate of 600,000 mtpa. The ACCC's Lucky Bay capacity estimate would therefore, all things being equal, need to be re-examined.

Accordingly, it is not clear why the ACCC has used the 600,000 mt figure and ignored other information provided by T-Ports which would better represent achievable maximum capacity. In particular, it is not clear why the ACCC has not had regard to the fact that, in its exemption application, T-Ports stated that it anticipates that a "*mean operational rate of 10,800 tonnes per day … is achievable*".[5]

If this information is used, then the highest practical capacity that Lucky Bay could achieve over 12 months is 2.7 mtpa. However, for the purpose of this submission, Viterra adopts a more conservative estimate of 1.93 mtpa on the basis of achievable monthly capacity multiplied by 9 months to account for maintenance and shutdowns (and to factor in the fact that the majority of exports occur in a 9 month period). This is well below Lucky Bay's own estimate of 3.6 mtpa of capacity and is a conservative approach, given that estimates of Viterra's own capacity are not calculated on a 9 month basis.

It is clear that the ACCC's approach underestimates the highest achievable practical capacity at competing port terminals. It is important that maximum capacity is not underestimated as this is a key element to the ACCC's decision on whether there is spare capacity available at Viterra's port terminals. The ACCC's approach is also inconsistent – in some cases it relies on public capacity information provided by port terminals, while in other cases it ignores it. In addition, the ACCC sometimes uses nominal capacity and at other times it uses business cases. And critically, it does not apply the same approach to the assessment of capacity at Viterra's port terminals.

3 Viterra faces significant competition in the supply of port terminal services

Viterra is subject to significant competition in the supply of port terminal services from both a global and regional perspective.

As recognised by the ACCC, Viterra is a price taker in the global grain market and Viterra is, therefore, incentivised to operate an efficient supply chain in South Australia, the benefits of which are shared with all market participants in South Australia. At a regional level, Viterra is subject to increasing competition from new entrants in South Australia as well as port terminals in neighbouring states. It also faces competitive threats from planned new entrants and from containerised competition and domestic demand, which has been a very significant constraint in recent years.

3.1 Viterra is significantly constrained by the global market in which it competes

As set out in Viterra's Application, the global bulk grain export market is highly competitive and South Australia's share is less than 3% by volume. As recognised by ESCOSA:[6]

> *The South Australian bulk grain industry is a price taker within a global market … [and] 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*.

The ACCC appears to accept that Viterra is a price taker in the global setting and that Viterra is therefore incentivised to operate an efficient supply chain in South Australia. However, the ACCC also appears to discard this as a significant competitive constraint on Viterra because, in its view, Viterra still has significant market power at the port terminal service level in the South Australian supply chain, and any efficiencies that Viterra gains *"will not be necessarily*

[5] T-Ports Exemption Application, p. 2

[6] ESOCSA, Inquiry into the South Australian bulk grain export supply chain costs – Final Report, December 2018, p. 42.

passed on to other SA market participants in circumstances where Viterra retains significant market power at port".[7]

On this basis, the ACCC finds 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*".[8] Given its context, Viterra understands that the ACCC is referring to local competitive constraints in making this statement, i.e. it is asserting that the fact that Viterra faces significant competitive pressure in the global market is irrelevant.

While not entirely clear, Viterra understands the ACCC to be asserting that, while Viterra may have "*little to no market power in international markets*",[9] this does not mean Viterra is incentivised to pass through any gains in efficiency (that have arisen due to global pressure) to other market participants – therefore, without localised competition, an exemption is unlikely to assist other South Australian participants.

However, contrary to the ACCC's suggestions, the evidence shows that Viterra does in fact pass on efficiencies to other market participants. In Viterra's view, this indicates that Viterra is incentivised to (and does) operate an efficient supply chain to compete on a global stage, and to pass through the benefits of efficiency gains to its customers. Further, and as recognised by ESCOSA, this also shows that there is no evidence that Viterra is exercising market power to the detriment of competition. Even if the ACCC continues to assert that this can only be the case if there is local competition, then the fact that Viterra passes through cost savings to other participants indicates that the level of local competition in South Australia is sufficient to place competitive pressure on Viterra, to the benefit of other South Australian market participants.

It would appear that the ACCC has had no, or insufficient, regard to the following matters in making its preliminary finding that Viterra may not be incentivised to pass on efficiencies to other SA market participants:

(a) **Global competition incentivises Viterra to pass through efficiencies**

The fact that Viterra operates in a global market is what incentivises Viterra to pass through efficiencies to its customers and to continuously strive to improve the quality of its services. This is because Viterra's main customers are large global marketers and exporters who source grain from many countries around the world. If Viterra's services are not high quality, efficient and cost effective, these marketers can easily switch their acquisition source to other parts of Australia or to other countries. The ACCC seems to have had little, if any, regard to how the global market operates and how it incentivises Viterra to provide efficient and cost competitive services to its customers.

(b) **Viterra has in fact passed through cost savings to its customers**

Over the past three years, Viterra's supply chain costs for exporting during peak shipping periods[10] fell by **[*Confidential*]**. Over this period, Viterra continued to invest heavily in its infrastructure (including by investing in services such its laboratory and IT services to

[7] Draft Determination, p. 37.

[8] Draft Determination, p. 114.

[9] Draft Determination, p. 36.

[10] Weighted average major wheat supply chain cost at major sites for product delivered in November and shipped in March.

create additional value for marketers and growers) and increased productivity by maintaining or improving turnaround at its port terminal and up-country sites.

As set out in previous submissions to the ACCC, Viterra has also passed through cost reductions in the form of fee reductions. For example:

- Viterra reduced its booking fee from $5.50 to $5.00 in 2019;
- **[*Confidential*]**; and
- to provide growers more time to sell their grain to marketers, since October 2019, Viterra has provided growers a free full month of storage for deliveries. This is in addition to not charging growers for the remainder of the month in which delivery occurs (which itself can be a full month). **[*Confidential*]**

The ACCC refers to some fee reductions in different parts of its Draft Determination but seems to have little, if any, regard to them in the context of considering whether Viterra is incentivised, and does, pass through cost savings to other market participants.

(c) **Fee reductions are not the only way to share the benefits of efficiencies**

In addition, price is not the only means of passing through the benefits of increased efficiencies.

As set out in its submission dated 12 March 2020,[11] Viterra has invested heavily and introduced a number of innovative services in recent years to ensure that grain that is exported from its port terminals is of high quality, consistent and reliable. These include automating a number of processes as well as the following:

- Investing approximately $3 million in a new state of the art laboratory in South Australia capable of managing variable crop volume, commodities and quality (which was opened in 2018). The laboratory is fitted with the latest grain analysis equipment which is tested in adherence to the Australian Government National Measurement Institute's standards. The laboratory is also ISO 22000 accredited by the National Association of Testing Authorities.

- The introduction of dynamic binning which allows customers to deliver grain into Viterra's systems that, at the time of receival, does not meet the specific quality requirements of industry receival standards. This has delivered $10.7 million in value to growers over the past two years. Development of this sophisticated software system enables Viterra to keep track of the average levels of certain grain parameters held within its system. Viterra then manages the quality of that grain within its system to enable the export of the grain according to the quality requirements of end-customers.

- The creation of a new quality program "Verified Viterra" to reflect the high standards and systems needed to deliver quality grain. In addition, since opening the laboratory, Viterra introduced a new grain management system, SIMS, allowing for better reporting and easier access to information for its customers.

[11] Viterra Supplementary Submission dated 11 March 2020, Public Version, p. 3.

Over the past three years, Viterra's supply chain costs for exporting during peak shipping periods[12] fell by **[*Confidential*]**. Over this period, Viterra continued to invest heavily in its infrastructure (including by investing in services such its laboratory and IT services to create additional value for marketers and growers) and increased productivity by maintaining or improving turnaround at its port terminal and up-country sites.

In the 5 years to June 2019, Viterra made investments of over $200 million in port terminal and supply chain infrastructure and made a further investment of $23 million in its supply chain in 2020 (a low production year) demonstrating its commitment to operating an efficient supply chain. These investments better enable Viterra's export customers to meet the exacting standards of individual end-customers. Investment in quality is important for South Australia to remain competitive in the international market, as grain terminal operators in the Black Sea region are increasingly focused on improving quality to make grain exported from this region more attractive in export markets. The associated costs have not been passed through to end-customers in the form of higher fees.

The ACCC seems to have had little (if any) regard to this in its Draft Determination.

(d) **There is no evidence that Viterra is exercising market power to the detriment of competition**

As recognised by ESCOSA, there is no evidence that Viterra is exercising market power to the detriment of competition, and high earnings do not in themselves indicate market power being exercised to the detriment of competition.

- As noted in the Initial CRA Report, port terminal margins need to be sufficient to offset investment costs and allow the PTSPs to earn a competitive rate of return to capital on investments in port terminal operations. This ensures that PTSPs can provide an efficient and sustainable supply chain over the long term.
- In its Report, ESCOSA found—following an extensive industry consultation and inquiry—that Viterra's fees are not excessive compared to counterparts and that there is no evidence that Viterra is exercising market power to the detriment of competition.

While the ACCC refers to the fact that port terminals may need higher earnings to offset high investment costs and to ESCOSA's findings, it seems to have given little weight to these facts or to the fact that Viterra has used its earnings to make significant investments to benefit its customers.

(e) **Exporters have not been exiting the market due to Viterra's conduct**

In its Draft Determination, the ACCC states that "*where Viterra (or any PTSP) is able to prevent cost savings being passed onto other industry participants, these industry participants … may exit the market.*"[13] However, to Viterra's knowledge, no exporter has stopped using port terminals in South Australia to export grain in recent years as a result of Viterra's fees or service quality. To the extent that an exporter stops exporting from South Australia to compete in the global grain market, this will be due to a combination

[12] Weighted average major wheat supply chain cost at major sites for product delivered in November and shipped in March.

[13] Draft Determination, p. 113

of other factors including grain availability, the efficiency and risk appetite of the exporter and global market conditions.

These factors clearly demonstrate that other market participants in South Australia have benefited from the fact that Viterra operates in a global market and is, accordingly, under significant pressure to operate an efficient supply chain. The fact that exporters choose to acquire South Australian grain and use Viterra's services is indicative of the fact that it operates a highly efficient supply chain, which is capable of protecting the quality of grain to be exported, to the benefit of its customers. This, in turn, benefits South Australian growers who are able to sell their grain to marketers and exporters around the world.

The ACCC seems to consider that Viterra's only motivation for improving the quality and the efficiency of its services is to maximise its return to shareholders without consideration for other industry participants.[14] However, this is a narrow, short term, uncommercial and disappointing view, and ignores the fact that shareholder returns can only be maximised if the company is able to attract and retain customers over a long period of time, considering that investment in infrastructure may have a life of 20 to 30 years.

It is important that the ACCC considers the benefits of granting exemptions to the entire South Australian grain industry, which is currently at a disadvantage in the global trading market as a result of the uneven application of regulation to port terminals in this state. As noted to the ACCC by Geoff Ryan (a grower on the Eyre Peninsula), an exemption would increase operational flexibility and simplify the rules for allocating capacity and loading vessels at Thevenard which would, in turn, encourage exporters to purchase grain from South Australian growers.

3.2 Viterra is significantly constrained by competitor port terminals in South Australia

There is significant and increasing competition in South Australia, and barriers to entry for bulk grain port terminal services are not high, as evidenced by the number of new and planned entrants in South Australia in recent years.

Viterra currently competes with the following PTSPs in South Australia, who together have the ability to ship up to 3.085 million tonnes (excluding ADM) of capacity per year from South Australia:

- Cargill, which will operate a mobile ship loader at Berth 20, has the ability to ship up to 540,000 tonnes of grain per annum.
- Semaphore, which operates the bulk grain loader at Osborne Berth 1 at IHB, has the ability to ship up to 615,000 tonnes of grain per annum.
- T-Ports, which operates the new facility at Lucky Bay on the Eyre Peninsula, has—on a conservative estimate—the ability to ship up to 1.93 million tonnes of grain per annum.

ADM has also recently completed a number of domestic coastal shipments out of Port Pirie. The ACCC has not included this as exporter capacity because it understands that ADM does not have appropriate exporter accreditation to provide export-related services at this time. However, Viterra does not see this as a significant barrier to export, and it is clear that ADM has the infrastructure established (and associated capacity) to export grain from Port Pirie once it has the relevant accreditation. In any event, to the extent that it ships grain from

[14] See Draft Determination, p. 128.

South Australia, it is a competing PTSP regardless of where the grain ends up – Viterra considers that any movement of grain away from its port terminals is competition.

Even if the concept of a catchment zone (which Viterra considers to be a fluid and outdated concept) is used to assess the level of competition faced by a port terminal, each of Viterra's port terminals is constrained by at least one of these competitors' activities.

In addition, Viterra is constrained by the threat of new entry in South Australia. There are proposed large developments on the Yorke Peninsula and the Eyre Peninsula which act as a significant constraint on Viterra. In addition, although LINX has indicated that it will cease using IHB for a period, it will remain a potential competitor (having shown its ability to successfully export grain from IHB), and its facility will be available to other potential new entrants.

3.2.1. Catchment zones are increasingly outdated constructs but, to the extent that they are used as an assessment tool, each of Viterra's port terminals faces competition

For the reasons set out in Viterra's previous submission, the concept of traditional "catchment zones" for grain grown in South Australia are fluid and increasingly outdated constructs. The fluidity and increasing irrelevance of catchment zones is recognised by a number of PTSPs (in addition to Viterra) including Semaphore,[15] GrainCorp,[16] Emerald[17] and T-Ports.[18]

To the extent that they remain relevant to the ACCC's assessment, grain catchment areas in South Australia have expanded due to competitive road transport costs, increased on-farm storage and the efficiency of grain receival.[19] Therefore, it is important that a catchment zone is not defined too narrowly. To do so would underestimate the competitive constraints that Viterra is subject to and result in an unnecessary and inflexible regulatory burden.

As set out in the Draft Determination, AEGIC has recognised that there may be two broadly defined growing areas in South Australia due to its peninsula geography – the Eyre Peninsula and the rest of South Australia. To the extent that catchment areas are used as an analytical tool, Viterra considers that, consistent with AEGIC's analysis, grain grown in the Eyre Peninsula may be more likely to be diverted to storage and ports on that peninsula (noting, however, that grain has at times moved from the Eyre Peninsula to other regions, including the East Coast domestic market). In contrast, grain grown in the central and eastern regions of South Australia may be more likely to be sent to ports on the Yorke Peninsula, Port Adelaide and to the East Coast. The large region in which grain will move is due to competitive road transport costs, and the fact that the distance to port in South Australia is relatively short.

With this in mind, Viterra considers that—to the extent that a catchment grain area is defined for assessment purposes—these should not be defined narrowly. It considers that the

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[15] In its Port Adelaide wheat port exemption assessment (16 May 2017), Semaphore stated that "*as South Australia has the shortest distance to port than any other Australian State, the catchment area for the grain for exporters to utilise the SCS operations can be potentially drawn from a considerable growing region".*

[16] In its Geelong and Portland exemption application supplementary submission (27 February 2015), GrainCorp stated "T*he catchment concept was applicable under the single desk export arrangements when there was only one exporter, but has lost currency since export deregulation and changes in transport arrangements.*"

[17] In its Melbourne Port Terminal exemption application (28 November 2014), including its supplementary submission (26 February 2015), Emerald stated that "*Grain produced in Victoria is consumed domestically or exported through Melbourne or its competitor ports, primarily Geelong and Portland but also Port Kembla and Port Adelaide. Grain produced is transported either directly to the domestic consumer/port or via upcountry storage silos*"

[18] T-Ports' submission in response to ACCC's issues paper on Viterra's application for exemption, 26 August 2019.

[19] AEGIC, Australia's grain supply chains: Costs, risks and opportunities, https://www.aegic.org.au/wp-content/uploads/2018/11/FULL-REPORT-Australias-grain-supply-chains-DIGITAL.pdf

following are the narrowest potential grain catchment areas for the purposes of the ACCC's assessment:

- the grain growing region on the Eyre Peninsula; and
- the grain growing region that encompasses the Yorke Peninsula and a large area surrounding Adelaide, stretching from Dooen in the west of Victoria, to Werrimull in north Victoria, and north-west to Port Pirie and Melrose in South Australia.

(a) **Eyre Peninsula**

The ACCC appears to be suggesting a very narrow catchment zone which splits the Eyre Peninsula so that:

- Lucky Bay's catchment area is predominantly located on the Eastern Eyre Peninsula, with the potential to compete for some grain in the Lower and Western Eyre Peninsula;
- Port Lincoln's catchment area is the Lower and Eastern Eyre Peninsula as well as some areas of the Western Eyre Peninsula; and
- Thevenard's catchment area is the northern area of the Western Eyre Peninsula.

According to this view, Thevenard and Lucky Bay do not source grain from the same catchment area, and Port Lincoln and Lucky Bay only overlap to a significant extent in the Eastern Eyre Peninsula. This view is primarily premised on a freight differential analysis and, by virtue of this, fails to account for the fact that freight costs are only one in a myriad of factors relevant to where growers and marketers deliver grain. Other relevant factors to where growers and marketers will deliver grain are the price that can be obtained for the grain and the suitability of a particular site and port terminal based on the customer's needs. Marketers operate in a global grain market, and their decisions about where to buy and deliver grain will also be influenced by end-customer demand and quality requirements, as well as global grain market conditions.

In any event, freight costs are competitive on the Eyre Peninsula and rail is no longer an option on the Eyre Peninsula. As recognised by the South Australian Freight Council (**SAFC**), the cessation of rail on the Eyre Peninsula will *increase* (not decrease) the Eyre Peninsula catchment area.[20]

The ACCC's view is also not consistent with the fact that:

- Viterra understands that growers as far as Cungena in the western region of Eyre Peninsula and Ungarra in the southern region of the Eyre Peninsula have delivered grain by road to Lucky Bay. To put this in context, Lucky Bay is 172 km further from Cungena than Thevenard and 79 km further from Ungarra than Port Lincoln;[21]

[20] SAFC Submission in response to ACCC's issues paper on Viterra's application for exemption, 6 September 2019.

[21] Lucky Bay is 294 km away from Cungena and only 122km from Thevenard; Lucky Bay is 141 km away from Ungarra and only 62 km to Port Lincoln. See https://twitter.com/MylesTomney/status/1330115932497326086

- as set out in Viterra's response to question 9 of the ACCC RFI dated 13 January 2020, growers and marketers that are closer to Thevenard regularly deliver to Port Lincoln to take advantage of price relativities (i.e. if they can achieve better prices at a particular site);

- T-Port's upcountry storage site (at Lock) is situated in central Eyre Peninsula which is well situated for growers in all regions of the Eyre Peninsula. T-Ports has also introduced a freight assist program to attract growers from further afield; and

- grain from the Eyre Peninsula has moved to the East Coast of Australia in response to changing market (price) conditions, which shows that grain will move to locations further away if the price conditions are more favourable to the grower or marketer.[22]

Viterra considers that the ACCC's catchment area analysis (as explained above) defines too narrow an area of competitive overlap by virtue of the fact that it is based primarily, if not wholly, on GTA location differentials (i.e. freight differentials). But freight is not the only determinative—nor always the most pertinent—factor for a grower or marketer when deciding where to deliver grain.

As explained in Viterra's response to question 9 of the ACCC RFI dated 13 January 2020, grain is moved to where it is most profitable for the grower or marketer. This will not necessarily be determined by distance to receival site or port (and the location differential), but rather the net return based on the price on offer at alternate destinations less the costs incurred to access these prices. In addition, T-Ports is offering a cash incentive for growers who are further than 45 km from Lucky Bay and who deliver to Lucky Bay or to its Lock facility.[23]

Growers and exporters continuously monitor economic conditions (in real time) to determine where it is most profitable to deliver grain and take into account a number of factors relevant to theirs and their end-customers' requirements.

In any event, there are a number of sites on the Eyre Peninsula which are closer to Lucky Bay than either Thevenard or Port Lincoln (or both). For instance:

- Arno Bay, Buckleboo, Cummins, Darke Peak, Edillilie, Elliston, Kapinnie, Kimba, Port Neill, Rudall, Warramboo, Wudinna and Lock (where Lucky Bay has its upcountry facility) are all closer to Lucky Bay than they are to Thevenard;

- Arno Bay, Buckleboo, Darke Peak, Kimba, Rudall, Warramboo, Wudinna and Lock are all closer to Lucky Bay than they are to Port Lincoln; and

- Arno Bay, Buckleboo, Darke Peak, Kimba, Rudall, Warramboo, Wudinna and Lock are all closer to Lucky Bay than they are to both Thevenard and Port Lincoln.

[22] In 2018-19, the proportion of grain grown on the Eyre Peninsula that was exported through Thevenard and Port Lincoln was 17% less than in 2017-18. It is likely that this grain was delivered to the East Coast.

[23] See https://twitter.com/tportsaus/status/1329912099666075650

In its Draft Determination, the ACCC also notes that, in addition to freight costs, catchment areas are dependent on the efficiency and/or capacity of the relevant port terminal facilities. In relation to Lucky Bay, the ACCC notes that it has freight advantages for some parts of the Eyre Peninsula but that the facility may be less efficient due to the transhipment operation. However, it notes that this "*remains unclear*".

Viterra does not consider that Lucky Bay's use of a transhipment vessel narrows the catchment area that this port serves. T-Ports is able to ship a very significant amount of grain through the use of a transhipment vessel (based on T-Ports' published loading rates) and is also able to load panamax vessels. The use of transhipment vessels to export large quantities of commodities has proven to be successful in the mining industry. For example, transhipment vessels are used to successfully export iron ore from Whyalla in South Australia,[24] and to export lead-zinc concentrate from the Bing Bong port in the Northern Territory and from the Century Port facility at Karumba in Northern Queensland.[25]

In addition, T-Ports has publicly stated that its operation is cost effective and that it is able to offer significantly lower port terminal fees than its competitors. This will serve to counter any higher freight costs that a marketer may encounter when comparing to the prospect of delivering to an alternative port. If anything, the operational approach at Lucky Bay will expand the catchment area, particularly given the highly competitive costs of road freight on the Eyre Peninsula.

