

To Ms Athena Wicks
Inquiry on Australia's Maritime Logistics
System
Productivity Commission
Email: maritime@pc.gov.au

18 February 2022

Dear Ms Wicks

Viterra's submission to the Productivity Commission's Maritime Logistics System Inquiry

Viterra's operations as a bulk wheat port terminal operator are regulated under the *Port Terminal Access (Bulk Wheat) Code of Conduct (Code)*, which is a mandatory industry code prescribed under section 51AE of the *Competition and Consumer Act 2010 (Cth) (CCA)*. The bulk handling facilities at Port Adelaide, Port Giles, Wallaroo, Port Lincoln and Thevenard, and the bulk loader at Outer Harbor are Maritime Services for the purposes of the *Maritime Services (Access) Act 2000 (SA) (MSAA)*, which is the State-based access regime introduced to ensure that exporters had access to port capacity. Viterra's submission explains how the repeal of the Code will remove redundant economic regulation and have an immediate impact on improving the efficiency of ports and supply chains, particularly in South Australia where the Code imposes a significant burden that is disproportionately borne by growers, exporters and regional communities.

1 Executive summary

The industry has significantly evolved since the Code came into effect in 2014. It is a substantially more competitive landscape today, there are more port terminal operators, active grain buyers and new low-cost infrastructure (including mobile ship loaders and trans-shipment vessels) which have provided a number of options for exporters. There is also significant under-utilisation of South Australian port infrastructure, including at Viterra's own terminals and increased domestic consumption of grain.

The industry is ready to transition to an open market for exporting grain. There is substantial competition between port operators and excess export shipping capability. Barriers to entry for new port terminals have decreased as evidenced by the number of new terminals and planned port developments in South Australia. Any previous concerns around terminal market power (if they were ever correct) clearly no longer exist.

The Code was only ever intended to apply for a transitional period, ahead of the industry moving to full deregulation. Instead, the Code has remained a permanent fixture and the Australian Competition and Consumer Commission (ACCC)'s current approach of exempting port terminal operators individually upon application has resulted in unequal application and enforcement of the Code, with some newer and interstate port terminal operators benefiting from a more generous regulatory approach.

In contrast, until last year the Code applied to all six of Viterra's port terminal facilities, and the ACCC took more than 2 years to decide to exempt two of Viterra's port terminal facilities. The exemption of only two of Viterra's port terminals – while all other non-Viterra grain port terminals in South Australia are exempt – continues to create material distortions between competing supply chains and impedes Viterra's ability to compete against other market participants who benefit from, and are supported by, a more generous regulatory approach.

Regulation should only be considered where a market failure has been clearly identified, and, if necessary, regulatory measures should be minimally intrusive, efficient and effective. This is not the case when it comes to the Code. Instead – and despite no evidence of any market failure – South Australia remains the one State that is disproportionately impacted by the Code. Of the seven non-exempt grain ports in Australia, four are in South Australia.

The Code's operational complexities reduces the attractiveness of commodities exported from non-exempt ports due to the lack of flexibility that can be offered to exporters, and reduces the competitiveness of South Australian grain in the global market. There is real harm and cost that arises from this artificial distortion, which is disproportionately borne by South Australian growers and regional communities.

The abolition of the Code would create significant benefits for growers by reducing costs, increasing flexibility and efficiency in managing the supply chain, and simplify the export environment by ensuring that all ports in South Australia and Australia operate on a level playing field.

For these reasons, Viterra urges the Productivity Commission to recommend the repeal of the Code which will directly improve the functioning of Australia's port and supply chains, remove unnecessary regulation, and allow South Australian growers to better compete internationally.

2 Viterra's operations

Viterra's agricultural supply chain and logistics network connects growers in South Australia and western Victoria to end user consumers, both global and domestic, and to supply sustainable, traceable and quality controlled agricultural products.

Viterra operates 55 storage and handling locations, including six bulk grain terminal facilities in South Australia located at Port Lincoln, Port Adelaide - Outer Harbor, Port Adelaide - Inner Harbour, Wallaroo, Port Giles and Thevenard.

Viterra provides a valuable service to growers and the grain industry, and our business contributes significantly to South Australia and western Victoria's economic success and wellbeing. In the past 12 months Viterra has spent \$978 million helping South Australian growers get their grain to market with \$738m paid to growers for their grain and \$240m spent on maintaining and operating the grain supply chain in South Australia.

Viterra's focus is on the long-term sustainability of its infrastructure assets, to ensure that it can continue to provide valuable services efficiently and effectively to its customers, now and into the future.

3 The Code's continued operation, and its application and enforcement has resulted in significant market distortions and costs

The Code is intended to regulate the conduct of port terminal operators (including Viterra) to ensure that bulk wheat exporters have fair and transparent access to port terminal services. At the time, the perceived regulatory problem that the Code sought to address was to prevent access constraints from emerging at bulk wheat port terminals and the limited number of terminal operators from using their alleged market power to charge higher prices.

On the Code's commencement on 30 September 2014, it had an original automatic expiry date of 30 September 2019. Importantly, the Code was intended to be transitional regulation, until such time as Australia's wheat industry moved to full deregulation. Unfortunately, this approach was not adopted, and the Code has continued to operate.