(b) **Yorke Peninsula and Adelaide regions**

In its Draft Determination, the ACCC describes the following as relevant catchment zones.

- **Relevant catchment zone for Port Adelaide**

  The ACCC considers the Adelaide region is likely to encompass the area from the Mid and Upper North regions of South Australia down to the Victorian and South Australian border. It considers that grain from the Yorke Peninsula is unlikely to move in large quantities to Adelaide for export. This is based on a GTA location differential analysis which, in the ACCC's view, shows that there is a freight advantage in delivering grain from the:

  - Mid and Upper regions to port terminals at Port Adelaide and Wallaroo; and
  - Yorke Peninsula to Port Giles and Wallaroo and that grain is unlikely to move from the Yorke Peninsula to Port Adelaide.

- **Relevant catchment zone for Wallaroo**

  The ACCC considers that the catchment area for Wallaroo is likely 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. This is based on the GTA location differential analysis referred to above.

[24] https://www.flindersports.com.au/marine-services/

[25] https://www.seatransport.com/transhipment-services/

- **Relevant catchment zone for Port Giles**

  The ACCC considers that the catchment area for Port Giles is likely to be the Yorke Peninsula. This is based on the GTA location differential analysis referred to above.

For the reasons set out above, Viterra considers that this catchment area analysis defines too narrow an area of competitive overlap because the assessment is based primarily, if not wholly, on GTA location differentials (i.e. freight differentials) without consideration of other relevant factors.

The ACCC's analysis does not properly account for the fact that grain does in fact move between the Yorke Peninsula and the Adelaide region. It is not uncommon for growers to deliver certain commodities grown on the Yorke Peninsula to Port Adelaide. For example, Cargill moves its grain from Maitland on the Yorke Peninsula to IHB for export. Viterra estimates that GrainFlow received between 120,000 and 140,000 tonnes of grain at its Maitland site on the Yorke Peninsula (60 km from Port Giles) in 2020-21, the majority of which will likely be moved to Port Adelaide (which is 215 km from Maitland) and shipped from Berth 20 at IHB.

In addition, the ACCC's analysis does not account for the fact that there are upcountry storage sites that fall within a particular ACCC-defined zone when the site is in fact closer to port terminals in another ACCC-defined zone. For example, the distance from Edithburgh (to the west of Port Adelaide) to Port Adelaide is 60 km less than from the distance from Bordertown (to the east of Port Adelaide) to Port Adelaide. It is also important that the ACCC also factor in that, for the eastern regions of South Australia, interstate port terminals form part of a competitive "catchment area" assessment. Grain grown in the eastern regions of South Australia is often exported through port terminals in Victoria. As set out in Appendix A of the CRA Supplementary Report, some producers in the eastern region can economically transport wheat to supply chains in Victoria in response to price changes. For example, the price that can be obtained for grain delivered to OHB varies significantly at different times to the price that can be obtained for grain delivered to GrainCorp's Geelong port terminal. This is an important factor for South Australian growers (particularly, in the eastern region) in deciding where to deliver as well as for marketers in determining how to price grain.

3.2.2. There is sufficient capacity at competing port terminals to impose a significant constraint on Viterra across South Australia and more locally

In circumstances where competing port terminals have capacity to ship sufficient volumes of grain so that Glencore Agriculture's exporters have credible alternatives, Viterra will have no incentive to foreclose access or provide discriminatory access to its port terminals, because competing exporters can shift significant volumes to competitor port terminals. The possibility of losing throughput—even a relatively small amount—is a significant competitive constraint on Viterra.

Taking Viterra's estimate of capacity at competing port terminals in South Australia (which, as noted above, are conservative), there is currently sufficient capacity at competing port terminals in South Australia to export 58.3% and 46.8% of the crop in the past two years (2017-18 production was 7.0 million tonnes and 2018-19 production was 5.5 million tonnes).[26]

[26] Bulk Grain Monitoring Report 2018-19, p 31; ABARES Australian Crop Report (December 2020).

This is a significant amount of throughput that Viterra could lose to competing port terminals in South Australia if it denies access or provides unfair terms of access.

As set out in sections 3.3 and 3.4, Viterra also needs to compete with domestic demand and port terminals in neighbouring states. In this regard, 2.5 million tonnes of grain was shipped from South Australia in 2018-19 (i.e. 47% of production),[27] meaning that there was sufficient competitor capacity to process all exported grain last year.

Table 3 below sets out the exports of Glencore Agriculture's competitors in the last two seasons, and how this compares to competitor capacity across South Australia and more locally.

Table 3: Competitor capacity vs exports by Glencore Agriculture's competitors (excl. ADM)

	Competitor port terminal capacity (mtpa)	**Exports by competitors from Viterra's port terminals (mtpa)**	
		2018-19	**2019-20**
Total SA	3.09	1.42[28]	[***Confidential***]
Eyre Peninsula	1.93	1.14[29]	[***Confidential***]
Port Adelaide	1.16	0.12[30]	[***Confidential***]
Yorke + Port Adelaide	1.16	0.29	[***Confidential***]

Source: ACCC Bulk Grain Monitoring Report 2017-18; Viterra estimates

As can be seen, on the basis of 2018-19 and 2019-20 export statistics, there would be sufficient competitor capacity today:

- across South Australia to process all of Glencore Agriculture's competitors' exports who used Viterra's port terminals;
- on the Eyre Peninsula (which ESCOSA considers to be a catchment area in South Australia) to process all of Glencore Agriculture's competitors' exports who used Port Lincoln and Thevenard;
- at Port Adelaide to process all of Glencore Agriculture's competitors' exports who used Viterra's IHB and OHB; and
- at Port Adelaide to process all of Glencore Agriculture's competitors' exports who used Viterra's facilities at Port Adelaide and on the Yorke Peninsula (together considered by ESCOSA to be a catchment area).

It is clear that there is sufficient competitor capacity across South Australia, as well as on the Eyre Peninsula and in the rest of South Australia, to export a very significant proportion of Glencore Agriculture competitors' requirements.

[27] Bulk Grain Monitoring Report 2018-19, p 34.

[28] Bulk Grain Monitoring Report 2018-19, pp 61-62.

[29] Bulk Grain Monitoring Report 2018-19, pp 67 and 69.

[30] Bulk Grain Monitoring Report 2018-19, p 65.

3.2.3. Viterra does not have any competitive advantage at port due to different transportation methods in South Australia

Viterra agrees with the ACCC that, given the relatively short distances to port, road transport is a viable alternative to rail in South Australia, and that road transport appears to be the preferred form of transport by many industry participants in regions across South Australia.[31]

Viterra also agrees with the ACCC's preliminary findings that:[32]

- Port Lincoln and Thevenard do not have a competitive advantage in sourcing grain over Lucky Bay due to different transportation methods as none of these facilities receive grain by rail; and
- Port Giles and Wallaroo do not have a competitive advantage in sourcing grain over Port Adelaide facilities due to different transportation methods.

However, Viterra does not agree with the ACCC's preliminary finding that Viterra's IHB and OHB port terminals 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.[33] This is because:

- as ESCOSA has noted, three quarters of SA's upcountry sites are within 200 km of port, and road transport is 'very competitive' with rail for these sites;
- as AEGIC has indicated, South Australia has the shortest distance between grain receival sites and port of all states, averaging 144 km to port, resulting in a relatively high portion of grain being transported to port via road freight services;
- there are significant fixed costs associated with rail and take or pay contracts, meaning that the Viterra bears significant risks under rail contracts; and
- the efficiency of road transportation in South Australia has increased significantly in the past decade, with the size of freight trucks increasing by around 29% since 2012-13 and by 13% in the past three years which means that more grain can be transported with fewer trucks.

3.2.4. Barriers to entry are not high and the threat of new entry in South Australia is a significant competitive constraint

The barriers to entering the market for providing port terminal services are not prohibitive. There have been significant technological changes at port terminals, meaning that the cost of entry has reduced. For example, T-Ports has stated that Lucky Bay has a "*lower build cost…compared to traditional grain export port facilities in South Australia, making the financial feasibility of the investment easier to attain with a lower throughput requirement*."[34]

The development of mobile ship loaders has also made entry into the export of wheat easier. These facilities have lower construction costs than traditional grain export terminals, reducing barriers to entry.[35] The ACCC notes that the competitive constraint imposed by mobile ship loaders "*may only operate in high output years and/or are limited in the vessel size they can*

[31] Draft Determination, p. 81.

[32] Draft Determination, pp. 81-82.

[33] Draft Determination, p. 82.

[34] T-Ports Exemption Application p. 4 [PS Note: It is referred to as just the "T-Ports Exemption Application" above.

[35] Wheat Port Code Review – Summary p vi.

load."[36] However, it also recognises that "*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*."

Viterra does not agree that mobile ship loaders are only for additional capacity during periods of high demand. The highest maximum capacity at a port terminal does not disappear during lower demand years – capacity is a flexible concept and a port terminal operator can, and will, increase capacity to the maximum practical level in high demand years.

In addition, containers are a low cost entry alternative and are becoming more common in South Australia. Containerised trade of Australian imports and exports have experienced an average growth rate of 2.4% annually over seven years (to 2019) in Melbourne, Sydney, Brisbane, Fremantle and Adelaide.[37]

The fact that barriers to entry are not high is evident from the amount of recent entry in South Australia (at Port Adelaide as well as on the Yorke Peninsula and Eyre Peninsula) as well as developments underway or being planned. These recent entrants and planned developments act as significant constraints on Viterra.

The following sets out current plans for new bulk grain port terminals in South Australia:

- T-Ports has commenced constructing a new development at Wallaroo adjacent to Viterra's port terminal. Site works, including demolition and civil works, commenced in November at T-Ports' Wallaroo grain export facility after the Minister for Infrastructure and Transport signed off on the project's Crown Development status. The facility will feature steel silos with 20,500 tonnes of grain capacity and a 500 metre rock causeway with grain conveyed to a ship loader for loading onto the transhipment vessel. A bunker site will feature six bunkers with a total of 240,000 tonnes of grain capacity. It is anticipated that this new facility will export 350,000 to 550,000 tonnes of grain per annum. Construction of the site is anticipated to be completed by between November 2021 and May 2022.[38]

- A subsidiary of Free Eyre, Peninsula Ports, is proposing to develop a new deep water port facility capable of loading Panamax sized vessels at Port Spencer on the southern end of the Eyre Peninsula. Peninsula Ports is expecting to be in a position to receive grain for the 2021 grain harvest season.

- A new deep sea multi-commodity port capable of loading panamax vessels at Cape Hardy is planned. Macquarie Capital has signed a joint development agreement with Iron Road and Eyre Peninsula Co-operative Bulk Handling Limited in relation to the project. The project is seen as having the capacity to export up to 1.5 mtpa of grain. Operations are expected to commence in early 2023.[39] As recognised by AEGIC, the establishment of a new multi-user port on the Eyre Peninsula at Cape Hardy will create additional grain export capacity.

[36] Draft Determination, p. 130.

[37] BITRE, Maritime Waterline 62, October 2018, pp 12-15.

[38] See https://tports.com/t-ports-to-expand-to-yorke-peninsula-with-wallaroo-port-development/

[39] See https://www.graincentral.com/logistics/macquarie-joins-iron-road-on-ep-cape-hardy-port-project/

In addition, LINX continues to be a potential competitor to Viterra at IHB. Prior to its recent exit, it had capacity of at least 750,000 tpa. It could easily re-enter the market at IHB as it has shown it is capable of doing so.

As the ACCC has acknowledged, potential entrants provide a degree of competitive constraint. However, the ACCC appears to have given the threat of new entry in South Australia limited attention on the basis that the ACCC does not generally "*consider the threat of competition to be as effective as actual competition*."[40] The threat of new entry is a significant constraint in circumstances where barriers to entry are low and new developments are well developed. This is evidenced by the fact that Viterra has historically responded to the threat of competition. As set out in its supplementary submission dated 12 March 2020, to ensure that it is able to compete with new competitors entering the market, Viterra has in the past few years invested heavily in its port terminals, introduced innovative solutions for customers including automation and dynamic binning, rationalised up country sites and reduced fees payable by customers.

Viterra considers that the ACCC should give further consideration to planned developments. These port terminals will increase the competitive constraints imposed on Viterra and—in conjunction with existing competition—the threat of entry has already acted as a competitive constraint on Viterra as outlined in Viterra's supplementary submission dated 12 March 2020.

3.3 Viterra is constrained by competition from other states

Viterra is constrained by competition from port terminals in other states. In its Supplementary CRA Report, CRA explained why exporting through port terminals in Melbourne, Portland and Geelong are commercially viable alternatives for grain produced in South Australia, particularly for grain produced in eastern South Australia near Port Adelaide.

Accordingly, any attempt to reduce prices paid to producers near Port Adelaide would likely cause significant substitution of volume towards ports in Victoria, which would reduce the incentive for Viterra to deny access to, or discriminate against, exporters that compete with Glencore Agriculture at its Port Adelaide terminals.

3.4 Viterra is constrained by competition from domestic sales

Viterra is competitively constrained by domestic sales of grain. As occurred in 2018/19 and 2019/20, if selling grain to domestic customers is more attractive for growers and marketers than exporting grain, then the amount of grain exported through Viterra's port terminals will decline.

Between 2017 and 2020, grain moved to the East Coast in large quantities due to drought conditions. In contrast to the ACCC, Viterra does not consider this to be a unique or "shock" market event. It is unclear how the ACCC can disregard the impacts of drought when they have been a historical regularity and it is considered that droughts and climate-related events are becoming increasingly regular in Australia. It is likely that the domestic market will continue to be affected by these in the coming years. The recent development of new logistics knowhow and relationships to move grain to the East Coast from South Australia means that sales from South Australia to the East Coast will be easier (and more common) in the future.

[40] Draft Determination, p. 116.

4 The upcountry storage market is characterised by competition and low barriers to entry

In its Draft Determination, the ACCC states that its preliminary view is that Viterra faces "*limited competition*" from third party and on-farm storage and that "*Viterra is the dominant upcountry storage provider on the Eyre Peninsula and Yorke Peninsula, as well as in the south eastern regions of SA.*"[41] The ACCC also finds that "*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*". [42]

However, for the reasons set out below, these conclusions do not easily flow from the ACCC's own analysis of competition and barriers to entry in the upcountry storage market. In Viterra's view, the evidence (as set out in the ACCC's analysis) makes it clear that:

- the competition that Viterra faces in the provision of upcountry storage services is not "limited". This simply cannot be the case when:
    - there are at least 15 alternative upcountry storage providers in South Australia. In addition to the upcountry storage providers listed in the Draft Determination, Viterra competes with ADM and Dublin Clean Grain, who have teamed up to offer storage at Carslake Road which is 55 km north of Port Adelaide and which ADM has stated will provide an additional delivery option for growers on the Yorke Peninsula and in the Upper North,[43] Plains Grain who offers storage at Mallala,[44] and Big River who offers storage at Loxton;
    - there is significant on-farm storage in South Australia (9-14% of the harvest); and
    - competitor storage capacity in South Australia (upcountry and at-port) represented more than 48.1% of the 2019-20 harvest (52.5% of the 2018-19 harvest and 41.3% of the 2017-18 harvest); and
- barriers to entry in the provision of storage are low. This is the case for both:
    - large scale providers, as evidenced by the fact that GrainFlow (Cargill) has 670,000 tonnes of storage capacity while T-Ports has 524,000 tonnes of storage capacity in South Australia; and
    - smaller scale providers, as evidenced by the fact that, in addition to GrainFlow and T-Ports, there are 15 competitive upcountry storage providers in South Australia and on-farm storage accounts for 9-14% of the harvest (in addition, T-Ports, Lucky Bay and Semaphore offer competitive at port storage).

It seems illogical to refer to these facts but then proceed to conclude that competition is limited and barriers to entry are likely to be higher than otherwise expected (or, as Viterra would phrase it, higher than the evidence clearly indicates to be the case).

[41] Draft Determination, pp. 72 and 77.

[42] Draft Determination, p. 77.

[43] https://www.admgrain.com.au/category/latest-news

[44] See https://www.graincentral.com/logistics/plains-grain-mallala-storage-to-open-for-harvest/

4.1 Competition in up country storage

Viterra competes with at least 15 alternate providers of upcountry storage in South Australia, including GrainFlow (Cargill) and T-Ports, who each have a significant amount of storage capacity in South Australia:[45]

- T-Ports has 524,000 tonnes of storage capacity on the Eyre Peninsula, which is equivalent to 23% of forecast annual production on the Eyre Peninsula; and
- Cargill has 670,000 tonnes of storage capacity in South Australia, which is equivalent to 20% of 2018/19 production in the rest of South Australia (i.e. excluding Eyre Peninsula).

The presence of at least 15 alternative storage providers in South Australia—including T-Ports and Cargill with a substantial amount of capacity—seems to be contrary to a finding of limited competition. In addition, it also seems to be contrary to the suggestion by the ACCC that third party storage providers in South Australia are relatively small in scale and serve the domestic and container markets[46] – neither Cargill's nor T-Port's facilities are small in scale and their facilities both serve the bulk export market.

The ACCC also recognises that Viterra competes with more than 1 million tonnes of storage capacity on-farm storage in South Australia which represents around 9-14% of the South Australian harvest. The ability to bypass Viterra's storage sites for 9-14% of the harvest is a significant competitive constraint on Viterra. It seems incongruous to describe this amount of alternative storage as "limited competition". This is particularly the case given that the amount of on farm storage can be increased very easily, is increasing[47] and is likely to increase further as T-Ports is expressly encouraging deliveries to it from on-farm storage,[48] which will encourage the construction of more on-farm storage in this region. As recognised by ADM, exporters are increasingly supportive of sourcing grain from on-farm storage systems across South Australia (from the Adelaide region to the Eyre Peninsula).[49]

Finally, the ACCC finds that, without accounting for on-farm storage, Viterra is likely to operate:

- 40% of the upcountry sites (i.e. 2 out of 5) on the Yorke Peninsula in 2020-21;[50] and
- 57% of the upcountry sites (i.e. 12 out of 21) in the Lower, Mid and Upper North regions of South Australia in 2020-21.[51]

If the ACCC's regional approach to storage is adopted, Viterra finds it difficult to understand how a 40% and 57% share of sites in particular regions can be viewed as "dominant", particularly given that there are a number of smaller third party storage facilities on the Yorke Peninsula that have not been included in the ACCC's analysis. In addition, the 75% figure in

[45] Draft Determination, p.69 (this includes Semaphore and ADM).

[46] Draft Determination, p, 69.

[47] See "On farm storage is on the rise", Stock Journal, 5 September 2019. https://www.stockjournal.com.au/story/6364343/confidence-in-on-farm-grain-storage-grows/; See also "On-farm grain storage is a worthwhile investment", Stock Journal, 15 February 2020 at https://www.stockjournal.com.au/story/6630022/on-farm-grain-storage-a-worthwhile-investment/

[48] See T-Ports' "On-Farm Grain Storage Guide" at https://tports.com/wp-content/uploads/2020/06/On-Farm-Grain-Storage-Booklet-final-online.pdf

[49] See "On farm storage is on the rise", Stock Journal, 5 September 2019. https://www.stockjournal.com.au/story/6364343/confidence-in-on-farm-grain-storage-grows/

[50] Draft Determination, p. 72.

[51] Draft Determination, pp. 69 and 72.

south eastern South Australia fails to account for the substantial volume of on-farm storage in this region, and the movement of grain to storage sites in Victoria.

4.2 Barriers to entry

In its Draft Determination, the ACCC makes the preliminary finding that:[52]

> *… barriers to entry into the up-country 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.*

This finding does not, however, easily fit with other statements that the ACCC makes in its Draft Determination, including that it "*acknowledges that the barriers to small scale entry into the upcountry storage market are likely relatively low*".[53] In addition, the ACCC's preliminary view is based on speculation about the impact of bundling and network effects and, as set out below, the ACCC puts forward no concrete theory of harm in this regard.

Finally, the ACCC's preliminary view is contrary to the facts which show that barriers to entry into upcountry storage in South Australia are low. If barriers to entry were not low, there would not be:

- 15 competitor upcountry storage providers in South Australia; and
- a significant volume (9-14% of harvest) of on-farm storage in South Australia, which is increasing.

Barriers to entry are low because the costs of establishing alternative storage sites and on-farm storage are low. On-farm storage is relatively inexpensive to build, with short-term storage able to be set up very quickly and with very low capital cost. The cost of establishing such storage can be as cheap as the cost of a silo bag. More traditional storage sites can also be established relatively cheaply and very quickly – for example, Viterra understands that the storage site at Mallala (which has bunkers and sheds) was constructed in approximately 6 months.[54]

4.3 Ability and incentive to exercise market power to harm competition

The ACCC finds that Viterra is dominant in the upcountry storage market mainly because it has a high market share. However, as set out above, Viterra's share is in fact not indicative of dominance in a number of regions analysed by the ACCC and, more relevantly, there is sufficient third party storage capacity to bypass Viterra's upcountry system for a substantial proportion of the harvest. In any event, if it is accepted that barriers to entry are low—as the actual evidence supports—then Viterra's market share should not on its own be indicative of market power.

However, even if it is accepted that Viterra has market power in the provision of upcountry storage in South Australia, this does not mean it has the incentive to exercise that market power to the detriment of producers or exporters, and there is simply no evidence that it has done this to date.

[52] Draft Determination, p. 77.

[53] Draft Determination, p. 75.

[54] See https://www.graincentral.com/logistics/plains-grain-mallala-storage-to-open-for-harvest/

Viterra has been incentivised to, and continues to, provide an efficient service at decreasing cost to customers over the past decade. The ACCC itself refers to AEGIC's finding that Viterra's Export Select rates steadily decreased in the period from 2012 to 2018 and to ESCOSA's finding that there is no evidence of Viterra exercising market power to the detriment of competition.[55]

In addition, as recognised by ESCOSA, there is no evidence that Viterra is setting fees that are not reflective of its logistical and/or operational requirements. For example, as explained to the ACCC in Viterra's supplementary submission dated 12 March 2020, it is necessary to charge a higher fee for deliveries from non-approved sites to a Viterra port terminal because it is required to provide a significantly higher number of services in relation to this grain to protect the quality of grain exported from its port terminals.

Viterra is greatly constrained by current and potential competition upcountry where barriers to entry are low. In addition, it understands that it operates in a global market and, to succeed, it must operate its supply chain efficiently. These factors mean that it is incentivised to both provide an efficient service to its customers and ensure that it is able to compete with current and future competitors through competitive services and fees.

4.4 The ACCC's theory of harm is unclear

The evidence clearly shows that Viterra's upcountry storage sites can be (and are) bypassed by producers and exporters (either by using third party storage facilities or on-farm storage) in respect of a substantial proportion of annual grain production in South Australia, a fact made clear by deliveries to, for example, Cargill's, ADM's and T-Ports' facilities. Further, even if the ACCC considered that competition was currently limited in South Australia or a particular region, the evidence clearly shows that barriers to entry are low and Viterra has not exercised any hypothetical market power to the detriment of its customers to date.

In addition, it is unclear what theory of harm the ACCC is seeking to put forward in relation to Viterra's operations at port (the subject of the Code). The ACCC itself seems to be struggling to articulate this, stating that:[56]

> *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).*

Despite an admitted lack of any theory of harm, the ACCC states that it is "*reasonable*" to expect that the "*dominant*" position of Viterra both upcountry and at port would "*likely interact*",[57] and "*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*."[58] However, the ACCC puts forward no specifics or analysis—supported by cogent evidence—as to how this might occur.

Despite stating that it is unclear how Viterra may use its position upcountry to the detriment of users of port terminal services, the ACCC speculates that factors such as bundling and network effects "may" make it difficult for competitors to enter the upcountry market by reinforcing barriers to entry.[59] However, the ACCC at other points in the Draft Determination

[55] Draft Determination, p. 63.

[56] Draft Determination, p. 75.

[57] Draft Determination, p. 75.

[58] Draft Determination, p. 62.

[59] Draft Determination, p. 76.

recognises that barriers to entry are low and its suggestions otherwise are speculative and contrary to the facts.

It is important that the ACCC does not continue to impose regulation on Viterra—the removal of which will have many benefits particularly in terms of operational flexibility—on the basis of speculative theories of harm and an overly protectionist approach to regulation. As set out in section 5, this is an inefficient approach to regulation. It also runs contrary to the Federal Government's position that regulation should "*never be adopted as a default position but rather introduced as a means of last resort*".[60] This is particularly the case in circumstances such as this where the ACCC has the ability to revoke an exemption decision should a speculative theory come to fruition.

5 Viterra has neither the incentive to deny access to its port terminals nor favour Glencore Agriculture in the provision of port terminal services

Throughout this process, Viterra has provided the ACCC with a number of independent reports by CRA to demonstrate why it does not have the incentive to deny access to its port terminals or favour Glencore Agriculture in the provision of port terminal services: the Port Terminal Report dated 7 November 2019 (**Initial CRA Report**); the Supplementary Port Terminal Report dated 9 January 2020 (**Supplementary CRA Report**); and CRA's Comments on ACCC Questions dated 3 June 2020 (**CRA RFI Response**).

The Initial CRA Report (as supplemented by the Supplementary CRA Report and the CRA RFI Response) contains a foreclosure incentive model to demonstrate that a strategy to deny access or favour Viterra's related entity, Glencore Agriculture, in the provision of port terminal services would be unprofitable.

In the Draft Determination, the ACCC critiques CRA's modelling and adjusts a number of the assumptions in CRA's model to fit its narrative that a denial of access and/or discrimination in favour of Glencore Agriculture could be profitable to Viterra. For the following reasons, Viterra is concerned with the ACCC's critique of CRA's foreclosure modelling and do not accept the ACCC's position that Viterra has an incentive to deny access or discriminate in favour of Glencore Agriculture. In particular:

- the ACCC has not taken into account factors that ameliorate—if not eliminate—the risk that Viterra may discriminate in favour of Glencore Agriculture; and
- the ACCC has made unrealistic adjustments to the assumptions in CRA's model, including by seemingly ignoring information provided to it in relation to those assumptions.

In addition, the ACCC appears to have adopted an overly protectionist approach to assessing whether Viterra has an incentive to foreclose access and, indeed, to its overall assessment of whether to grant the exemptions. This plays out in relation to its analysis of whether Viterra has an incentive to foreclose access. In its consideration of whether to exempt IHB, the ACCC appears to recognise that Viterra has an incentive to ensure significant throughput at its facilities *"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)."*[61] However, this finding is tempered by

[60] The Australian Government Guide to Regulation 2014 – Foreword by Frydenberg.

[61] Draft Determination, p. 114.

the ACCC's concerns that, despite this, "*it is not clear that this incentive will necessarily promote access for smaller third party exporters, relative to larger exporters*."[62]

Setting aside the lack of clarity as to who is a "smaller exporter" according to the ACCC, the fact that a small inefficient exporter may not, if its port terminals were exempted, be able to continue to obtain access at a port terminal is not evidence of an incentive to foreclose. It also would not indicate that Viterra is favouring a related entity. To the contrary, it is more than likely that this would be caused by the fact that this exporter was unable to compete because of their inefficiencies, including from lack of scale.

By adopting this overly protectionist approach to regulation, the ACCC risks relying on speculative concerns to support its position. This is without regard to the fact that there is no evidence to support the likelihood that such risks are material or would in fact eventuate, and despite the fact that the ACCC could, should such an unlikely risk eventuate, revoke its decision to exempt Viterra's port terminals. To this end, the ACCC's current approach is an unnecessarily cautious and inefficient approach to regulation.

5.1 The ACCC has not taken into account factors that ameliorate—if not eliminate—the risk that Viterra may discriminate in favour of Glencore Agriculture

In its Draft Determination, the ACCC suggests that CRA focused too heavily on the question of whether Viterra has an incentive to deny access to its port terminal services (i.e. prevent competitors of Glencore Agriculture from acquiring its port terminal services) rather than on whether Viterra has the incentive to provide favourable access to Glencore Agriculture (i.e. provide Glencore Agriculture with the most favourable slots).

However as set out in the CRA RFI Response and the attached comments by CRA on the Draft Determination (**CRA Comments**), this ignores the fact that denial of access is merely the most extreme form of discriminatory access. Therefore, any economic analysis that indicates that there is no incentive to deny access will also support the fact that a discriminatory strategy adopted by the PTSP that is sufficient to induce competitor exporters to shift significant volumes of grain to competitive ports would be unprofitable.

Any potential margin gains to Viterra and to Glencore Agriculture from a partial denial of access are likely be much lower relative to full denial of access by virtue of the fact that there are stricter constraints on Glencore Agriculture's ability to profitably increase its trading margins where access is only partially denied, compared to where it is fully denied. This is because in a scenario where competitors continue to have access to Viterra terminals (which would be the case if Viterra did not fully deny access to competing exporters), although this access would be somewhat more limited, it is unlikely that Glencore Agriculture could reduce prices paid to producers (to increase its marketer margins) at all, much less than by the 300% which CRA assumed in its modelling. As a result, the increase in profit to Viterra and Glencore Agriculture from partial denial would be much smaller than it would be with full denial.

The Draft Determination also fails to consider a number of other factors that ameliorate (if not eliminate) any potential benefits to Viterra from providing favourable access to Glencore Agriculture. These factors, which are discussed in the CRA Comments, include:

- Glencore Agriculture's largest competitors in South Australia are CBH, Cargill, ADM and Bunge. Each of these is a large and sophisticated company with global operations who would continue to export grain from South Australia even in the event that Viterra

[62] Draft Determination, p. 114.

provided Glencore Agriculture with favourable access to its port terminals services. They could do this by either exporting wheat through an established competing port terminal or by establishing new terminal operations of their own. Viterra knows that this can happen, as Cargill has already created an alternative export supply chain at IHB, and ADM has been moving grain by sea from Port Pirie and could easily begin exporting from that port. The long-term negative impacts on Viterra of such exporters bypassing its terminals would be significant.

- If Viterra engaged in discriminatory conduct that harms producers or exporters that compete with Glencore Agriculture, this would increase producers' and/or exporters' incentive to sponsor the construction of third-party competing terminals. The ability for this to occur is evident from the fact that there are already several proposals for new facilities on the Eyre Peninsula. The very threat of this new entry—as well as potential new proposals—serves as a significant competitive constraint on Viterra.
- Viterra is also cognisant of the fact that, if the ACCC grants an exemption and Viterra subsequently engages in harmful discriminatory behaviour, competitor exporters or producers will complain and the ACCC can revoke an exemption. Given the significant benefits of an exemption (particularly in terms of operational flexibility), Viterra would not be incentivised to engage in conduct that could lead to an exemption being removed, as it would then lose the significant advantages related to that exemption.

5.2 The ACCC has made unrealistic adjustments to the assumptions in the model, including by seemingly ignoring information provided to it in relation to those assumptions

In the Draft Determination, the ACCC states that, upon review of CRA's assumptions and conclusions, "*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*."[63] The ACCC then proceeds to make adjustments to CRA's model's assumptions to engineer an outcome whereby, under certain circumstances, Viterra may have an incentive to foreclose access to its port terminals.

Viterra disagrees with the view that CRA's conclusion is finely balanced – CRA's modelling is based on highly conservative assumptions which underestimate the likely profit loss to Viterra and Glencore Agriculture in the event that Viterra denied (or reduced) access to its port terminal services. Viterra also considers that the ACCC's adjustments to the model's assumptions (to create a scenario in which Viterra may find foreclosure of access to be profitable) are not reflective of real world facts (in terms of port terminal margins) or likely scenarios in the event of foreclosure (in terms of switching percentages and trading margin increases).

The ACCC appears to ignore the fact that CRA's modelling is based on conservative assumptions, despite this being explained in the CRA Supplementary Report. CRA's conservative approach was intentional, so that it could illustrate that—even if one adopts an unlikely set of assumptions in modelling—a foreclosure strategy by Viterra would decrease the net profit of it and Glencore Agriculture.

As explained in the CRA Supplementary Report (and reiterated in the CRA Comments)—and contrary to the ACCC's suggestions otherwise—assumptions of a $10 port terminal margin, a 60% switching rate and a 300% increase in Glencore Agriculture's trading margin are highly conservative. Despite this, the ACCC sets out a series of speculative and unrealistic scenarios in the Draft Determination, including where the port terminal margin is halved to $5, the

[63] Draft Determination, p 56.

trading margin is increased to $7.50 and the switching rate is reduced to 30% in order to engineer hypotheticals where Viterra may have an incentive to foreclose access. Setting aside the concerns Viterra has with adopting a an overly protectionist approach to regulation, the ACCC's adjustments do not represent a likely set of circumstances for the following reasons.

(a) **An assumption of a port terminal margin of $10 per tonne is highly conservative**

In its Initial CRA Report, CRA assumed an export terminal margin of $10 per tonne to analyse the profitability of a strategy by Viterra to foreclose terminal access. This was used for illustrative purposes only to demonstrate that—even using a conservative margin assumption—Viterra lacks a foreclosure incentive. CRA noted that Viterra's margins were likely higher given that port terminal margins need to be sufficiently high to offset investment costs and allow the PTSP to earn a competitive rate of return to capital on port terminal operations. CRA also explained that a terminal margin higher than that assumed (i.e. higher than $10 per tonne) reduces the profitability of any foreclosure strategy because, all else equal, the loss in profit to Viterra from a strategy that reduces throughput at Viterra terminals would increase.

The fact that $10 per tonne is a conservative estimate for the margins that a PTSP would expect to earn was later demonstrated by information in the Peninsula Ports Information Memorandum published by Free Eyre Limited (**Peninsula Ports IM**). In the Peninsula Ports IM, Free Eyre projected margins for a planned grain export terminal on the Eyre Peninsula. It projected contribution margins ranging from $38.14 per tonne in 2022 to $42.93 per tonne in 2026, and EBITDA margin ranging from $30.26 per tonne in 2022 to $36.79 per tonne in 2026. This information was provided to the ACCC in the CRA Supplementary Report to illustrate that a realistic port margin was likely to be substantially higher than $10 per tonne. The information in the Peninsula Ports IM should be given due weight given that it is a carefully prepared document containing information on which investors are expected to be able to reply.

The CRA Supplemental Report also showed that, if other assumptions are maintained at their initial levels (which are very conservative), increasing the terminal margin to the lower end of the Free Eyre range (i.e. $30 per tonne) increases the losses associated with a foreclosure strategy substantially. The CRA Supplementary Report further demonstrated that, assuming a less conservative margin of $30 per tonne and changing the other input assumptions to make them even more conservative would result in the strategy still remaining unprofitable, e.g., if the switching percentage is reduced to 40% from 60% and the exporter margin is increased to $7.50/tonne from $5.00/tonne, a foreclosure strategy remains unprofitable.

These aspects of CRA's reports do not, however, appear to have been taken into account or otherwise given much weight by the ACCC. This is concerning **[*Confidential*]**

Therefore, the ACCC's adjustment to the CRA model to include a $5 port terminal margin is not reflective of **[*Confidential*]** port terminal margins. It significantly underestimates this input into the model and, accordingly, the outcome of modelling that uses a $5 per tonne input assumption should be disregarded.

(b) **An assumption of a 60% switching rate is highly conservative, as is an assumption of a 300% increase in Glencore Agriculture's trading margin**

In Tables 2.7 and 2.8 of its Draft Determination, the ACCC amends the CRA's modelling by adjusting both the switching percentage assumption and the increase in Glencore Agriculture's trading margin (using a $10 or $15 port terminal margin assumption). It would appear that the purpose of this is to show that there *may* be scenarios in which a foreclosure strategy *may* be profitable to Viterra and Glencore Agriculture.

Tables 2.7 of the Draft Determination seeks to show what would happen if a switching percentage of 30%, 40%, 50% (and so on) was used in conjunction with an increase in Glencore Agriculture's trading margin from $2.50, up to $7.50. By doing this, when assuming a $10 port terminal margin, a foreclosure strategy may be profitable:

- if the assumed switching rate is below 60% and the increase to Glencore Agriculture's trading margin is assumed to be $5 or greater; or
- if the assumed switching rate is 60% and the increase to Glencore Agriculture's trading margin is assumed to be $6 or greater; or
- if the increase to Glencore Agriculture's trading margins is assumed to be $7.50.

However, these assumptions are not realistic because:

- a switching percentage below 60% is highly unlikely; and
- an increase to Glencore Agriculture's trading margins above $5 is highly unlikely.

During this process, the ACCC put forward switching percentages lower than 60% based on a catchment area analysis. However, it is difficult to calculate switching percentages based on a specified catchment zone given that, as recognised by the ACCC, catchment zones (to the extent they are still relevant) are shifting and widening. In addition, as explained in the CRA RFI Response, the ACCC's analysis was flawed as, among other matters, it calculated its switching percentage by determining the volume of grain that would switch away from Viterra's terminals as a percentage of *all* of the grain volume exported from the Eyre Peninsula.

As explained to the ACCC,[64] the switching percentage in CRA's model is the percentage of volume that is exported through Viterra terminals *by non-Glencore Agriculture marketers* that would switch to competitor port terminals. It is not the proportion of *all* volume exported through Viterra terminals. In Viterra's view, to assume that only 60% of competitor volume would switch if it engaged in a foreclosure strategy is highly conservative, and a switching percentage below 60% is highly unlikely.

In addition, in its model, CRA assumed that, if Viterra were to engage in a foreclosure strategy, Glencore Agriculture would have the ability to reduce the price it paid to growers by a *maximum* of $5 per tonne without losing substantial volume. This assumed a 300% increase in Glencore Agriculture's trading margin, which is highly

64 CRA explained this aspect of its modelling in the CRA RFI Response.

conservative and unlikely to be achieved. As explained in both the Initial CRA Report and the CRA RFI Response, while Glencore Agriculture might hypothetically gain the ability to profitably reduce prices to growers because a foreclosure strategy by Viterra could limit its competition in the purchase of wheat for export, a number of factors limit its ability to reduce prices to growers, including competition from:

- marketers who ship through existing competing ports;
- new port terminals;
- terminals in Victoria; and
- demand in the domestic market.

Any analysis that assumes a trading margin increase higher than 5% does not appear to have taken these competitive constraints into account.

It is also interesting that—as shown in Table 2.8 of the Draft Determination—if a port terminal margin of $15 per tonne is assumed, then a $7.50 increase to Glencore Agriculture's trading margins would still not be profitable with an assumed 60% switching rate. Further, if a port terminal margin at the low end of the Peninsula Port IM's projections is assumed, i.e. $30, then any foreclosure strategy remains unprofitable with a 40% switching assumption.

(c) **The ACCC's adjustments based on Cargill's and T-Ports' participation are unrealistic**

In the Draft Determination, the ACCC suggests that CRA's analysis needs to be adjusted to reflect the fact that Cargill is now operational at IHB and T-Ports is now operational at Lucky Bay, whereas LINX is no longer active at IHB.

The ACCC makes this adjustment by reducing the volume exported through Viterra's port terminals by Glencore Grain's competitors. In doing so, the ACCC assumes that competing exporters have switched some volume to competing terminals. On this basis, the ACCC finds that, if no other input assumptions are changed, a foreclosure strategy becomes profitable at a 60% switching rate, assuming a $10 port terminal margin and a $5 increase in Glencore Agriculture's trading margins.

The reason that a foreclosure strategy becomes profitable in the ACCC's scenario is that reducing exporter volume at Viterra's port terminals reduces the volume that also switches to competing terminals because the switching percentage used is 60% of the exporter volume at Viterra's port terminals.

However, there are a number of concerns with the ACCC's adjustments:

- The approach can just as easily be flipped to show that—since the entry of Cargill and T-Ports—a foreclosure strategy is less profitable. As set out in the CRA Comments, if, rather than assuming that the switching percentage stays the same, one assumes that the switching volume stays the same, then the profit loss (in both total dollars and as a percentage of profit without foreclosure) is even higher than in CRA's model. In changing the initial conditions, as the ACCC does, there is no reason to also maintain the 60% switching percentage assumption, rather than assuming that the same volume switches. The latter approach is more logical and realistic given that, as set out above, the 60% switching rate assumption is conservative and would become even more conservative (and likely to be much higher) in a situation where there are now more existing port terminals to which Glencore Agriculture's competitors can switch their grain.

- Further, even if Viterra assumed that only 60% of the reduced volume switches, the foreclosure strategy would only become profitable if Viterra also assumed:
  - a $5 port terminal margin which, as set out above, is factually incorrect;
  - a $10 port terminal margin and a $5 or more increase in Glencore Agriculture's trading margin. However, as set out above, both of these assumptions are also conservative – **[*Confidential*]** it is highly unlikely that Glencore Agriculture's trading margins would increase by 500% or more should Viterra seek to foreclose access.

The ACCC's adjustments to CRA's model—and its conclusions—are therefore not realistic. Viterra believes that this may be as a result of the following:

- An apparent desire by the ACCC to manufacture a particular conclusion (i.e. that Viterra *may* be incentivised to foreclose access to its terminals in certain situations) to protect growers and exporters from any speculative risk. It is an understandable impulse for a regulator to want to protect certain types of market players from any risk. However, efficient regulation does not seek to protect against every speculative risk to market players, and Viterra believes that it is inefficient for a regulator to make a decision designed to protect against any and every hypothetical scenario, no matter how unlikely. The scenarios that the ACCC has assumed (in an attempt to show that CRA's conclusions are finely balanced) are unlikely to occur and, to the extent that such an unlikely scenario did eventuate to the detriment of exporters or growers, the ACCC is able to revoke an exemption decision.
- A failure to account for, or give sufficient weight to, information provided by CRA to the ACCC in the Supplementary CRA Report and CRA RFI Response. Viterra urges the ACCC to give due consideration to all the relevant information provided to it in this process.

6 Fair and transparent access to port terminal services

In its Draft Determination, the ACCC refers to clause 2 of the Code which states that the purpose of the Code is to "*regulate the conduct of port terminal service providers to ensure that exporters of bulk wheat have fair and transparent access to port terminal services*".

This is an important consideration and Viterra prides itself on having provided open, fair and transparent access to exporters both before and during the application of the Code. Clause 5(3)(d) of the Code also provides that, when making a determination on whether to exempt a PTSP, the ACCC must have regard to, among other matters, the likelihood that exporters of bulk wheat will have fair and transparent access to port terminal services.

Viterra notes that this criterion and the purpose as expressed in clause 2 of the Code must also be considered in conjunction with the Explanatory Statement to the Code, which provides that the objectives of the Code include promoting the operation of an efficient and profitable bulk wheat export industry and reducing unnecessary regulatory burden on port terminal service providers.

Therefore, when applying criterion (d), it is important to interpret fair access in the context of these purposes, and competition law and economics more generally, so that Parts 3 to 6 of the Code are only applied to a PTSP where to do so promotes efficient competition rather than individual competitors, and minimises the costs of unnecessary regulation. In Australia, the rationale for having competition laws is to protect the competitive process, not individual competitors.[65] As stated by CRA: "*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*". [66]

It is important that the ACCC does not consider fair access through a moral or protectionist lens. It would be contrary to the fundamental principles of Australian and global competition law and economics if fairness be taken to mean propping up small but inefficient market participants or protecting the remote possibility of future market participants (the entry of which is uncertain and unknown) at the expense of current customers, particularly where such entrants would have alternative avenues to export.

However, the ACCC appears to have been influenced by the need for protectionism (at the expense of promoting efficient competition) at a number of points throughout its Draft Determination. For example, when considering competition in bulk wheat export operations for IHB, the ACCC states 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 exporter.*[67]

It is important that, in its Final Determination, the ACCC does not seek to protect smaller inefficient competitors at the expense of efficient competition. While this approach may increase the number of exporters using South Australian port terminals, it reduces efficient competition for the purchase of grain from South Australian growers and the sale of that grain into export markets. As noted in the CRA Comments:

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

In addition, it is important that fairness is not misinterpreted to mean "obtaining exactly the same", as opposed to having a fair opportunity to obtain access. As recognised in Viterra's PLPs (which were approved by the ACCC under clause 25 of the Code which includes a fairness criterion), there are factors which necessarily differentiate exporter demand, and which are

[65] *Queensland Wire Industries v BHP* (1989) 167 CLR 177 at [24] (Mason CJ and Wilson J).

[66] Initial CRA Report, p 23

[67] Draft determination, p. 114

relevant and fair considerations when determining how constrained capacity should be allocated between different customers seeking the same slot. These include the overall amount of capacity the customers book with Viterra, evidence of the customers' intention to execute, and demonstrated flexibility in relation to over-demanded slots.

Finally, it is important that the ACCC does not subjugate other criteria in clause 5(3) of the Code to criterion (d) in that clause, including the operational benefits to Viterra and exporters of an exemption. As the High Court has previously noted, where there are a range of criteria that the ACCC must have regard to, it cannot simply "*ignore some of those factors or give them cursory consideration only in order to put them to one side*".[68] Gummow and Hayne JJ concurred in *East Australian Pipelines* that "*It was not enough for the ACCC to say in its final determination that it had considered those matters in the sense of having looked at but discarded them.*" Likewise, the Federal Court has clearly stated that "*mere recitation of submissions to it and then the expression of an unreasoned conclusion*" is insufficient.[69]

It is therefore critical that, in the ACCC's deliberative process, it give proper, genuine and realistic consideration to each of the fundamental matters prescribed in the Code. It should not be the case that the ACCC focuses its analysis on a particular criterion, to the suppression of others.

7 Comments on third party submissions

Throughout the duration of the ACCC's inquiry, the limited public submissions opposing the granting of exemptions have largely been based on assertions that are unsupported by any substantive analysis. This contrasts strongly with the large amount of information and evidence provided by Viterra and the detailed economic evidence provided in reports by CRA. It is important that the final determination is based on evidence and a clear application of economic principles, rather than on mere assertions.

Viterra's comments on submissions in response to the Draft Determination from T-Ports, GPSA, AGE and John Hill are set out below.

7.1 T-Ports submission

T-Ports' submission of 17 November 2020 makes a number of comments on the CRA reports and Viterra's response to Lucky Bay. Some of T-Ports' statements are not supported by evidence and some indicate that Viterra is in fact constrained by—and responding to—competition in South Australia.

(a) T-Ports' comments on CRA's analysis

T-Ports makes a number of comments on CRA's reports. Viterra agrees with T-Ports' comment that a port terminal margins of $10 is conservative. However, a number of T-Ports' comments are unsupported and highly speculative:

- T-Ports' assessment of marketer margins is highly speculative. T-Ports (who Viterra notes does not have any grain trading expertise) suggests that marketer margins are likely to fall within a $5-$10 per mt range as opposed to the range used by ESCOSA being $1-$2 per mt. However, T-Ports admits that it has not examined ESCOSA's calculation. In addition, T-Ports' "back-of-the-envelope" calculation uses unsupported assumptions and it is unclear whether it has

[68] *East Australian Pipeline Pty Ltd v ACCC* (2007) 233 CLR 229 at [52] (Gleeson CJ, Heydon and Crennan JJ).

[69] *Telstra Corporation Ltd v ACCC* (2008) 176 FCR 153 at 185 (Rares J).

included all relevant costs in this assessment. In any event, even if a marketer margin of $9 (at the high end of T-Ports' range) was assumed in conjunction with a port terminal margin of $15 (at the low end of T-Ports' range), then CRA's foreclosure model would still show a net loss to Viterra and Glencore if Viterra were to engage in a foreclosure strategy.

- T-Ports' challenge to CRA's 60% switching percentage assumption is based entirely on an assumption that marketers have no export terminal options if they cannot obtain access to Viterra's port terminals. This is simply not the case – CRA has demonstrated that competing export terminals in South Australia have sufficient capacity to handle the switching volumes. Viterra notes that T-Ports also excludes itself as an export path in South Australia – this is evidently not a realistic approach to switching options now available to exporters in South Australia.

- T-Ports' claim that Glencore Agriculture's marketer margin could increase by more than $5 is based on speculation and is unsupported by any evidence.

(b) **Comments on Viterra's response to competition**

T-Ports suggests that responding to competition with competitive behaviour is a misuse of market power. In this regard, it refers to the fact that Viterra is providing competitive fee arrangements in response to new competition at Lucky Bay. Viterra considers this to be evidence of competition at work and the fact that Viterra clearly feels constrained by the new competition from T-Ports at Lucky Bay.

7.2 Grain Producer SA submission

GPSA's submission makes a number of claims about CRA's analysis, the level of competitive constraint imposed on IHB and OHB by mobile loading operations, whether Viterra passes through cost savings to growers, and Lucky Bay's operations. For the following reasons, Viterra considers GPSA's claims are misguided.

(a) **CRA analysis**

GPSA raises a concern with CRA's use of 2017/18 harvest figures in its analysis. GPSA states that the 6.94 million tonnes of grain produced in 2017/18 (the season used in CRA's analysis) is below the long-term average of 7.9 million tonnes.

However, 7.9 million tonnes significantly overstates average production in the period between 2011-12 to 2019-20. Production levels between 2011-12 and 2019-20 varied between 5.5 million tonnes (2018-19) and 10.7 million tonnes (2016-17) as set out in Table 4 below. Average annual production over this period was 7.1 million tonnes. However, if the unusually high harvest of 2016-17 (which was more than 3 million tonnes above any other year) is excluded, the average production is 6.6 million tonnes.

Table 4: Crop production in South Australia

Season	South Australian production (mt)
2011-12	7.4
2012-13	6.5

Season	South Australian production (mt)
2013-14	7.2
2014-15	7.4
2015-16	6.1
2016-17	10.7
2017-18	7.0
2018-19	5.5
2019-20	6.0
Average	7.1
Average excluding 2016-17	6.6

Source: ACCC Bulk Grain Monitoring Report 2018-19, Table 6.1; ABARES Australian Crop Report (December 2020).

It is clear that GPSA's figure of 7.9 million tonnes is well above production in a typical year (and significantly above the median production level in the period between 2011-12 and 2019-20 – in fact, production of or above 7.9 million tonnes has only occurred once in the past nine years), whereas 2017-18 is more representative of a typical production year and represents the median production for the period from 2011-12 to 2019-20.

GPSA also states that the other assumptions used by CRA in its modelling need to be vigorously tested by the ACCC. For the reasons set out in this submission, when these assumptions are vigorously examined, it is clear that they are highly conservative.

Finally, GPSA alleges—without any substantiation—that Viterra is likely to have an incentive to prioritise Glencore Agriculture's use of its Port Adelaide facilities and shipping slots for exports in a counter-cyclical marketing period. It is not entirely clear what GPSA's concern is in this regard. While it is not clear, Viterra believes that GPSA may be arguing that in low throughput months (i.e. non-peak periods), Cargill and Semaphore are likely to export less grain, which reduces their available capacity such that there is less non-Viterra capacity available to Glencore Agriculture's competitors. However, capacity itself does not decrease just because throughput in a particular month decreases. Viterra also exports less grain through its port terminals in off-peak months but its capacity remains the same – in addition, Viterra is more incentivised to increase throughput during these periods, eliminating any incentive to discriminate.

(b) **Competition at Port Adelaide**

GPSA claims that competitor port facilities at IHB are not competitive with OHB. This is premised on the concept that competitor operations at IHB have different characteristics to Viterra's facilities, including in relation to the vessel size they can load and road receival rates. This is a narrow view of competition.

Port terminal services are not homogenous products and competition should not be framed on the basis of whether two port terminals offer identical services. The fact that port terminals differ in their receival rates and vessel loading size does not indicate that these terminals do not compete to attract the same grain. Each of Cargill and Semaphore have a significant amount of capacity at their IHB operations, which can be used to take grain away from Viterra's operations. A loss of even 10% of throughput to a competitor significantly affects Viterra's earnings.

(c) **Pass through of cost savings**

GPSA argues that it has "*seen little evidence of mutual benefit from Viterra's efficiencies and consequential reduced costs*" and refers to the ESCOSA report in 2018 to suggest that Viterra does not pass through any reduction in costs to producers. For the reasons set out in section 3.1 of this submission, this is not the case. It also ignores the different ways in which efficiencies can be shared with customers.

(d) *Lucky Bay's operations*

GPSA notes that T-Ports had not, as at mid-2020, obtained the necessary export licenses and phytosanitary certificates required for export shipping,. This is no longer the case. T-Ports has now loaded a number of shipments of grain from its Lucky Bay port facility for export.

7.3 AGE submission

AGE's main submission appears to be that Viterra is not subject to sufficient competitive constraints at port or upcountry, and is incentivised to provide favourable access to Glencore Agriculture. For the reasons set out above in sections 3, 4 and 5, Viterra disagrees with these claims.

AGE also makes a number of other claims that are not supported by the evidence and Viterra urges the ACCC to give no weight to submissions unsupported by analysis or evidence:

- AGE claims that CRA uses "misleading data" in its analysis, by estimating Lucky Bay's capacity to be 3.6 million tonnes. Setting aside the fact that this is Lucky Bay's own capacity claim, CRA does not in fact use 3.6 million tonnes in its analysis – rather it uses 1.93 million tonnes based on T-Ports' published loading rates multiplied by 5 days a week over nine months. Further information on the use of this figure is contained in section 2 above.

- AGE makes similar submissions to GPSA that competitor port facilities at IHB are not competitive with OHB due to different characteristics of these port terminals, and that Viterra has not shared any efficiencies with the grain industry. Viterra's views on these arguments are set out above in section 7.2.

AGE makes a number of other claims that are not supported by any substantive analysis, and Viterra urges the ACCC to give minimal (if any) weight to submissions that are not supported by any reasoning or analysis.

7.4 John Hill submission

The submission provided by Mr Hill to the ACCC on 3 November 2020 includes claims about high fees charged by Viterra and a suggestion that Viterra does not pass through efficiencies in the form of fee reductions. For the reasons set out in section 3.1, this is not the case. It also ignores the different ways in which efficiencies can be shared with customers.

Notes to annexures

In making a determination to exempt or not exempt a port terminal from Parts 3 to 6 of the Code, the ACCC must have regard to the following factors in clause 5(3) of the Code:

(a) the legitimate business interests of the port terminal service provider;

(b) the public interest, including the public interest in having competition in markets;

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

(d) the likelihood that exporters of bulk wheat will have fair and transparent access to port terminal services;

(e) the promotion of the economically efficient operation and use of the port terminal facility;

(f) the promotion of competition in upstream and downstream markets;

(g) whether the port terminal services provider is an exporter or an associated entity of an exporter;

(h) whether there is already an exempt service provider within the grain catchment area; and

(i) the promotion of efficient investment in port terminal facilities.

Annexures 1 to 5 address the application of the criteria to each of Port Lincoln, Thevenard, Wallaroo, Port Giles and together IHB and OHB. The information in these annexures is supplementary to the information contained in the front end of this submission.

When applying the criteria set out in clause 5(3) of the Code, it is important that the ACCC gives proper, genuine and realistic consideration to each of criterion and does not focus its analysis on a particular criterion to the suppression of others. For the reasons set out in the annexures and the body of this submission—as well as in Viterra's prior submissions—a proper balanced application of these criteria illustrates that there are no grounds on which any of Viterra's port terminals should be subject to Parts 3 to 6 of the Code.

An exemption from the requirements of Parts 3 to 6 of the Code for all port terminals would place Viterra on a level playing field with competing port terminal operators who do not operate under the same level of regulation. In addition, it would enable Viterra to provide more competitive and flexible services to exporters for bulk grain exports and support lower supply chain costs and increased investment by allowing Viterra to operate its port terminal with more flexibility and efficiency.

Annexure 1: Port Lincoln

1 Summary

Viterra considers that a considered and balanced application of the criteria in clause 5(3) of the Code supports the granting of an exemption from Parts 3 to 6 of the Code for Port Lincoln.

(a) An exemption will increase Viterra's operational flexibility, which is in both Viterra's and exporters' legitimate business interests. Operational flexibility provides Viterra the ability to more effectively and quickly respond to changes in market conditions or customer requirements which, in turn, improves the efficiency and competitiveness of its operations, as well as the experience of its customers.

(b) Viterra is constrained from exercising any market power in the provision of port terminal services at Port Lincoln to the detriment of other market participants because:

i. as recognised by the ACCC, Viterra is a price taker in the global grain market and is, therefore, incentivised to operate an efficient supply chain in South Australia, the benefits of which are shared with all market participants in South Australia.

ii. Port Lincoln is constrained by competition within South Australia and, more locally, on the Eyre Peninsula—which Viterra considers to be the narrowest relevant grain catchment area—and is constrained by the credible threat of new entry given planned developments in this region and low barriers to entry (particularly in the current environment of low interest rates and easy access to capital);

iii. there has been excess capacity at Port Lincoln in each of the past three seasons and current shipping capacity on the Eyre Peninsula exceeds forecast production;

iv. Viterra competes with domestic demand for grain (including on the East Coast) with new supply chains to the East Coast established in recent years, making this a continuing competitive constraint;

v. Port Lincoln does not have a competitive advantage sourcing grain over Lucky Bay due to different transportation methods as none of these facilities receive grain by rail; and

vi. Viterra's upcountry storage facilities in South Australia and, more locally, on the Eyre Peninsula are subject to competition and the credible threat of new entry given the low barriers to entry.

It is, therefore, not surprising that ESCOSA previously found there to be no evidence of Viterra exercising market power to the detriment of competition.

(c) Notwithstanding that Viterra is vertically integrated in the supply chain, independent economic modelling shows that Viterra has no incentive to deny fair and transparent access to its port terminals or provide favourable access to Glencore Agriculture, to the detriment of competition.

2 Application of clause 5(3) criteria

2.1 The legitimate business interests of the port terminal service provider

In the Draft Determination, the ACCC accepts that an exemption can "*reasonably be expected to provide a PTSP with greater operational flexibility*", including because variation to the PLPs via ACCC approval "*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)*".[70] The ACCC recognises that PTSPs need to balance operational needs across different parts of the supply change and that it is difficult to predict future operational needs such that "*that changes to the PLPs are unlikely to be able to adequately address all potential issues ahead of time*".[71]

Viterra agrees with these findings in the Draft Determination. However, as explained below, Viterra is concerned that the ACCC has failed to:

- recognise the level of difficulty involved in changing a non-exempt PTSP's PLPs and, hence, the disincentive to seek changes; and
- give sufficient weight to this criterion (and its findings) when considering whether to exempt Port Lincoln from Parts 3 to 6 of the Code.

It is important that the ACCC gives sufficient weight to Viterra's legitimate business interests when balancing the clause 5(3) criteria, particularly as Viterra's legitimate business interests in increasing operational flexibilities and efficiencies within the South Australian supply chain are also in the interests of growers, exporters and shipping companies. It is also important that the ACCC views current settings through a pragmatic and commercial lens, which would shine light on the fact that the current requirement to seek approval for PLPs is highly burdensome and impractical.

(a) The ACCC must give due consideration to Viterra's legitimate business interests

The ACCC states that business interests will not be "legitimate" if they involve a PTSP preventing access seekers from obtaining fair and transparent access to port terminal services and, therefore, "*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*".[72]

Setting aside the fact that Viterra is incentivised to provide its customers with fair and transparent access and is constrained by global and local competition, and that there is no evidence that Viterra has exercised any market power to the detriment of other market participants, Viterra is concerned that the ACCC appears to be relegating criterion 5(3)(d) to a position that is inferior to other clause 5(3) criteria.

Operational flexibility provides a PTSP with the ability to more effectively and quickly respond to changes in market conditions and customer requirements which, in turn, improves the efficiency and competitiveness of the PSTP's operations as well as the entire supply chain. This operational flexibility and associated efficiencies is in both the PTSP's and its customers' legitimate business interests, regardless of the degree of market power that the PTSP is considered to have or the competitive constraints to which it is subject. This is because, contrary to suggestions otherwise, if Viterra

[70] Draft Determination, pp 109 - 110.

[71] Draft Determination, p 128.

[72] Draft Determination, p 110.

does not provide a cost effective and high quality service to its customers—and pass through any efficiency gains which, as set out in the submission, it has done to date—Viterra will not be able to earn a reasonable return on its investment, as its earnings are dependent on it retaining customers and maximising throughput.

As set out in this submission, it is important that the ACCC does not subjugate one of the clause 5(3) criteria to others. As the High Court noted, where there are a range of criteria that the ACCC must have regard to, it cannot simply "*ignore some of those factors or give them cursory consideration only in order to put them to one side*".[73] It is critical that the ACCC gives proper, genuine and realistic consideration to Viterra's legitimate business interests and not relegate this as inferior, or dependent on, one of the other criteria.

(b) **The ACCC must recognise that the current requirement to seek approval for PLPs is highly burdensome and impractical**

In its Draft Determination, the ACCC states that:[74]

> *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.***
>
> (Emphasis added)

Viterra is concerned that, by including the bolded statement above, the ACCC is suggesting that Viterra may not in fact need to change any aspects of the PLPs (as it has not sought to do so to date) and/or that Viterra could easily do so if necessary and, therefore, that an exemption may not benefit Viterra in this regard.

However, this does not properly account for the fact that, as explained by Viterra in its Application, non-exempt PTSPs are not incentivised to change their PLPs because of the costly and unduly long time it takes to do this, which results in missed opportunities. This does not mean that the PTSP does not consider that certain changes would greatly benefit the efficiencies of its operations to the benefit of its customers, which is particularly the case for Viterra given the highly prescriptive nature of its PLPs.

2.2 The public interest, including the public interest in having competition in markets

The ACCC has reached a preliminary view 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*."[75]

[73] *East Australian Pipeline Pty Ltd v ACCC* (2007) 233 CLR 229 at [52] (Gleeson CJ, Heydon and Crennan JJ).

[74] Draft Determination, p 128.

[75] Draft Determination, p 144.

Viterra disagrees with this assessment, which is contrary to the evidence provided to the ACCC and inconsistent with the ACCC's decision to exempt T-Ports' Lucky Bay facility on the Eyre Peninsula. Viterra is also concerned that the ACCC appears to have decided that an exemption is not warranted on the basis solely of its assessment of criteria (b) and (g) – as set out above, it is important that the ACCC gives proper weight to all of the criteria in clause 5(3) of the Code.

There is strong evidence that Viterra's Port Lincoln facility is subject to competition in both a global and regional context and, as recognised by ESCOSA, there is simply no evidence that Viterra has exercised any market power that it may have—including in regard to Port Lincoln or upcountry storage facilities on the Eyre Peninsula—to the detriment of other market participants.

Viterra has provided significant information to the ACCC which shows that:

- Viterra as a price taker in global grain markets is incentivised to operate an efficient supply chain, the benefits of which it has passed through to other market participants;
- Viterra's Port Lincoln and Thevenard facilities are constrained by competition within South Australia and, more locally, on the Eyre Peninsula and are constrained by the credible threat of new entry given planned developments and low barriers to entry; and
- Viterra's upcountry storage facilities within South Australia and, more locally, on the Eyre Peninsula are subject to competition and the credible threat of new entry given the low barriers to entry.

A decision to exempt Port Lincoln in circumstances where a PTSP has established a significant competitive operation within 177 km is consistent with the ACCC's view of competition between port terminals on the East Coast of Australia, in particular as between the Port of Newcastle and Port Botany. It is also consistent with its previous decisions to exempt port terminals as soon as a competitor who commenced operations in the same region was granted an exemption.[76] T-Ports is already an exempted operator and, in its first season of operation, it loaded nine vessels at Lucky Bay and shipped approximately 120,000 tonnes from Lucky Bay. This is a very significant amount considering that 2019-20 was a low production year and T-Ports commenced its operations late in the season (i.e. in March, five months after the season opened) which means it was not operating in some early peak shipping months. Since 1 October 2020 (i.e. the start of the new season), Viterra understands that T-Ports has loaded a further two vessels. It is clear that T-Ports has established itself as a viable competitor on the Eyre Peninsula.

2.2.1 An exemption will improve South Australia's position in global grain markets

The ACCC appears to believe that, although Viterra is a price taker in global grain markets, this does not incentivise Viterra to pass through any associated efficiencies to other market participants and, therefore, improve those participants' position in global grain markets.

[76] In 2015, the ACCC granted GrainCorp Operations Limited an exemption for its Port Kembla facility conditional on the ACCC also granting an exemption for Quattro's Port Kembla facility.

As set out in section 3.1 of this submission, this is not the case. Viterra is incentivised to, and does, pass through efficiencies to other market participants.

The ACCC relies heavily on a statement by ESCOSA that Viterra has chosen not to share supply chain efficiencies with market participants and that its earnings are at the "*upper end of what might be expected for a firm with Viterra's level of risk*" to reach its preliminary view that it is "*not clear*" that cost savings that Viterra achieves as a result of being subject to global competition "*will necessarily be passed on to other SA market participants in circumstances where Viterra retains significant power at port*."[77]

Viterra is concerned that ESCOSA's statement is now outdated and was in any case refuted at the time (and contrary to evidence provided to the ACCC in this inquiry). It is also concerned that its statement above has been taken out of context. In addition, the ACCC's seemingly strong reliance on this statement appears to be at the expense of giving any consideration to relevant evidence provided by Viterra to the ACCC which shows that Viterra has in fact (and is incentivised to) pass through efficiency gains and cost savings to other market participants.

ESCOSA did state in its 2018 report into the South Australia supply chain that "*Viterra appears to be earning returns towards the upper end of … what might be expected for a firm with its level of risk",* but there was more context to this as shown below:

> *Viterra appears to be earning returns towards the upper end of,* ***but not in excess of, what might be expected for a firm with its level of risk*** *(on average across harvest years, but subject to significant year-on-year variations depending on harvest yields).*[78]

It is clear that ESCOSA did not consider Viterra's earnings to be in excess of what is expected of a firm with its level of risk. As noted in the Initial CRA Report, port terminal margins need to be sufficiently high to offset investment costs and allow the PTSP to earn a competitive rate of return to capital on port terminal operations. Port terminal operators also need to ensure that margins are sufficiently high to address the highly variable nature of crop production and the adverse impact of low production years due to drought.

ESCOSA also stated that "*Viterra, to date, has not chosen to share efficiencies with industry through lower fees*".[79] However, this statement refers to "lower fees" and should not be taken to mean that Viterra had not chosen to share efficiencies through higher quality services. As set out in previous submissions, Viterra invests heavily in its supply chain infrastructure to ensure that the services it offers are of high quality and to ensure that the grain exported from its facilities are of high quality so as to attract a premium in export markets. This is very much to the benefit of growers, marketers and exporters.

In addition, this statement is no longer—if it ever was—accurate. As set out in section 3.1 of this submission, Viterra has passed through cost savings to its customers. The ACCC seems to have had little, if any, regard to this evidence. It should also be noted that Viterra has maintained its capital and maintenance programs over the last two years despite the low production levels in these years.

[77] Draft Determination, p 113.

[78] ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report, December 2018*, p 2.

[79] ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report, December 2018*, p 4.

In addition, the ACCC seems to have little, if any, regard to other aspects of ESCOSA's report, including the following statements:

> *"Viterra appears to be earning returns towards the upper end of,* ***but not in excess of, what might be expected for a firm with its level of risk*** *(on average across harvest years, but subject to significant year-on-year variations depending on harvest yields). Viterra appears to have* ***focused on extracting supply chain efficiencies, rather than protecting and preserving unduly high returns****."*[80]
>
> "*Viterra's* ***fees are not considered excessive at this time,*** *compared with the total fee levels charged by its Australian counterparts.*"[81]
>
> "*Viterra* ***seeks to provide good customer service***."[82]
>
> "*The* ***Commission has not found*** *or been presented with any* ***conclusive evidence of Viterra exercising market power to the detriment of competition***."[83]
>
> (Emphasis added).

It is clear that ESCOSA found that Viterra seeks to provide its customers with quality services and found no evidence of Viterra using any market power to the detriment of other market participants.

It is important that the Final Determination is based on all of the evidence presented to the ACCC during this process, and that statements by ESCOSA are considered in the context of all its findings, as well as in the context of other evidence provided to the ACCC.

When the evidence is properly considered, it is clear that Viterra as a price taker in global grain markets is incentivised to operate an efficient supply chain, and pass through any improvements in efficiencies—whether they be in terms of quality or cost reductions—to its customers. It follows that the operational benefits (including increased efficiency) that will ensue from an exemption at Port Lincoln will be of benefit to not only Viterra but also to other market participants. An exemption will therefore improve South Australia's position in the global grain market, to the benefit of all market participants.

2.2.2 Port Lincoln is subject to competition from other port terminal operators in Australia and on the Eyre Peninsula

Viterra is not only competitively constrained by the global market in which it competes, but also by other port terminal operations in Australia, including Lucky Bay on the Eyre Peninsula.

As set out in its Application, if Viterra's operations are not efficient and cost effective, marketers and exporters will seek to use other port terminals, whether these are in South Australia or other states in Australia. They can do this by using alternative port terminals in South Australia and neighbouring states to export grain grown in South Australia, or by sourcing grain from growing regions outside of South Australia.

On the Eyre Peninsula, there is also a significant new competitor that operates a port terminal in close vicinity to Port Lincoln – i.e. T-Ports, which operates a new port terminal facility at

[80] ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report*, December 2018, p 2.

[81] ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report*, December 2018, p 35.

[82] ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report*, December 2018, p 35.

[83] ESCOSA, *Inquiry into the South Australian bulk grain export supply chain costs – Final Report*, December 2018, p 35.

Lucky Bay. Even before this facility was operational, the threat of its impending entry led to a competitive response by Viterra. As set out in its supplementary submission dated 12 March 2020, to ensure that Viterra was able to compete with new competitors entering the market, Viterra reduced costs by rationalising upcountry sites from 36 to 23 on the Eyre Peninsula, invested heavily in its port terminals, introduced innovative solutions for customers including dynamic binning and reduced fees payable by customers over the past few years.

This indicates that the threat of new entry and newly established port terminals serve as a significant competitive threat and should not be disregarded by the ACCC – a port terminal need not have been operating for a certain period of time or have exported a specific amount of grain to be a sufficient competitive threat to Viterra. This is particularly the case given the low barriers to entry, as explained below.

(a) **Catchment area analysis**

For the reasons set out in section 3.2.1 of this submission, Viterra considers that the concept of catchment zones is increasingly outdated and irrelevant. However, it understands that the ACCC intends to analyse competition in "catchment areas" for the purposes of its assessment, whilst also acknowledging that these areas are increasingly fluid.[84]

To this end, and for the reasons set out in section 3.2.1 of this submission, Viterra considers that the narrowest "catchment area" served by each of Port Lincoln and Lucky Bay is the Eyre Peninsula. In its application for exemption, T-Ports also refers to the "*Eyre Peninsula catchment zone*".[85]

The Eyre Peninsula is one of two growing regions recognised by AEGIC in South Australia, and—given the close distance of production areas to ports in South Australia and competitive road transport costs on the Eyre Peninsula where rail is no longer used—all port terminals in this region compete to source grain from growers in the region.

The fact that there may be some freight advantages for delivering to a particular port from a particular area on the peninsula does not mean that the other ports on the peninsula do not compete for grain from that area. This is because, as set out in section 3.2.1 of this submission, freight costs are not the only indicator of grain movements – other relevant considerations include the price that can be achieved for grain at a particular site, port terminal fees and non-price terms such as the timing and availability of services. Importantly, T-Ports has publicly stated that exports through Lucky Bay will be up to 40% cheaper on average to growers than via alternative supply chains.[86] It has also encouraged deliveries direct from on-farm storage, which will encourage deliveries from further afield and an increase in on-farm storage.

The fact that distance is not the sole indicator of where grain will be delivered is also reflected in the fact that, as set out in section 3.2.1 of this submission, grain at sites closer to Thevenard is often delivered to Port Lincoln. In addition, Viterra understands that growers as far as a grower at Cungena in the western region of Eyre

[84] Draft Determination, p 84.

[85] T-Ports, Application for Exemption, 17 April 2019, pp 1, 4 and 6. See https://www.accc.gov.au/system/files/T-Ports%20exemption%20application%20submitted%2028%20March.pdf

[86] Richard Evans, "Eyre Peninsula Port a Game Changer for Transportation", *The Advertiser Business Daily*, 2 March 2019.

Peninsula and Ungarra in the southern region of the Eyre Peninsula have delivered grain by road to Lucky Bay. To put this in context, Lucky Bay is 172 km further from Cungena than Thevenard and 79 km further from Ungarra than Port Lincoln.[87] In any event, T-Ports' upcountry site is situated at Lock in central Eyre Peninsula which is well situated for growers in all regions of the Eyre Peninsula.

Viterra therefore considers that it competes with Lucky Bay in relation to all grain produced on the Eyre Peninsula and that the ACCC's view of the catchment area is too narrow. However, even on the ACCC's own overly narrow view of catchment areas, it appears that the ACCC accepts that there will be competition between Port Lincoln and Lucky Bay, and a decision to exempt Lucky Bay but not Port Lincoln seems inconsistent.

(b) **Lucky Bay is a significant competitive constraint**

The ACCC's preliminary view is that Port Lincoln has several infrastructure advantages over Lucky Bay and that the competitive constraint imposed by Lucky Bay is uncertain.

Viterra disagrees. Lucky Bay is a large and highly competitive development – its use of transhipment vessels provides it with an advantage as it eliminates the need for major jetty structures and other port infrastructure, lowering its costs and allowing it to market lower port terminal fees to its customers.

It is clear that the entry of T-Ports at Lucky Bay has changed the competitive dynamic on the Eyre Peninsula. As set out above, Viterra responded to the threat of Lucky Bay before its operations even commenced.

T-Ports' significant investment both in terms of port terminal facilities and storage facilities, combined with its public statements on competitive costs and ability to accept deliveries direct from on-site farm storage, has placed it in a highly competitive position on the Eyre Peninsula. This is clear from the fact that Lucky Bay has significant shipping capacity (a fact to which the ACCC seems to have little regard) and shipped nine vessels and around 120,000 tonnes of grain in its first season of operation, noting this was a low production season and T-Ports only commenced operating late in the season after a number of peak shipping months had passed.

Contrary to the ACCC's suggestions, Viterra does not consider the fact that a competing port terminal has a different approach to loading (i.e. transhipment vessels) and lower receival and loading rates to be a reason to dismiss that port terminal as a significant competitive threat. This is evident by the fact that Viterra has already responded to the competition (or, at that stage, impending competition) at Lucky Bay. Port terminals compete on more factors than just size and rates of loading and receival, as is clear at Port Adelaide. As set out in section 3.2.1 of the submission, the use of transhipment vessels to export large quantities of commodities has proven to be successful in the mining industry.

[87] Lucky Bay is 294 km away from Cungena and only 122km from Thevenard; Lucky Bay is 141 km away from Ungarra and only 62 km to Port Lincoln.

In particular, costs for exporters are a relevant competitive factor and Lucky Bay has publicly stated that the costs of exports from its terminal are lower than through alternative supply chains.

In any event, Lucky Bay is a large facility and, despite the differences between Lucky Bay's and Port Lincoln's loading approaches:

- Lucky Bay's use of transhipment vessels provides it with an advantage as it lowers infrastructure related costs;
- Lucky Bay has operational daily loading rates of 10,800 tonnes, which if multiplied 9 months on a 5 day week, gives it the ability to export a significant amount of capacity, being 1.93 mtpa (86% of forecast production on the Eyre Peninsula) – even its published business case estimate of 600,000 tpa represents 27% of forecast production on the Eyre Peninsula;
- Lucky Bay is capable of loading panamax vessels and, therefore, matching the vessel size at Port Lincoln and has successfully loaded panamax vessels this year;[88]
- the storage at Lucky Bay is on par with Port Lincoln's (360,000 tonnes compared with 395,600 tonnes);
- Port Lincoln does not have a competitive advantage sourcing grain over Lucky Bay due to different transportation methods as none of these facilities receive grain by rail; and
- Lucky Bay is located closer to some growing areas than Port Lincoln.

It seems clear that Lucky Bay is a strong new competitor and that its threat to Viterra is not unclear. Its customer base is increasing, with Louis Dreyfus joining ADM as a buyer of grain delivered to T-Ports' sites at Lock and Lucky Bay.[89]

2.2.3 There is significant excess capacity at Port Lincoln and across ports on the Eyre Peninsula

The ACCC states that Port Lincoln has previously experienced significant capacity constraints from both a peak and annual perspective. However, it finds that Lucky Bay will draw grain from Port Lincoln, which would alleviate these constraints to an "uncertain" extent.

Viterra does not consider Port Lincoln to be capacity constrained and this finding seems to contradict the ACCC's own statement that Port Lincoln has an average annual capacity utilisation rate of 82%. Viterra notes that the ACCC also states that, if drought affected years were excluded, this would increase to 85%. Viterra considers this to be a poor indicator of Port Lincoln's capacity utilisation, as the bumper crop 2016-17 harvest is also an atypical production year and yet is included in the ACCC's assessment. Viterra considers that a comparison of maximum practical capacity with forecast production on the Eyre Peninsula is a better reference point for determining whether Port Lincoln is likely to be capacity constrained moving forward.

[88] See http://theleadsouthaustralia.com.au/industries/primary-industries/port-in-shipshape-for-first-australian-grain-exports/

[89] See "LDC joins ADM, Flexi Grain at TPorts sites", Grain Central, 18 November 2020. https://www.graincentral.com/markets/ldc-joins-adm-flexi-grain-at-t-ports-sites/

The highest practical capacity at Port Lincoln is 2.55 mtpa, which is the amount of grain Viterra was able to ship from Port Lincoln in 2016-17. Annual throughput at Port Lincoln has been well below 2.55 million tonnes since the unusual bumper crop harvest of 2016-17 and it is unlikely that Viterra will be capacity constrained at Port Lincoln in the foreseeable future, given that its highest practical capacity is higher than forecast production on the Eyre Peninsula (the 2018 Eyre Peninsula Freight Study, commissioned by the SA Department of Planning, Transport and Infrastructure, forecasts annual production of 2.24 million tonnes for the next three years).

In addition, since 2016-17, the highest throughput months were **[*Confidential*]** This shows that the vast majority of months since 2016-17 (in fact, all but **[*Confidential*]** in the past three seasons) fell short of the maximum monthly capacity of 212,500 tonnes (i.e. the highest practical capacity divided by 12 which likely understates monthly capacity in peak periods once shutdowns are accounted because, as previously noted, shutdowns these would take place outside of peak periods).

Therefore, when taking the capacity at Lucky Bay into account, Port Lincoln is unlikely to be capacity constrained going forward. It is important that the ACCC does not seek to base its decision on an unusually high harvest year (2016-17) particularly in circumstances where a significant amount of additional capacity has come onto the Eyre Peninsula (through T-Ports) such that, even in a rare bumper harvest going forward, Eyre Peninsula ports are unlikely to be capacity constrained.

2.2.4 Port Lincoln faces competition from domestic demand and containers

As set out in section 3.4 of this submission, Port Lincoln can face competition from domestic demand. For example, since 2017/18, grain from the Eyre Peninsula has been moved in significant quantities to customers on the East Coast of Australia. This has set up new supply chains from South Australia to the East Coast, which will make this supply route easier in future.

In addition, containers are a low cost entry alternative and are becoming more common in South Australia.

2.2.5 Low barriers to entry and new entry

As set out in section 3.2.4 of the submission, the barriers to entering the market for providing port terminal services are not prohibitive. T-Ports has stated that Lucky Bay has a "*lower build cost…compared to traditional grain export port facilities in South Australia, making the financial feasibility of the investment easier to attain with a lower throughput requirement*."[90]

The following sets out current plans for new bulk grain port terminals on the Eyre Peninsula:

- Peninsula Ports is proposing to develop a new deep water port facility capable of loading Panamax sized vessels at Port Spencer on the southern end of the Eyre Peninsula, and is expecting to be in a position to receive grain for the 2021 grain harvest season.

[90] T-Ports, Submission, Application for exemption from the Competition and Consumer (Industry Code – Port Terminal Access (Bulk Wheat)) Regulation 2014, 28 March 2019, p 4.

- A new deep sea multi-commodity port capable of loading Panamax vessels at Cape Hardy is planned. The project is seen as having the capacity to export up to 1.5 mtpa of grain. Operations are expected to commence in early 2023.

As set out in section 3.2.4 of the submission, the ACCC appears to have given the threat of new entry in South Australia limited attention on the basis that the ACCC does not generally "*consider the threat of competition to be as effective as actual competition*."[91] While Viterra acknowledges that this may be the case, the threat of new entry is still a significant constraint in circumstances where barriers to entry are low and new developments are well developed.

Viterra considers that the ACCC should give more weight to these planned developments. These port terminals will increase the competitive constraint on Port Lincoln and the threat of new entry has already acted as a competitive constraint on Viterra as explained above.

2.3 The promotion of competition in upstream and downstream markets

As set out in section 4 of this submission, the provision of upcountry storage and handling services in South Australia is operating efficiently and is characterised by a large number of service providers, increasing competition and low barriers to entry (in particular, in regard to on-farm storage).

In addition, upcountry facilities are characterised by low barriers to entry. The costs of upcountry grain receival sites are around 10 times less than those of traditional port facilities with public construction costs of upcountry grain storage facilities being in the range of $3 million to $19 million.[92] In addition, on-farm storage is relatively inexpensive to build, with short-term storage able to be set up very quickly and with very low capital cost. On-farm storage is expected to grow on the Eyre Peninsula given the low cost of construction and the fact that Lucky Bay is encouraging deliveries from farm direct to port. As recognised by ADM, there has been an increase in confidence to invest in on-farm storage on the Eyre Peninsula.[93]

On the Eyre Peninsula, in addition to on-farm storage, T-Ports' Lock facility has 150,000 tonnes of capacity. T-Ports also has at-port storage with capacity of 384,000 tonnes (which is similar to the storage capacity at each of Port Lincoln and Thevenard, being 24,000 tonnes more than at Thevenard and 12,600 less than at Port Lincoln). Together with Lock, its storage capacity on the Eyre Peninsula accounts for 23% of forecast annual production on the Eyre Peninsula. There are also low barriers to expanding storage.

In addition, Viterra provides, and has always provided, open access to its upcountry facilities. Viterra's business is based on providing access and its pricing reflects the competitive nature of the market in which it operates.

2.4 The interests of exporters who may require access to port terminal services

As set out in its previous submissions, Viterra is limited in its ability to quickly respond to its customers' needs due to the prescriptive restrictions in its PLPs and the burdensome process involved in changing the PLPs. A reduction in the level of regulation at Port Lincoln will enable Viterra to operate more flexibly, innovate with its customers and freely compete to provide an efficient export pathway for customers.

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[91] Draft Determination, p 116.

[92] DAWR Interim Report, p 50.

[93] See "On farm storage is on the rise", Stock Journal, 5 September 2019. https://www.stockjournal.com.au/story/6364343/confidence-in-on-farm-grain-storage-grows/

In particular, an exemption will provide Viterra with greater flexibility in the way it allocates and manages capacity. For example, Viterra would be able to facilitate slot trades as well as additions and changes to its shipping stem at short notice. This greater flexibility makes it more likely that Viterra will be able to meet the different needs of exporters. Viterra needs to be able to provide as much flexibility to exporters as possible, to enable the South Australian grain industry to remain competitive in a global market.

Viterra has provided the ACCC with a large amount of information on these points in previous submissions and responses, including by providing examples of where the current inflexibility created by regulation has disadvantaged exporters. Despite this, the ACCC appears to have had little regard to the benefits that exporters will gain from increased operational flexibility, and it is unclear whether the ACCC has considered all the information provided to it in this regard.

In its Draft Determination, the ACCC states (without any apparent detailed consideration of the information provided to it on these points) that:

> *… 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*.[94]

It seems that the ACCC is again subjugating a criterion (here, the interests of exporters) to other criteria in clause 5(3). Setting aside the fact that—for the reasons included in this submission—Viterra does not have an incentive to discriminate in favour of a particular exporter and that there are sufficient competitive alternatives to Port Lincoln, Viterra is concerned that the ACCC is not sufficiently considering the benefits of an exemption for efficient exporters. As noted in the CRA Comments:

> *In its assessment of the benefits and costs of exemption, the ACCC must have regard to the costs imposed by the Code, and the inefficiencies that it creates in the supply chain. Importantly, in considering the potential benefits from deregulation, it would be misguided to conclude that the objective of promoting competition should simply involve maximising the number of competitors. Rather, it implies an objective of promoting efficient competition that reduces costs and maximizes benefits to participants throughout the supply chain.*
>
> *… CRA has noted that the ACCC has not quantified, even approximately, the costs or benefits of exemption. Rather, it has simply identified some possible risks of exemption if Viterra was to favour Glencore Agriculture in the provision of terminal access, and arbitrarily decided that these risks outweigh the benefits of exemption. CRA has noted that this arbitrary, non-empirically based, approach to regulation is unsound as a matter of economics.*

[94] Draft Determination, p 120.

It is important that the ACCC gives due regard to all relevant considerations, including the benefits to exporters (and, in particular, efficient exporters) arising from increased flexibility that an exemption would provide. As explained in section 6 of this submission, fair access should not be interpreted from a protectionist perspective, but should be about promoting efficient competition.

Further to section 6 of this submission, Viterra is also concerned that the ACCC has given undue attention to protecting small and inefficient exporters in its assessment of this criterion. In its consideration of this criterion, the ACCC includes an entire section on "Support for smaller exporters under the Code".[95] In particular, the ACCC states that:[96]

> *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 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).*
>
> (emphasis added)

Viterra disagrees that an efficient but smaller exporter would not be able to access its port terminal services in the absence of regulation. As set out above, Viterra has no incentive to deny access to competing exporters or favour Glencore Agriculture in the provision of access. This lack of incentive applies regardless of the size of the exporter. However, if a small exporter is inefficient, then it will be unable to compete effectively in a market with less protectionist regulation. This would not be demonstrative of Viterra providing unfair terms of access or discriminating in favour of a related entity. Rather, it would be a reflection of the fact that the exporter itself is unable to compete in the global grain market that Viterra operates in.

It would be contrary to the fundamental principles of Australian and global competition law and economics were fairness be taken to mean propping up small but inefficient market participants or protecting the remote possibility of future market participants (the entry of which is uncertain and unknown) at the expense of current customers, particularly where such entrants would have alternative avenues to export in South Australia (and on the Eyre Peninsula). To do so would be inefficient and, while it may increase the number of exporters using South Australian port terminals, this strategy would reduce efficient competition for the purchase of grain from South Australian growers and the sale of that grain into export markets.

2.5 The likelihood that exporters of bulk wheat will have fair and transparent access to port terminal services.

Viterra has demonstrated that it is committed to providing fair and open access to exporters, and to responding to exporter needs. There are currently 8 exporters using Port Lincoln and, over the past 10 years, each change to Viterra's capacity allocation system has been in response to customer feedback. If an exemption is granted, exporters will continue to be provided with fair and transparent access to Port Lincoln.

[95] Draft Determination, p 119.

[96] Draft Determination, p 120.

2.5.1 Viterra has no incentive to deny fair and transparent access

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*".[97] In particular, the ACCC states 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 export*". [98]

However, Viterra has a strong commercial incentive to maximise throughput at its ports and is cognisant of the fact that relying on, or favouring, one marketer is an uncommercial model given the high-risk nature of grain trading and the significant investments it has made in its infrastructure.

As the ACCC is aware, Viterra commissioned CRA to undertake foreclosure incentive modelling to determine whether Viterra has an incentive to deny access to its port terminals or discriminate in favour of Glencore Agriculture in providing access to its port terminals. As explained in section 5 of this submission—even when CRA used highly conservative assumptions—the analysis demonstrates that denial of access or discriminatory conduct in favour of Glencore Agriculture would result in a net loss to Viterra and Glencore Agriculture.

2.5.2 Fairness must be considered in context and the Code should not be used as a mechanism to prop up uncompetitive or inefficient exporters

When applying criterion (d), it is important to interpret fair access in the context of the wider purposes of the Code (as described in section 6 of this submission) and competition law and economics more generally. As set out in section 6 of this submission, fairness should not be interpreted to mean protecting individual competitors rather than promoting efficient competition, or "obtaining exactly the same" as opposed to having a fair opportunity to obtain access.

In addition, it is important that the ACCC does not subjugate other criteria in clause 5(3) of the Code to criterion (d) in that clause, in particular the operational benefits of an exemption to Viterra and exporters. As the High Court has previously noted, where there are a range of criteria that the ACCC must have regard to, it cannot simply "*ignore some of those factors or give them cursory consideration only in order to put them to one side*".[99]

2.6 The promotion of the economically efficient operation and use of the port terminal facility and the promotion of efficient investment in port terminal facilities

Viterra agrees with the ACCC that it is in Viterra's interests to operate its facilities efficiently to provide a return to investors regardless of whether an exemption is granted, and that unnecessary regulation has the potential to affect the operational efficiency and level of investment in port terminal facilities. [100] As discussed above and in previous submissions, the application of Parts 3 to 6 of the Code significantly hinders Viterra's operational flexibility and efficiency, and an exemption would improve Viterra's ability to operate Port Lincoln more efficiently, to the benefit of all market participants.

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[97] Draft Determination, p 122.

[98] Draft Determination, p 122.

[99] *East Australian Pipeline Pty Ltd v ACCC* (2007) 233 CLR 229 at [52] (Gleeson CJ, Heydon and Crennan JJ).

[100] Draft Determination, pp 151 - 152.

Despite this, the ACCC's preliminary view is that:[101]

> *… 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).*
>
> *… [and] 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*."

Viterra disagrees with this preliminary finding.

The ACCC appears to consider that the efficiency benefits of an exemption are only relevant if there is "sufficient" competition and Viterra will not be incentivised to provide favourable access to a related entity.[102] Setting aside its comments on the need for proper consideration of each criterion, Viterra notes that—for the reasons above—it does not have an incentive to deny fair access or favour Glencore Agriculture in the provision of port terminal services.

In addition, Viterra disagrees that Port Lincoln does not face sufficient competition. Not only is Lucky Bay a significant competitive constraint, Viterra is a price taker in a global market and is therefore—as acknowledged by the ACCC and ESCOSA—incentivised to operate its supply chain efficiently. In order to remain competitive in the global grain market and to compete with the new port terminal at Lucky Bay, Viterra will have a continued incentive to keep its costs down and make efficient investments, the benefits of which it passes through to exporters, in order to attract exporters to use its facility and maximise its return on investment.

Further, and as set out in previous submissions, Viterra invests heavily in its infrastructure (including at Port Lincoln) and shares the benefits of investments and cost reductions with other market participants. If Viterra is able to operate its terminals more flexibly because of the removal of unnecessary regulation, it will be encouraged to invest further in its supply chain. Conversely, the imposition of continued regulation—and the operational inflexibility and uncertainty that this creates—adversely affects Viterra's incentive to invest.

2.7 Whether Viterra is an exporter or an associated entity of an exporter

Vertical integration is not in and of itself anti-competitive (and, as is widely acknowledged by scholars and competition authorities, vertical integration is likely to yield substantial cost reductions). A corporation should not be subject to regulation merely because of its vertical integration. As set out above:

- there is no evidence that Viterra has exercised any market power to the detriment of competition to date;
- economic modelling indicates that Viterra does not have the incentive to provide Glencore Agriculture with favourable access to its port terminal services; and
- Port Lincoln faces significant competition globally and, more locally, from Lucky Bay.

[101] Draft Determination, p 151.

[102] Draft Determination, pp 149-151.

In any event, were Viterra to engage in conduct that harms competition or market participants following an exemption, this would lead to complaints and "*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*."[103]

2.8 Whether there is already an exempt service provider within the grain catchment area

Viterra understands that the ACCC intends to analyse competition in "catchment areas" for the purposes of its assessment, whilst also acknowledging that these areas are increasingly fluid.[104] To this end, and for the reasons set out in section 3.2.1(a) of this submission, Viterra considers that the narrowest grain catchment area served by Port Lincoln is the Eyre Peninsula.

Lucky Bay is an exempt service provider in this grain catchment area and, as set out above, it is a significant new competitor. Viterra considers that it would be inconsistent to exempt Lucky Bay but continue to impose burdensome regulation on Port Lincoln. The reasons for exempting Lucky Bay—i.e. the competitive constraint imposed by another port terminal in its catchment area—apply equally to Port Lincoln. Both port terminals serve the same grain catchment area and have significant:

- port capacity (with T-Ports' capacity equivalent to over 80% of forecast production on the Eyre Peninsula); and
- storage capacity (Lucky Bay has 384,000 tonnes only 12,600 less than at Port Lincoln).

[103] Draft Determination, p 153.

[104] Draft Determination, p 84.

Annexure 2: Thevenard

1 Summary

Viterra considers that a considered and balanced application of the criteria in clause 5(3) of the Code supports the granting of an exemption from Parts 3 to 6 of the Code for Thevenard. This is because:

(a) an exemption will increase Viterra's operational flexibility, which is in both Viterra's and exporters' legitimate business interests;

(b) the amount of wheat exported through Thevenard represents a small amount of the commodities exported from Thevenard and the amount of wheat exported from Thevenard represents a very small proportion of wheat exported from Australia;[105]

(c) Viterra is constrained from exercising any market power in the provision of port terminal services at Thevenard to the detriment of other market participants because:

   i. Viterra competes in a global grain market and, as a price taker in that market, is incentivised to operate an efficient supply chain, the benefits of which it passes through to other market participants;

   ii. Thevenard is constrained by competition within South Australia and, more locally, on the Eyre Peninsula—which Viterra considers to be the narrowest relevant grain catchment area—and is constrained by the credible threat of new entry given planned developments in this region and low barriers to entry; and

   iii. there has been excess capacity at Thevenard in each of the past three seasons and current shipping capacity on the Eyre Peninsula exceeds forecast production;

   iv. Thevenard does not have a competitive advantage sourcing grain over Lucky Bay due to different transportation methods as none of these facilities receive grain by rail; and

   v. Viterra's upcountry storage facilities in South Australia and, more locally, on the Eyre Peninsula are subject to competition and the credible threat of new entry given the low barriers to entry.

   It is, therefore, not surprising that ESCOSA previously found there to be no evidence of Viterra exercising market power to the detriment of competition.

(d) Notwithstanding that Viterra is vertically integrated in the supply chain, independent economic modelling shows that Viterra has no incentive to deny fair and transparent access to its port terminals or provide favourable access to Glencore Agriculture to the detriment of competition.

[105] As stated to the ACCC by Silo Chair, Geoff Ryan in his submission dated 22 June 2020, "*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*".

The continued imposition of prescriptive regulatory requirements on a port terminal that exports less than 3.2% of South Australian grain exports is an inefficient application of regulation, in circumstances where that regulation is then also applied (in effect) to the export of commodities (including gypsum and mineral sands) that were never intended to be subject to access regulation (which are the main commodities exported from Thevenard).

To continue to impose regulation on Thevenard and not Lucky Bay in circumstances where Lucky Bay shipped more than 60% of the grain exported from Thevenard in 2019-20 is also a highly inconsistent approach to regulation. If the ACCC is suggesting that Lucky Bay does not impose a sufficient competitive constraint on Thevenard or Port Lincoln, it can be inferred that these port terminals also do not impose a sufficient competitive constraint on Lucky Bay. If so, a decision to not exempt Thevenard and Port Lincoln is inconsistent with a decision to continue to exempt Lucky Bay.

2 Application of clause 5(3) criteria

2.1 The legitimate business interests of the PTSP

For the reasons set out in section 2.1 of Annexure 1, an exemption from Parts 3 to 6 of the Code is in Viterra's legitimate business interests.

While the ACCC refers to the operational inflexibilities associated with Parts 3 to 6 of the Code (and, therefore, the potential benefits of an exemption), it appears to downplay these in its consideration of Thevenard in section 4.6 of the Draft Determination. In this section, the ACCC states:[106]

> *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.*

This understates the difficulties and burdens in changing PLPs. As explained to the ACCC, PTSPs are discouraged from seeking changes to their PLPs because of the cost and time it takes the ACCC to approve these changes and the fact that changes will then usually be too late to address the operational issue of concern. Viterra has provided ample information on this point to the ACCC and refers the ACCC to not only the lengthy period of time it took the ACCC to approve Viterra's PLPs, but also the long period of time this exemption process has taken (almost 18 months to date) to support this point. In addition, the ACCC does not appear to have given much weight to the fact that the continued application of Parts 3 to 6 of the Code at Thevenard is especially constraining, given that this port terminal is primarily a port for exporting other commodities.

The ACCC states that Viterra has significant market power at Thevenard and ships 330,000 tonnes of grain annually from Thevenard.[107] However, this assessment fails to properly account for the fact that, as shown in Table 5 below, the proportion of wheat as compared to other commodities exported from Thevenard is minimal (it represented **[*Confidential*]** of all

[106] Draft Determination, p 172.

[107] Draft Determination, p 173.

exports from Thevenard in 2019/20, [***Confidential***] of all exports from Thevenard in 2018/19 and [***Confidential***] of all exports from Thevenard in 2017/18). In addition, the amount of grain exported from Thevenard represents a very small proportion of grain and wheat exported from Australia:[108]

- The amount of grain exported through Thevenard was [***Confidential***] of grain exports from Australia in 2019/20, [***Confidential***] of grain exports from Australia in 2018/19 and [***Confidential***] of grain exports from Australia in 2017/18.[109]

- The amount of wheat exported through Thevenard was [***Confidential***] of wheat exports from Australia in 2019/20, [***Confidential***] of wheat exports from Australia in 2018/19 and [***Confidential***] of wheat exports from Australia in 2017/18.[110]

Table 5: Exports of commodities through Thevenard (tonnes)

[***Confidential***]

The continued imposition of prescriptive regulatory requirements on a port terminal that exports less than 2% of Australian wheat exports in 2019/20 is an inefficient application of regulation in circumstances where other commodities (which were never intended to be regulated) are in effect subject to prescriptive regulatory requirements.

2.2 The public interest, including the public interest in having competition in markets

The ACCC has reached a preliminary view that:[111]

> *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.*

There is strong evidence that Thevenard is subject to competition in a global and regional context and, as recognised by ESCOSA, there is no evidence that Viterra has exercised any market power that it may have—including in regard to Thevenard or upcountry storage facilities on the Eyre Peninsula—to the detriment of other market participants. Viterra has provided significant information to the ACCC which shows that:

- Viterra is a price taker in the global grain market and, as such, is incentivised to operate an efficient supply chain, the benefits of which it has passed through to other market participants;

- Viterra's Port Lincoln and Thevenard facilities are constrained by competition within South Australia and, more locally, on the Eyre Peninsula. They are also constrained by the credible threat of new entry given planned developments and low barriers to entry; and

[108] These figures exclude exports from one State to another (i.e. exports from Port Adelaide to Queensland are excluded.

[109] ABS data and Viterra's information.

[110] ABS data and Viterra's information.

[111] Draft Determination, p 173.

- Viterra's upcountry storage facilities within South Australia and, more locally, on the Eyre Peninsula are subject to competition and the credible threat of new entry given the low barriers to entry.

For the reasons set out in section 3.2.1(a) of this submission, Viterra considers that the narrowest catchment region for Thevenard overlaps with Lucky Bay. As set out in section 3.2.1(a) of this submission, freight costs are only one in a myriad of factors relevant to where growers and marketers deliver grain. Other factors include the price that a grower or marketer can achieve for grain, and Viterra notes that grain is priced at a premium at Lucky Bay. In any event, and as explained in section 3.2.1(a) of this submission, freight costs are competitive on the Eyre Peninsula, T-Ports is offering free on-farm pick up and T-Port's Lock facility is centrally located for growers in all regions of the peninsula. This illustrates the significant constraints that Viterra faces at Thevenard.

2.2.1 An exemption will improve South Australia's position in global grain markets

As explained in section 2.2.1 of Annexure 1, Viterra as a price taker in global grain markets is incentivised to operate an efficient supply chain, and passes through any improvements in efficiencies—whether they be in terms of quality or cost reductions—to its customers. It follows that the operational benefits (including increased efficiency) that will ensue from an exemption at Thevenard will be of benefit to not only Viterra but also to other market participants. An exemption will therefore improve South Australia's position in the global grain market, to the benefit of all market participants.

2.2.2 Thevenard is subject to competition from other port terminal operators in Australia and on the Eyre Peninsula

As set out in section 2.2.2 of Annexure 1, Viterra's port terminals are competitively constrained by the global market in which Viterra competes, and more locally by port terminal operators in Australia, including, in particular for Thevenard, Lucky Bay on the Eyre Peninsula. Contrary to the ACCC's suggestions, Lucky Bay acted as a competitive constraint on Viterra even before it was operational and, now that it is operational, is a significant competitive constraint on Viterra at Thevenard.

(a) **Catchment area analysis**

The ACCC's views on criterion (b) as it applies to Thevenard appear to be largely based on a narrow view of the relevant catchment area for Thevenard – the ACCC suggests that this covers only the North Western Eyre Peninsula. The ACCC then notes that Port Lincoln may source some grain from the Western Eyre Peninsula, but then goes on to suggest that:[112]

> *… 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). … 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.*

[112] Draft Determination, p 174.

As set out in section 3 of the submission, the fact that a particular port terminal may have a freight advantage in relation to grain from a particular site is not the only relevant factor in the growers', marketers' and exporters' decision of where to deliver or buy that grain. This is clear from the evidence provided to the ACCC (which the ACCC seems to dismiss in the quote above without any proper analysis) that shows that grain does in fact move to Port Lincoln from sites closer to Thevenard. Other factors relevant to growers', marketers' and exporters' decisions on where to move grain are the price they can receive for the grain, as well as logistics such as slot availability and vessel size (noting that both Lucky Bay and Port Lincoln are capable of loading Panamax vessels, whereas Thevenard is not).

Indeed, if freight was considered to be the only determinative factor to decisions on where to deliver grain, catchment areas would be limited to only those sites closest to each port terminal and there would never be any competition between port terminals in a "catchment area". This is clearly an unrealistic analytical approach to the degree of competition between port terminals. In any event, T-Ports' Lock facility is centrally located on the Eyre Peninsula, road freight (the only option on the peninsula) is highly competitive, T-Ports is offering a cash incentive for growers who are further than 45 km from Lucky Bay and who deliver to Lucky Bay or to its Lock facility, and many sites on the Eyre Peninsula are closer to Lucky Bay than Thevenard and/or Port Lincoln. This illustrates the significant constraints that Viterra faces at Thevenard.

(b) **Lucky Bay is a significant competitive constraint on the Eyre Peninsula**

For the reasons set out in section 2.2.2(b) of Annexure 1, Lucky Bay is a significant new competitor on the Eyre Peninsula.

Lucky Bay has publicly stated that the costs of exports from its terminal are lower than through alternative supply chains and, despite differences between the loading approaches of Lucky Bay and Port Lincoln:

- Lucky Bay has operational daily loading rates of 10,800 tonnes, which if multiplied 9 months on a 5 day week, gives it the ability to export a significant amount of capacity, being 1.93 mtpa (86% of forecast production on the Eyre Peninsula) – even its published business case estimate of 600,000 tpa represents 27% of forecast production on the Eyre Peninsula;
- Lucky Bay is capable of loading Panamax vessels, which exceeds the maximum vessel size at Thevenard;
- the storage at Lucky Bay (384,000 tonnes) exceeds the storage at Thevenard (362,625 tonnes); and
- Thevenard does not have a competitive advantage sourcing grain over Lucky Bay due to different transportation methods as none of these facilities receive grain by rail.

It is clear that Lucky Bay is a strong new competitor, and to exempt Lucky Bay and not Thevenard is—simply put—an inconsistent outcome.

2.2.3 There is significant excess capacity at Thevenard and across ports on the Eyre Peninsula

There is significant excess capacity at Thevenard with a very low annual capacity utilisation rate of 45%.

The highest practical capacity at Thevenard is 0.76 mtpa, which is the amount of grain Viterra was able to ship from Thevenard in 2016-17. Annual throughput at Thevenard has been below 0.76 million tonnes since the unusual bumper crop harvest of 2016-17 and it is unlikely that Viterra will be capacity constrained at Thevenard in the foreseeable future. Since 2016-17, the highest throughput months at Thevenard were **[*Confidential*]**. This shows that the vast majority of months (in fact, **[*Confidential*]**) fell well short of the maximum monthly capacity of 62,975 tonnes (i.e. the highest practical capacity divided by 12 which likely understates monthly capacity in peak periods once shutdowns are accounted because, as previously noted, these would take place outside of peak periods).

Viterra is concerned that the ACCC has had little regard to the fact that Thevenard ships only a very small proportion of South Australia's wheat and is not capacity constrained, despite it stating that it is more concerned about vertical integration where a PTSP is capacity constrained. It is important that the ACCC properly accounts for the low utilisation rate at Thevenard and the low proportion of wheat exported from this facility in its decision. These factors provide further support of CRA's analysis, which demonstrates that Viterra does not have an incentive to deny access to exporters or to provide favourable terms of access to Glencore. To do so would lead it to lose much needed throughput at Thevenard, which is contrary to its commercial interests.

The ACCC also needs to ensure that a consistent approach to exemptions across PTSPs is applied – it would seem inconsistent if it exempted Lucky Bay on the basis that Lucky Bay was new and likely to export comparatively small amounts of grain at least in the initial stages of its operations (and, therefore, likely to have associated excess capacity) but not exempt Thevenard, which exports a very small amount of wheat and has significant excess capacity.

2.2.4 Low barriers to entry and new entry

As set out in section 2.2.5 of Annexure 1, the barriers to entering the market for providing port terminal services are not prohibitive and there are significant plans for new entry on the Eyre Peninsula. As explained above, the threat of new entry is a significant constraint on Viterra, particularly in circumstances where barriers to entry are low and new developments are already planned and underway.

2.3 The promotion of competition in upstream and downstream markets

As set out in section 2.3 of Annexure 1, upcountry storage and handling services in South Australia (including on the Eyre Peninsula) are operating efficiently and are characterised by a large number of providers, increasing competition and lowering barriers to entry (in particular, in regard to on-farm storage). Viterra provides, and has always provided, open access to its upcountry facilities, and customers of Viterra's storage facilities on the Eyre Peninsula are also able to move their grain out to third parties.

2.4 The interests of exporters who may require access to port terminal services

For the reasons set out in section 2.4 of Annexure 1, exporters will greatly benefit from the operational flexibility and efficiencies that would arise from an exemption. As noted in that section, there are operational inflexibilities inherent in Viterra's prescriptive PLPs, the amendment of which is a costly and lengthy exercise under the Code.

As noted in section 2.1 of this Annexure 2, while referring to the operational inflexibilities associated with Parts 3 to 6 of the Code (and the potential benefits of an exemption in this regard), the ACCC appears to downplay these in its consideration of Thevenard in section 4.6 of the Draft Determination. It is important that, in its Final Determination, the ACCC has proper regard to the costs of regulation, particularly given that these are borne not only by Viterra but by its customers and the entire South Australian supply chain.

2.5 The likelihood that exporters of bulk wheat will have fair and transparent access to port terminal services.

For the reasons set out in section 2.5 of Annexure 1, exporters have had—and, if an exemption is granted, will continue to have—fair and transparent access to Thevenard.

2.6 The promotion of the economically efficient operation and use of the port terminal facility and the promotion of efficient investment in port terminal facilities

For the reasons set out in section 2.6 of Annexure 1, an exemption will increase the efficiency and encourage further investment in Viterra's port terminal facilities. Viterra has invested significantly in Thevenard to date and, as explained in this submission, has shared the benefits of investments in its supply chain with other market participants.

2.7 Whether Viterra is an exporter or an associated entity of an exporter

For the reasons set out in section 2.7 of Annexure 1, although Viterra is an associated entity of an exporter, it has neither the incentive to deny access to its port terminals or provide Glencore Agriculture with favourable access. If Viterra denied access to third parties at Thevenard—which is small and characterised by excess capacity—it would lose significant amounts of potential revenue, which is not in its commercial interest.

2.8 Whether there is already an exempt service provider within the grain catchment area

To the extent that the ACCC considers "catchment areas" to be relevant to its assessment, Viterra notes that Lucky Bay is an exempt service provider in the Eyre Peninsula area (which is, in its view, the narrowest relevant catchment area). For further information on the relevant catchment area and the competitive constraint imposed by Lucky Bay in this region, please see section 2.2.2(b) of this Annexure 2.

Annexure 3: IHB

1 Summary

Viterra welcomes the ACCC's preliminary decision to grant an exemption from Parts 3 to 6 of the Code for Viterra's port terminals at Port Adelaide. Viterra does not consider the decision of whether to grant an exemption at these port terminals is "finely balanced".

The following considerations make it clear that IHB should no longer be subject to Parts 3 to 6 of the Code:

(a) an exemption will increase Viterra's operational flexibility, which is in both Viterra's and exporters' legitimate business interests;

(b) Viterra is constrained from exercising any market power in the provision of port terminal services at Port Adelaide to the detriment of other market participants because:

   i. Viterra competes in a global grain market and, as a price taker in that market, is incentivised to operate an efficient supply chain, the benefits of which it passes through to other market participants;

   ii. IHB is constrained by competition within South Australia and, more locally, at Port Adelaide and Port Pirie;

   iii. IHB is constrained by the threat of new entry (including by LINX re-entering at Port Adelaide and by T-Ports' planned development at Wallaroo) and the fact that barriers to entry are low; and

   iv. IHB competes with domestic demand for grain (including on the East Coast) with new supply chains to the East Coast established in recent years, making this a continuing competitive constraint;

   v. there has been excess capacity at IHB in each of the past three seasons and there is excess port terminal capacity across port terminals at Port Adelaide;

   vi. IHB does not have a material competitive advantage sourcing grain over other port terminals at Port Adelaide due to different transportation methods; and

   vii. Viterra's upcountry storage and handling facilities in South Australia—including in grain growing regions served by Port Adelaide—are subject to competition and there is a credible threat of new entry given the low barriers to entry.

(c) Notwithstanding that Viterra is vertically integrated in the supply chain, independent economic modelling shows that Viterra has no incentive to deny fair and transparent access to its port terminals or provide favourable access to Glencore Agriculture to the detriment of competition.

2 Application of clause 5(3) criteria

2.1 The legitimate business interests of the PTSP

For the reasons set out in section 2.1 of Annexure 1, an exemption from Parts 3 to 6 of the Code is in Viterra's legitimate business interests.

2.2 The public interest, including the public interest in having competition in markets

There is strong evidence that IHB is subject to competition in a global and regional context and, as recognised by ESCOSA, there is no evidence that Viterra has exercised any market power that it may have—including in regard to IHB or upcountry storage facilities that deliver grain to Port Adelaide—to the detriment of other market participants. Viterra has provided a significant amount of information to the ACCC which shows that:

- Viterra competes in a global grain market and, as a price taker in that market, is incentivised to operate an efficient supply chain, the benefits of which it has passed through to other market participants;
- IHB is constrained by competition within South Australia and, more locally, at Port Adelaide and Port Pirie, and is constrained by the credible threat of new entry, including re-entry by LINX at Port Adelaide; and
- Viterra's upcountry storage facilities are subject to competition and there is a real threat of new entry given the low barriers to entry.

2.2.1 An exemption will improve South Australia's position in global grain markets

As explained in section 2.2.1 of Annexure 1, Viterra as a price taker in global grain markets is incentivised to operate an efficient supply chain, and passes through any improvements in efficiencies—whether they be in terms of quality or cost reductions—to its customers. It follows that the operational benefits (including increased efficiency) that will ensue from an exemption at IHB will be of benefit to not only Viterra, but also to other market participants. An exemption will therefore improve South Australia's position in the global grain market, to the benefit of all market participants.

2.2.2 IHB is subject to competition from other port terminal operators in Australia, including at Port Adelaide and in Victoria

The ACCC's draft views is that IHB "*is likely sufficiently competitively constrained to support an exemption from Parts 3 to 6 of the Code*" taking into account that "*IHB faces competition from a number of sources in addition to other PTSPs at Port Adelaide … [including] containerised bulk grain exports and domestic demand for grain, as well as (to a lesser extent) competing PTSPs in Victoria.*"[113]

Viterra agrees that the application of the criteria support granting IHB and exemption from Parts 3 to 6 of the Code. Viterra's port terminals are competitively constrained by the global market in which Viterra competes. In addition, and to an even greater extent, IHB is competitively constrained locally by Cargill and Semaphore at Port Adelaide and ADM at Port Pirie, as well as by containerised exports and port terminals in nearby Victoria.

[113] Draft Determination, p 114.

(a) **Catchment area analysis**

To the extent that the ACCC decides to consider grain catchment areas to guide its assessment, Viterra agrees that Cargill, Semaphore and ADM compete for grain within the same catchment area.

For the reasons set out in section 3.2.1 of the submission, Viterra considers the relevant catchment area for Port Adelaide to be wider than the ACCC suggests. For the following reasons, Viterra considers that the narrowest "catchment area" served by port terminals at Port Adelaide is the region that encompasses the Yorke Peninsula and a large area surrounding Adelaide, stretching from Dooen in the west of Victoria, to Werrimull in north Victoria, and north-west to Port Pirie and Melrose in South Australia:

- Grain will move to different port terminals in response to variables other than freight costs, including the price a grower or marketer can achieve at a particular site and logistics such as slot availability and timing. This is made clear by the fact that large quantities of grain moved from the Yorke Peninsula to domestic markets on the East Coast in recent years.

- AEGIC has recognised that all of South Australia (other than the Eyre Peninsula) is one of two growing regions, and has noted that sites in this area are close to ports and that road transport costs are competitive in South Australia.

- As set out in Viterra's Application, 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. For example, Cargill moves grain to IHB from GrainFlow's Maitland site on the Yorke Peninsula.

The ACCC relies solely it seems on GTA differentials to determine possible boundaries of a grain catchment area for IHB, which it suggests includes all of the port terminals at Port Adelaide as well as some port terminals in Victoria. However, as explained in section 2.2.2(a) of Annexure 1 and 2, freight is not the sole indicator of where a grower or marketer will deliver grain, and the catchment area would be wider than that suggested by the ACCC.

In any event, for the purposes of IHB, the exact scope of that area can be left open as, even within the narrow region suggested by the ACCC, IHB faces competition from Cargill and Semaphore and is constrained by the prospect of new entry, including the re-entry at IHB by LINX.

(b) **Cargill and Semaphore are a significant competitive constraint at Port Adelaide**

As set out in section 2.2 of this submission, Cargill has significant capacity at Berth 20 (540,000 tpa) as does Semaphore at IHB (615,000 tpa). The capacity at these ports combined is higher than IHB's highest practical capacity (1.01 million tpa). Further, mobile ship loaders provide a form of flexible competition at Port Adelaide, and the cost of entry for a mobile ship loader is very low.

Therefore, Viterra agrees with the ACCC's draft finding that Cargill's and Semaphore's facilities at Port Adelaide act as a competitive constraint on Viterra's facilities at Port Adelaide. However, Viterra is concerned by some of the comparisons that the ACCC has undertaken between these port terminals.

In its Draft Determination, the ACCC states that IHB has an advantage over Cargill and Semaphore in drawing grain located further from port because rail is more efficient than road when transporting grain more than 200km. Although it does not affect the ACCC findings, Viterra does not consider that IHB's rail links gives it any material advantage given that:

- three quarters of SA's upcountry sites are within 200 km of port and that road transport is "*very competitive*" with rail for these sites;
- South Australia has the shortest distance between grain receival sites and port of all states, averaging 144 km to port, resulting in a relatively high portion of grain being transported to port via road freight services; and
- the significant fixed costs associated with rail and take or pay contracts mean that the Viterra bears significant risks under its rail contracts for low production years.

Even if there is a freight advantage to IHB for a small number of sites delivering to Port Adelaide, this does not mean that Cargill and Semaphore do not impose a significant competitive constraint on IHB, particularly given that, as explained above, freight differentials are not the only relevant factor in considering where to deliver grain.

In its Draft Determination, the ACCC also states that IHB has an advantage compared to Cargill and Semaphore because of its greater storage capacity (and the fact that it does not operate on a Just In Time Process), and because it can receive grain by rail, which means its receival rate is higher than at Cargill's and Semaphore's sites.

Viterra does not consider that a competing port terminal is not a significant competitive threat simply because it has a different approach to receiving, storing or loading grain. A competitor need not have exactly the same capacity or infrastructure to exert significant competitor pressure on Viterra. A loss of even 10% of throughput to a competitor significantly affects Viterra's earnings.

(c) **Port terminals in Victoria are also a significant competitive constraint on IHB**

As recognised by the ACCC, IHB also faces competitive constraints from markets in Victoria, including container, domestic and bulk grain export markets. In its Supplementary CRA Report, CRA explained why exporting through terminals in Melbourne, Portland and Geelong are commercially viable alternatives for grain produced in South Australia, particularly grain produced in eastern South Australia near Port Adelaide. Therefore, any attempt to reduce prices to producers near Port Adelaide would likely cause significant substitution of volume towards ports in Victoria.

2.2.3 There is significant excess capacity at Port Adelaide

The ACCC states that "*IHB appears to have little extra spare capacity available, particularly during peak periods*."[114] Viterra does not agree with this finding, which also seems to contradict the ACCC's own statement that IHB had an average annual capacity utilisation rate of 78%. The highest practical capacity at IHB is 1.01 mtpa, which is the amount of grain Viterra was able to ship from IHB in 2016-17. Annual throughput at IHB has been below 1.01 million tonnes since the unusual bumper crop harvest of 2016-17 and it is unlikely that Viterra will be capacity constrained at IHB in the foreseeable future.

Since 2016-17, the highest throughput months at IHB were **[*Confidential*]**. This shows that the vast majority of months (in fact, all but **[*Confidential*]** in the past three seasons) fell short of IHB's maximum monthly capacity of 84,166 tonnes (i.e. the highest practical capacity divided by 12 which likely understates monthly capacity in peak periods once shutdowns are accounted because, as previously noted, these would take place outside of peak periods).

Therefore, when taking the capacity at other port terminals using Port Adelaide into account, IHB is unlikely to be capacity constrained going forward. It is important that the ACCC does not seek to base its decision on an unusually high crop year (2016-17) particularly in circumstances where a significant amount of competitor capacity is available at Port Adelaide (and there are plans for increased competitor capacity at Wallaroo which competes with grain from the same growing region) such that, even in a rare bumper harvest going forward, Port Adelaide ports are unlikely to be capacity constrained.

2.2.4 IHB faces competition from domestic demand and containers

The ACCC appears to accept that IHB faces some degree of competitive constraint from domestic demand. However, its analysis focuses more on demand within South Australia than the recent demand for grain from the East Coast. As set out in section 3.4, the movement of significant quantities of grain from South Australia in recent years has established new supply chains that will make the likelihood of future movements of grain from South Australia to the East Coast more likely, particularly given Australia's variable weather conditions.

The ACCC acknowledges that containers provide some degree of competition in relation to grain grown in particular regions. Exporters are also able to, and do, use containers for exports from Port Adelaide. In addition, grain grown in South Australia can be packed into containers for export from other states.

2.2.5 Low barriers to entry and new entry

As set out in section 2.2.5 of Annexure 1, the barriers to entering the market for providing port terminal services are not prohibitive and the threat of potential entry is a significant constraint on Viterra, particularly in circumstances where proposed developments are already planned and underway.

In this regard, there are significant plans for new entry at Yorke Peninsula, which is served by the same growing region as Port Adelaide. The construction of T-Ports' planned port terminal at Wallaroo has already commenced. As the ACCC seems to acknowledge, IHB will compete with this new terminal as they export grain grown in the same region. In addition, ADM has been shipping grain from Port Pirie to the East Coast (which takes throughput from Port Adelaide), and could obtain the export accreditation it needs to export grain from Port Pirie.

[114] Draft Determination, p 123.

Finally, LINX has shown that it can successfully set up and operate a competing site at Port Adelaide, such that there is a credible threat of it re-entering the market in the future.

2.3 The promotion of competition in upstream and downstream markets

As set out in section 4 of the submission, upcountry storage and handling services in South Australia are characterised by a large number of providers, increasing competition and low barriers to entry. It is also operating efficiently. In the Adelaide and Yorke Peninsula region, Viterra competes with 14 alternate upcountry storage providers who together offer around 1.4 million tonnes of capacity. Viterra provides, and has always provided, open access to its upcountry facilities, and customers of Viterra's storage facilities in South Australia are also able to move their grain out to third parties.

While the ACCC acknowledges that there may be credible alternative storage options for grain grown in what it considers to be the Port Adelaide catchment area, the ACCC also raises concerns about the potential for "*Viterra's position upcountry to interact with its dominant position at port to affect competition*".[115]However, the ACCC puts forward no specifics or analysis as to how this might occur beyond speculating that bundling and network effects "may" make it difficult for competitors to enter the upcountry market by reinforcing barriers to entry.[116] However, barriers to entering the upcountry storage and handling market are clearly low, as shown by the fact that there is over 1 million tonnes of on-farm storage in South Australia and approximately half of the upcountry storage sites in the Lower, Mid and Upper North regions are third party sites.

2.4 The interests of exporters who may require access to port terminal services; the likelihood that exporters of bulk wheat will have fair and transparent access to port terminal services.

For the reasons set out in section 2.4 and 2.5 of Annexure 1, exporters will greatly benefit from the operational flexibility and efficiencies that would arise from an exemption, and exporters have had—and, if an exemption is granted, will continue to have—fair and transparent access to port terminal services at IHB.

2.5 The promotion of the economically efficient operation and use of the port terminal facility and the promotion of efficient investment in port terminal facilities

For the reasons set out in section 2.6 of Annexure 1, an exemption will increase the efficiency of, and encourage further investment in, Viterra's port terminal facilities. Viterra has invested significantly in IHB to date and, as explained in this submission, has shared the benefits of investments in its supply chain with other market participants.

2.6 Whether Viterra is an exporter or an associated entity of an exporter

For the reasons set out in section 2.7 of Annexure 1, although Viterra is an associated entity of an exporter, it has neither the incentive to deny access to its port terminals or provide Glencore Agriculture with favourable access.

2.7 Whether there is already an exempt service provider within the grain catchment area

Viterra notes that each of Cargill and Semaphore are exempt PTSPs.

[115] Draft Determination, p 117.

[116] Draft Determination, p 76.

Annexure 4: OHB

1 Summary

Viterra welcomes the ACCC's preliminary decision to grant an exemption from Parts 3 to 6 of the Code for Viterra's port terminals at Port Adelaide. Viterra does not consider the decision of whether to grant an exemption at these port terminals is "finely balanced". The following considerations make it clear that OHB should no longer be subject to Parts 3 to 6 of the Code:

(a) an exemption will increase Viterra's operational flexibility, which is in both Viterra's and exporters' legitimate business interests;

(b) Viterra is constrained from exercising any market power in the provision of port terminal services at Port Adelaide to the detriment of other market participants because:

  i. Viterra competes in a global grain market and, as a price taker in that market, is incentivised to operate an efficient supply chain, the benefits of which it passes through to other market participants;

  ii. OHB is constrained by competition within South Australia and, more locally, at Port Adelaide and Port Pirie;

  iii. OHB is constrained by the threat of new entry (including by LINX re-entering at Port Adelaide and by T-Ports planned development at Wallaroo) and the barriers to entry are low; and

  iv. OHB competes with domestic demand for grain (including on the East Coast) with new supply chains to the East Coast established in recent years, making this a continuing competitive constraint;

  v. there has been excess capacity at OHB in each of the past three seasons and there is excess port terminal capacity across port terminals at Port Adelaide;

  vi. OHB does not have a material competitive advantage sourcing grain over other port terminals at Port Adelaide due to different transportation methods; and

  vii. Viterra's upcountry storage and handling facilities in South Australia—including those closer to Port Adelaide—are subject to competition and there is a credible threat of new entry given the low barriers to entry.

(c) Notwithstanding that Viterra is vertically integrated in the supply chain, independent economic modelling shows that Viterra has no incentive to deny fair and transparent access to its port terminals or provide favourable access to Glencore Agriculture to the detriment of competition.

2 Application of clause 5(3) criteria

2.1 The legitimate business interests of the PTSP

For the reasons set out in section 2.1 of Annexure 1, an exemption from Parts 3 to 6 of the Code is in Viterra's legitimate business interests.

2.2 The public interest, including the public interest in having competition in markets

There is strong evidence that OHB is subject to competition in a global and regional context and, as recognised by ESCOSA, there is no evidence that Viterra has exercised any market power that it may have—including in regard to OHB or upcountry storage facilities that deliver grain to Port Adelaide—to the detriment of other market participants. Viterra has provided significant information to the ACCC which shows that:

- Viterra competes in a global grain market and, as a price taker in that market, is incentivised to operate an efficient supply chain the benefits of which it has passed through to other market participants;
- OHB is constrained by competition within South Australia and, more locally, at Port Adelaide and Port Pirie, and is constrained by the credible threat of new entry, including re-entry by LINX at Port Adelaide; and
- Viterra's upcountry storage facilities are subject to competition and there is a real threat of new entry given the low barriers to entry.

2.2.1 An exemption will improve South Australia's position in global grain markets

As explained in section 2.2.1 of Annexure 1, Viterra as a price taker in global grain markets is incentivised to operate an efficient supply chain, and passes through any improvements in efficiencies—whether they be in terms of quality or cost reductions—to its customers. It follows that the operational benefits (including increased efficiency) that will ensue from an exemption at OHB will be of benefit to not only Viterra, but also to other market participants. An exemption will therefore improve South Australia's position in the global grain market to the benefit of all market participants.

2.2.2 OHB is subject to competition from other port terminal operators in Australia including at Port Adelaide and in Victoria

The ACCC's draft views are that "*Viterra's OHB facility is likely sufficiently competitively constrained to support an exemption from Parts 3 to 6 of the Code*."[117]

Viterra agrees that the application of the criteria support granting OHB and exemption from Parts 3 to 6 of the Code. Viterra's port terminals are competitively constrained by the global market in which Viterra competes. In addition, and to an even greater extent, OHB is competitively constrained locally by Cargill and Semaphore at Port Adelaide, ADM at Port Pirie as well as by containerised exports and port terminals in nearby Victoria.

For further information on catchment areas and the competitive constraint imposed by Cargill and Semaphore at Port Adelaide, ADM at Port Pirie and by port terminals in Victoria, please refer to section 2.2.2 of Annexure 3.

2.2.3 There is significant excess capacity at Port Adelaide

The ACCC states that there "*appears to be a significant amount of spare capacity available at*" OHB and that "*third party exporters … appear to be able to secure access at OHB during peak periods*."[118]

[117] Draft Determination, p 136.

[118] Draft Determination, p 124.

Viterra agrees that there is significant excess capacity at OHB on an annual basis. As explained in section 2.1 of the submission, the highest practical capacity at OHB is 2.33 mtpa, which is higher than grain throughput at OHB in each of the past three seasons.

However, the ACCC also states that OHB appears to be capacity constrained during peak periods. It refers to the bumper crop season 2016-17 to support its view. However, this was an unusual season over the past ten years and, since then, Viterra has not been capacity constrained at OHB in peak periods. Since 2016-17, the highest throughput months at OHB were **[*Confidential*]** Based on a maximum monthly capacity of around 194,444 tonnes (i.e. the highest practical capacity divided by 12 which likely understates monthly capacity in peak periods once shutdowns are accounted because, as previously noted, these would take place outside of peak periods), Viterra has had excess capacity at OHB in all but **[*Confidential*]** during the past three seasons.

Therefore, taking other capacity at Port Adelaide and Port Pirie into account, OHB is unlikely to be capacity constrained going forward. It is important that the ACCC does not seek to base its decision on an unusually high harvest year (2016-17). This is particularly in circumstances where a significant amount of competitor capacity is available at Port Adelaide (and there are plans for increased competitor capacity at Wallaroo which competes with grain from the same growing region) such that, even in a rare bumper harvest going forward, Port Adelaide ports are unlikely to be capacity constrained.

2.2.4 OHB faces competition from domestic demand and containers

For information on the competitive constraint imposed by domestic demand and containers on Viterra's Port Adelaide terminals, please refer to section 2.2.4 of Annexure 3.

2.2.5 Low barriers to entry and new entry

For information on the low barriers to entry and planned and potential entry that act as a competitive constraint on Viterra's Port Adelaide operations, please refer to section 2.2.5 of Annexure 3.

2.3 The promotion of competition in upstream and downstream markets

For information on competition in upcountry storage and handling markets insofar as they relate to Viterra's Port Adelaide terminals, please refer to section 2.3 of Annexure 3.

2.4 The interests of exporters who may require access to port terminal services; the likelihood that exporters of bulk wheat will have fair and transparent access to port terminal services.

For the reasons set out in section 2.4 and 2.5 of Annexure 1, exporters will greatly benefit from the operational flexibility and efficiencies that would arise from an exemption, and exporters have had—and, if an exemption is granted, will continue to have—fair and transparent access to port terminal services at OHB.

2.5 The promotion of the economically efficient operation and use of the port terminal facility and the promotion of efficient investment in port terminal facilities

For the reasons set out in section 2.6 of Annexure 1, an exemption will increase the efficiency of, and encourage further investment in, Viterra's port terminal facilities. Viterra has invested significantly in OHB to date and, as explained in this submission, has shared the benefits of investments in its supply chain with other market participants.

2.6 Whether Viterra is an exporter or an associated entity of an exporter

For the reasons set out in section 2.7 of Annexure 1, although Viterra is an associated entity of an exporter, it has neither the incentive to deny access to its port terminals or provide Glencore Agriculture with favourable access.

2.7 Whether there is already an exempt service provider within the grain catchment area

Viterra notes that each of Cargill and Semaphore are exempt PTSPs.

Annexure 5: Wallaroo

1 Summary

Viterra considers that a considered and balanced application of the criteria in clause 5(3) of the Code supports the granting of an exemption from Parts 3 to 6 of the Code for Wallaroo. This is because:

(a) an exemption will increase Viterra's operational flexibility, which is in both Viterra's and exporters' legitimate business interests;

(b) Viterra is constrained from exercising any market power in the provision of port terminal services at Wallaroo to the detriment of other market participants because:

i. Viterra competes in a global grain market and, as a price taker in that market, is incentivised to operate an efficient supply chain, the benefits of which it passes through to other market participants;

ii. Wallaroo is constrained by competition within South Australia and, more locally, at Port Pirie and Port Adelaide;

iii. Wallaroo is constrained by the threat of new entry (including by LINX re-entering at Port Adelaide and by T-Ports' planned development at Wallaroo) and barriers to entry are low; and

iv. Wallaroo competes with domestic demand for grain (including on the East Coast), with new supply chains to the East Coast established in recent years, making this a continuing competitive constraint;

v. there has been excess capacity at Wallaroo in each of the past three seasons;

vi. the amount of grain exported through Wallaroo represents a very small proportion of grain exported from Australia (since 2011-12, only 10% of South Australia's exports have gone through Wallaroo, with 5% in 2018-19)[119] and there is significant excess port terminal capacity across port terminals at Wallaroo;

vii. Wallaroo does not have a competitive advantage sourcing grain over other port terminals due to different transportation methods as it is accessed by road; and

viii. Viterra's upcountry storage and handling facilities in South Australia—including those serving port terminals on the Yorke Peninsula—are subject to competition and there is a credible threat of new entry given the low barriers to entry.

(c) Notwithstanding that Viterra is vertically integrated in the supply chain, independent economic modelling shows that Viterra has no incentive to deny fair and transparent access to its port terminals or provide favourable access to Glencore Agriculture to the detriment of competition.

[119] ACCC Bulk Grain Handling Report 2018-19, p 58.

2 Application of clause 5(3) criteria

2.1 The legitimate business interests of the PTSP

For the reasons set out in section 2.1 of Annexure 1, an exemption from Parts 3 to 6 of the Code is in Viterra's legitimate business interests.

2.2 The public interest, including the public interest in having competition in markets

The ACCC has reached a preliminary view that "*Viterra's Wallaroo facility does not face sufficient competitive constraint to support an exemption from Parts 3 to 6 of the Code*."[120]

Viterra disagrees with this assessment, which is contrary to the evidence provided to the ACCC. Viterra is concerned that the ACCC has decided that an exemption is not warranted on the basis solely of its assessment of criteria (b) and (g) – as set out above, it is important that the ACCC gives proper weight to all of the criteria in clause 5(3) of the Code.

There is strong evidence that Wallaroo is subject to competition in both a global and regional context and, as recognised by ESCOSA, there is no evidence that Viterra has exercised any market power that it may have—including in regard to Wallaroo or upcountry storage facilities that deliver grain to Wallaroo—to the detriment of other market participants. Viterra has provided significant information to the ACCC which shows that:

- Viterra competes in a global grain market and, as a price taker in that market, is incentivised to operate an efficient supply chain, the benefits of which it has passed through to other market participants;
- Wallaroo is constrained by competition within South Australia and, more locally, by ADM at Port Pirie and Cargill and Semaphore at Port Adelaide;
- Wallaroo is constrained by the credible threat of new entry, including by T-Ports at Wallaroo; and
- Viterra's upcountry storage facilities are subject to competition and there is a real threat of new entry given the low barriers to entry.

2.2.1 An exemption will improve South Australia's position in global grain markets

As explained in section 2.2.1 of Annexure 1, Viterra as a price taker in global grain markets is incentivised to operate an efficient supply chain, and passes through any improvements in efficiencies—whether they be in terms of quality or cost reductions—to its customers. It follows that the operational benefits (including increased efficiency) that will ensue from an exemption at Wallaroo will be of benefit to not only Viterra but also to other market participants. An exemption will therefore improve South Australia's position in the global grain market to the benefit of all market participants.

2.2.2 Wallaroo is subject to competition from other port terminal operators in Australia including at Port Adelaide and in Victoria

Viterra is not only competitively constrained by the global market in which it competes, but also by other port terminal operators in Australia, including at Port Pirie and Port Adelaide.

[120] Draft Determination, p 154.

(a) **Catchment area analysis**

The ACCC relies on GTA freight differentials in finding that Wallaroo's catchment area extends between the Yorke Peninsula and the Mid and Upper North regions of South Australia, but not to the Port Adelaide region. However, as explained in section 2.2.2(a) of Annexure 1, freight is not the only indicator of where a grower or marketer will deliver grain. Accordingly, basing an analysis on freight differentials alone presents an artificial view of the outer boundaries of a potential catchment area for assessment purposes.

For the following reasons, Viterra considers that the narrowest "catchment area" served by Wallaroo is the grain growing region that encompasses the Yorke Peninsula and a large area surrounding Adelaide, stretching from Dooen in the west of Victoria, to Werrimull in north Victoria, and north-west to Port Pirie and Melrose in South Australia:

- grain will move to different port terminals in response to variables other than freight costs, including the price a grower or marketer can achieve at a particular site, and logistics such as slot availability and timing. This is made clear by the fact that large quantities of grain moved from the Yorke Peninsula to domestic markets on the East Coast in recent years;
- AEGIC has recognised that all of South Australia (other than the Eyre Peninsula) is one of two growing regions, and has noted that sites in this area are close to ports and that road transport costs are competitive in South Australia; and
- as set out in Viterra's Application, 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. For example, as set out above, Cargill moves grain off the Yorke Peninsula to its IHB port terminal.

(b) **Wallaroo faces significant competitive constraints on the Yorke Peninsula and at Port Adelaide**

The ACCC's preliminary view is that Cargill and Semaphore at Port Adelaide likely compete with Wallaroo for grain grown in the Mid and Upper North regions of South Australia and, therefore, impose a *"limited competitive constraint"* on Wallaroo.[121]

For the reasons set out above, Viterra considers that Cargill and Semaphore also compete with Wallaroo for grain grown in other regions of South Australia (excluding the Eyre Peninsula) and that their competitive constraint is, therefore, not limited. However, even if Viterra was to consider the constraint imposed on Wallaroo by virtue of Cargill and Semaphore competing for grain in the Mid and Upper North regions alone, this is also not an insignificant constraint.

The combined highest practical capacity of Cargill's and Semaphore's port terminal facilities (1.16 mtpa) is higher than Wallaroo's highest practical capacity (0.84 mtpa) and, therefore, Cargill and Semaphore at Port Adelaide are significant competitors for

[121] Draft Determination, p 154.

grain whether this is delivered from the Mid and Upper North regions or other regions of South Australia. Further, the fact that Wallaroo has higher receival rates and at-port storage than Cargill and Semaphore does not diminish the fact that these port terminals are together able to export more grain than Wallaroo on an annual basis.

In addition, Wallaroo also competes with ADM at Port Pirie on the Yorke Peninsula. ADM has recently completed a number of domestic coastal shipments out of Port Pirie. The ACCC has analysed ADM as a potential competitive threat but this is not the case – it is already competing for grain with Wallaroo. To the extent ADM ships grain from South Australia, it is a competing PTSP regardless of where the grain ends up – any movement of grain away from Viterra's port terminals is competition. In addition, it is clear that ADM has the infrastructure established (and associated capacity) to export grain from Port Pirie once it has the relevant accreditation.

2.2.3 There is significant excess capacity at Wallaroo

The ACCC states that Wallaroo appears to have faced significant capacity constraints on both an annual and peak period basis. Viterra does not agree with this finding, which also seems to contradict the ACCC's own statement that Wallaroo had an average annual capacity utilisation rate of 65%.

The highest practical capacity at Wallaroo is 0.84 mtpa, which is the amount of grain Viterra was able to ship from Wallaroo in 2016-17. Annual throughput at Wallaroo has been below 1.01 million tonnes since the unusual bumper crop harvest of 2016-17 and it is unlikely that Viterra will be capacity constrained at Wallaroo in the foreseeable future. Since 2016-17, the highest throughput months at Wallaroo were **[*Confidential*]** This shows that the vast majority of months (in fact, all but **[*Confidential*]** in the past three seasons) fell well short of the maximum monthly capacity of 70,000 (i.e. the highest practical capacity divided by 12 which likely understates monthly capacity in peak periods once shutdowns are accounted because, as previously noted, these would take place outside of peak periods).

Therefore, taking the capacity at Port Pirie and competitor port terminals using Port Adelaide into account, Wallaroo is unlikely to be capacity constrained going forward. It is important that the ACCC does not seek to base its decision on an unusually high harvest year (2016-17) particularly in circumstances where a significant amount of competitor capacity is available at Port Adelaide and Port Pirie (and there are plans for increased competitor capacity at) such that, even in a rare bumper harvest going forward, Wallaroo is unlikely to be capacity constrained.

Viterra is concerned that the ACCC has had little regard to the fact that Wallaroo ships only a small proportion of South Australia's wheat and is not capacity constrained, despite it stating that it is more concerned about vertical integration where a PTSP is capacity constrained. It is important that the ACCC properly accounts for the low utilisation rate at Wallaroo and the low proportion of wheat exported from this facility in its decision. These factors strengthen Viterra's incentive to increase throughput at Wallaroo, and further account for why Viterra does not have an incentive to deny grain exporters with access to Wallaroo or to provide favourable terms of access to Glencore.

2.2.4 Wallaroo faces competition from domestic demand and containers

As set out in section 2.2.4 of Annexure 1, Viterra's port terminals—including on the Yorke Peninsula—face competition from domestic demand and containers are a low cost entry alternative and are becoming more common in South Australia.

2.2.5 Low barriers to entry and new entry

As set out in section 2.2.5 of Annexure 1, the barriers to entering the market for providing port terminal services are not prohibitive and the threat of potential entry is a significant constraint on Viterra, particularly in circumstances where proposed developments are already planned and underway.

In this regard, there are significant plans for new entry in South Australia. This includes T-Ports' plan for a new port terminal at Wallaroo, the construction of which has commenced. The construction process is anticipated to take between 12 and 18 months.[122] As the ACCC seems to acknowledge, Wallaroo will compete with this new terminal as they export grain grown in the same region. It is important the ACCC recognises the significant constraint imposed on Viterra from planned entry.

2.3 The promotion of competition in upstream and downstream markets

As set out in section 2.3 of Annexure 1, upcountry storage and handling services in South Australia are characterised by a large number of providers, increasing competition and low barriers to entry and is operating efficiently.

In the Adelaide and Yorke Peninsula region, Viterra competes with 14 alternate upcountry storage providers who together offer around 1.4 million tonnes of capacity, and Viterra operates only 40% of the upcountry sites on the Yorke Peninsula and 57% of the upcountry sites in the Lower, Mid and Upper North regions of South Australia in 2020-21. In addition, there is a significant amount of on-farm storage in South Australia and the costs of constructing and expanding on-farm storage are low.

Viterra provides, and has always provided, open access to its upcountry facilities, and customers of Viterra's storage facilities in South Australia are also able to move their grain out to third parties.

2.4 The interests of exporters who may require access to port terminal services; the likelihood that exporters of bulk wheat will have fair and transparent access to port terminal services.

For the reasons set out in section 2.4 and 2.5 of Annexure 1, exporters will greatly benefit from the operational flexibility and efficiencies that would arise from an exemption, and exporters have had—and, if an exemption is granted, will continue to have—fair and transparent access to port terminal services at Wallaroo.

2.5 The promotion of the economically efficient operation and use of the port terminal facility and the promotion of efficient investment in port terminal facilities

For the reasons set out in section 2.6 of Annexure 1, an exemption will increase the efficiency and encourage further investment in, Viterra's port terminal facilities. Viterra has invested significantly in Wallaroo to date and, as explained in this submission, has shared the benefits of investments in its supply chain with other market participants.

[122] See https://tports.com/t-ports-to-expand-to-yorke-peninsula-with-wallaroo-port-development/

2.6 Whether Viterra is an exporter or an associated entity of an exporter

For the reasons set out in section 2.7 of Annexure 1, although Viterra is an associated entity of an exporter, it has neither the incentive to deny access to its port terminals or provide Glencore Agriculture with favourable access.

2.7 Whether there is already an exempt service provider within the grain catchment area

Viterra notes that each of Cargill and Semaphore are exempt PTSPs.

Annexure 6: Port Giles

1 Summary

Viterra considers that a considered and balanced application of the criteria in clause 5(3) of the Code supports the granting of an exemption from Parts 3 to 6 of the Code for Port Giles. This is because:

(a) an exemption will increase Viterra's operational flexibility, which is in both Viterra's and exporters' legitimate business interests;

(b) Viterra is constrained from exercising any market power in the provision of port terminal services at Port Giles to the detriment of other market participants because:

i. Viterra competes in a global grain market and, as a price taker in that market, is incentivised to operate an efficient supply chain, the benefits of which it passes through to other market participants;

ii. Port Giles is constrained by competition within South Australia and, more locally, at Port Adelaide and Port Pirie;

iii. Port Giles is constrained by the threat of new entry (including T-Ports' planned development at Wallaroo) and barriers to entry are low; and

iv. Port Giles competes with domestic demand for grain (including on the East Coast) with new supply chains to the East Coast established in recent years, making this a continuing competitive constraint;

v. there has been excess capacity at Port Giles in each of the past three seasons;

vi. the amount of grain exported through Port Giles represents a very small proportion of grain exported from Australia (since 2011-12, only 12% of South Australia's exports have gone through Port Giles)[123]and there is significant excess port terminal capacity at Port Giles;

vii. Port Giles does not have a competitive advantage sourcing grain over other port terminals due to different transportation methods as it is accessed by road; and

viii. Viterra's upcountry storage and handling facilities in South Australia—including those serving port terminals on the Yorke Peninsula—are subject to competition and there is a credible threat of new entry given the low barriers to entry.

(c) Notwithstanding that Viterra is vertically integrated in the supply chain, independent economic modelling shows that Viterra has no incentive to deny fair and transparent access to its port terminals or provide favourable access to Glencore Agriculture to the detriment of competition.

[123] ACCC Bulk Grain Handling Report 2018-19, p58

2 Application of clause 5(3) criteria

2.1 The legitimate business interests of the PTSP

For the reasons set out in section 2.1 of Annexure 1, an exemption from Parts 3 to 6 of the Code is in Viterra's legitimate business interests.

2.2 The public interest, including the public interest in having competition in markets

The ACCC has reached a preliminary view that "*Viterra's Port Giles facility does not face sufficient competitive constraint to support an exemption from Parts 3 to 6 of the Code*."[124]

Viterra disagrees with this assessment, which is contrary to the evidence provided to the ACCC. Viterra is concerned that the ACCC has decided that an exemption is not warranted on the basis solely of its assessment of criteria (b) and (g) – as set out above, it is important that the ACCC gives proper weight to all of the criteria in clause 5(3) of the Code.

There is strong evidence that Port Giles is subject to competition in both a global and regional context and, as recognised by ESCOSA, there is no evidence that Viterra has exercised any market power that it may have—including in regard to Port Giles or upcountry storage facilities that deliver grain to Port Giles —to the detriment of other market participants. Viterra has provided significant information to the ACCC which shows that:

- Viterra competes in a global grain market and, as a price taker in that market, is incentivised to operate an efficient supply chain the benefits of which it has passed through to other market participants;
- Port Giles is constrained by competition within South Australia and, more locally, by ADM at Port Pirie and Cargill and Semaphore at Port Adelaide;
- Port Giles is constrained by the credible threat of new entry, including by T-Ports at Wallaroo; and
- Viterra's upcountry storage facilities are subject to competition and there is a real threat of new entry given the low barriers to entry.

2.2.1 An exemption will improve South Australia's position in global grain markets

As explained in section 2.2.1 of Annexure 1, Viterra as a price taker in global grain markets is incentivised to operate an efficient supply chain, and passes through any improvements in efficiencies—whether they be in terms of quality or cost reductions—to its customers. It follows that the operational benefits (including increased efficiency) that will ensue from an exemption at Port Giles will be of benefit to not only Viterra but also to other market participants. An exemption will therefore improve South Australia's position in the global grain market to the benefit of all market participants.

2.2.2 Port Giles is subject to competition from other port terminal operators in Australia including at Port Adelaide and in Victoria

Viterra is not only competitively constrained by the global market in which it competes, but also by other port terminal operators in Australia, including at Port Pirie and Port Adelaide.

[124] Draft Determination, p 164

(a) **Catchment area analysis**

The ACCC relies on GTA freight differentials in finding that Port Giles' catchment area is most likely limited to the Yorke Peninsula, but that there may be some competition between Port Giles and Adelaide in the northern Yorke Peninsula – although this grain is more likely to go to Viterra's Wallaroo facility.[125]

However, as explained in section 2.2.2(a) of Annexure 1, freight is not the only indicator of where a grower or marketer will deliver grain. Accordingly, basing an analysis on freight differentials alone presents an artificial view of the outer boundaries of a potential catchment area for assessment purposes. For the following reasons, Viterra considers that the narrowest "catchment area" served by Port Giles is the grain growing region that encompasses the Yorke Peninsula and a large area surrounding Adelaide, stretching from north-west to Port Pirie and Melrose in South Australia:

- grain will move to different port terminals in response to variables other than freight costs, including the price a grower or marketer can achieve at a particular site and logistics such as slot availability and timing. This is made clear by the fact that large quantities of grain moved from the Yorke Peninsula to domestic markets on the East Coast in recent years;
- AEGIC has recognised that all of South Australia (other than the Eyre Peninsula) is one of two growing regions, and has noted that production areas are close to ports and that road transport costs are competitive in South Australia; and

As set out in Viterra's Application, 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 from the north-west to Port Pirie and Melrose in South Australia. For example, as set out above, Cargill moves grain off the Yorke Peninsula to its IHB port terminal – Viterra estimates that GrainFlow received between 120,000 and 140,000 tonnes of grain at its Maitland site on the Yorke Peninsula (60 km from Port Giles) in 2020-21, the majority of which will likely be moved to Port Adelaide (which is 215 km from Maitland) and shipped from Berth 20 at IHB.

(b) **Wallaroo faces significant competitive constraints on the Yorke Peninsula and at Port Adelaide**

The ACCC's preliminary view is that Port Giles faces limited competition from other port terminals.

However, for the reasons set out above, Viterra considers that Cargill and Semaphore compete with Port Giles for grain grown in the region that encompasses the Yorke Peninsula and a large area surrounding Adelaide, stretching the north-west to Port Pirie and Melrose in South Australia. Therefore, Viterra considers Port Giles to compete with Cargill and Semaphore at Port Adelaide as well as ADM at Port Pirie. The combined highest practical capacity of Cargill's and Semaphore's port terminal facilities (1.16 mtpa) is equivalent to Port Giles' highest practical capacity (1.17 mtpa) and, therefore, Cargill and Semaphore at Port Adelaide are significant competitors.

[125] Draft Determination, p 164.

Further, the fact that Port Giles has higher receival and loading rates and at-port storage than Cargill and Semaphore does not diminish the fact that these port terminals are together able to export about the same amount of grain as Port Giles on an annual basis.

2.2.3 There is significant excess capacity at Port Giles

The ACCC states that Port Giles generally appears to have excess capacity on an annual basis and in peak periods, with low annual capacity utilisation of 55%.

Viterra agrees. As explained in section 2.1 of the submission, the highest practical capacity at Port Giles is 1.17 mtpa, which is higher than grain throughput at Port Giles in each of the past three seasons. In addition, since 2016-17, the highest throughput months at Port Giles were **[*Confidential*]**

This means that, based on maximum monthly capacity of 97,500 tonnes (i.e. the highest practical capacity divided by 12 which likely understates monthly capacity in peak periods once shutdowns are accounted because, as previously noted, these would take place outside of peak periods), Viterra has had excess capacity at Port Giles in all but **[*Confidential*]** during the past 3 seasons. It is clear that Port Giles is not capacity constrained and is therefore incentivised to maximise throughput and compete to source grain from a wide area and to keep its operations efficient and cost effective.

Viterra is concerned that the ACCC has had little regard to the fact that Port Giles ships only a small proportion of South Australia's wheat and is not capacity constrained, despite it stating that it is more concerned about vertical integration where a PTSP is capacity constrained. It is important that the ACCC properly accounts for the low utilisation rate at Port Giles and the low proportion of wheat exported from this facility in its decision. These factors strengthen Viterra's incentive to increase throughput at Port Giles, and further account for why Viterra does not have an incentive to deny grain exporters with access to Port Giles or to provide favourable terms of access to Glencore.

2.2.4 Giles faces competition from domestic demand and containers

As set out in section 2.2.4 of Annexure 1, Viterra's port terminals—including on the Yorke Peninsula—face competition from domestic demand and containers are a low cost entry alternative and are becoming more common in South Australia.

2.2.5 Low barriers to entry and new entry

As set out in section 2.2.5 of Annexure 1, the barriers to entering the market for providing port terminal services are not prohibitive and the threat of potential entry is a significant constraint on Viterra, particularly in circumstances where proposed developments are already planned and underway.

In this regard, there are significant plans for new entry in South Australia. This includes T-Ports' plan for a new port terminal at Wallaroo, the construction of which has commenced. As the ACCC seems to acknowledge, Port Giles will compete with this new terminal as they export grain grown in the same region.

2.3 The promotion of competition in upstream and downstream markets

As set out in section 2.3 of Annexure 1, upcountry storage and handling services in South Australia are characterised by a large number of providers, increasing competition and low barriers to entry. It is also operating efficiently. Viterra operated only 40% of the upcountry sites on the Yorke Peninsula and 57% of the upcountry sites in the Lower, Mid and Upper North regions of South Australia in 2020-21. In addition, there is a significant amount of on-farm storage in South Australia and the costs of constructing and expanding on-farm storage are low.

Viterra provides, and has always provided, open access to its upcountry facilities, and customers of Viterra's storage facilities in South Australia are also able to move their grain out to third parties.

2.4 The interests of exporters who may require access to port terminal services; the likelihood that exporters of bulk wheat will have fair and transparent access to port terminal services.

For the reasons set out in section 2.4 and 2.5 of Annexure 1, exporters will greatly benefit from the operational flexibility and efficiencies that would arise from an exemption, and exporters have had—and, if an exemption is granted, will continue to have—fair and transparent access to port terminal services at Port Giles.

2.5 The promotion of the economically efficient operation and use of the port terminal facility and the promotion of efficient investment in port terminal facilities

For the reasons set out in section 2.6 of Annexure 1, an exemption will increase the efficiency, and encourage further investment in, Viterra's port terminal facilities. Viterra has invested significantly in Port Giles to date and, as explained in this submission, has shared the benefits of investments in its supply chain with other market participants.

2.6 Whether Viterra is an exporter or an associated entity of an exporter

For the reasons set out in section 2.7 of Annexure 1, although Viterra is an associated entity of an exporter, it has neither the incentive to deny access to its port terminals or provide Glencore Agriculture with favourable access.

2.7 Whether there is already an exempt service provider within the grain catchment area

Viterra notes that each of Cargill and Semaphore are exempt PTSPs.