3.1 The Code has been applied and enforced unequally – to the detriment of South Australian growers

Despite the continued operation of the Code to some port terminals, the vast majority of port terminals have received an exemption from the most onerous provisions of the Code (Parts 3 to 6), either from the ACCC or the Minister of Agriculture. Of the 30 bulk wheat port terminals in Australia, only 8 operating terminals are subject to Parts 3 to 6 of the Code with one of those 8 currently having a draft decision in its favour from the ACCC to be exempt.

Four of the non-exempt terminals are based in South Australia, and operated by Viterra.¹ In fact, until last year, Viterra was the only port terminal operator which had all of its port terminal facilities fully regulated by the Code.

This unequal application of the Code comes at a significant cost to growers, exporters, and regional communities in South Australia, who have been the most heavily and disproportionately impacted by the Code.

In contrast, port terminal service operators in the largest wheat export state, Western Australia, are all exempt from Parts 3 to 6 of the Code. In 2014, the Minister for Agriculture used his powers under the Code to grant Co-operative Bulk Handling Limited's port terminal facilities located at Albany, Esperance, Geraldton and Kwinana an exemption. This is despite Western Australia's five grain ports having exported 14.5m million tonnes of bulk grain out of an Australian grain export total of 33.3m tonnes, while Viterra exported only 5.7m tonnes of bulk grain through its ports during the 2020-2021 period.²

We are also concerned with Viterra's experience regarding the slow process for reviewing exemption applications. On 2 July 2019, Viterra applied to the ACCC for an exemption from compliance with Parts 3 to 6 of the Code for port terminal services at each of its 6 port terminal facilities in South Australia. However, the ACCC took more than 20 months to make its final determinations on 27 April 2021 to grant exemptions for Viterra's port

¹ The remaining facilities are GrainCorp's port terminal facilities at Portland, Gladstone and Mackay.

² Australian Competition and Consumer Commission, Bulk grain ports monitoring report – data update 2020-21, p 1. Available at: <https://www.accc.gov.au/system/files/Bulk%20grain%20ports%20monitoring%20report.pdf>.

terminal facilities at Port Adelaide Inner Harbour and Outer Harbor and not to grant exemptions for Viterra's facilities at Port Giles and Wallaroo.

In addition, the ACCC took more than 2 years to make a final decision on 20 July 2021 not to grant Viterra exemptions for port terminal services at Port Lincoln and Thevenard, despite the ACCC's own guidelines stating that *"the ACCC will seek to conduct its exemption assessment and decide whether to make the exemption determination within 12 weeks"*.³

These slow timelines increase uncertainty and make it extremely difficult to deal with customers on other than a short-term basis.

While the ACCC's guidelines indicate that there may be extensions to this timeframe in certain circumstances, it is completely unreasonable for the ACCC to take two years to make a decision. During the same period, the ACCC granted exemptions to four competing port terminals in South Australia, making each of these decisions within a period of between 2 months and 7 months.

3.2 Costs of compliance with the Code

The significant costs associated with the Code are being disproportionately borne by the small number of non-exempt terminals (the majority of these being in South Australia).

The continued operation of Parts 3 to 6 of the Code substantially reduces the flexibility of non-exempt port terminal operators (including Viterra) as they cannot quickly and readily respond to changing circumstances or exporter requests relating to the allocation of capacity. This puts these port terminal operators at a significant disadvantage compared to exempt operators by increasing their costs and reducing their flexibility in managing the supply chain.

In addition, Viterra estimates that the compliance costs associated with the Code exceeds \$1 million per year. Although it is difficult to quantify the costs to growers, exporters have informed Viterra that they:

- discount the price they pay for grain in South Australia because of the Code; and
- have taken customers elsewhere because of the lack of flexibility at Viterra's ports as a result of the application of Parts 3 to 6 of the Code.

The higher level of regulation enforced upon Viterra is resulting in a real cost to the South Australian grain industry.

These issues would be directly addressed if the Code was repealed.

³ Australian Competition and Consumer Commission, *Compliance with the Port Terminal Access (Bulk Wheat) Code of Conduct: information for industry participants - Guidelines on the ACCC's process for making and revoking exemption determinations*, p 8. Available at: <https://www.accc.gov.au/system/files/Guidelines%20on%20the%20ACCC%E2%80%99s%20process%20for%20making%20and%20revoking%20exemption%20determinations%20-%20October%202014.pdf>.

4 **The Code imposes unnecessary regulation and cost in circumstances where there has been no market failure**

While the continued operation of the Code comes at a significant cost, there is also no evidence of any market failure that the Code was intended to address. Port terminal operators face substantial competition and are subject to competitive pressures from new and future developments, increasing excess capacity and changes in grain consumption. In the absence of any market failure justifying regulatory intervention, there is no economic basis for the Code's continued operation.

4.1 **The grain market in South Australia is highly competitive**

The South Australian grain market has changed markedly since the Code was introduced and is significantly more competitive. In 2014, there were six South Australian grain ports. There are now 11, with a combined (and in our view very conservative) estimate of export capacity of 13 MT for an average export task of 6.8 MT taken from the ACCC's Bulk grain monitoring report. This illustrates the current low barriers to entry for new port terminal operators. In addition, Viterro competes with at least 15 alternative upcountry storage providers and significant on-form storage. New infrastructure including mobile ship loaders and trans-shipment vessels have provided alternative low-cost options for exporters. The grain industry is ready to complete the transition to an open market.

This is consistent with findings by Charles River Associates (**CRA**), who prepared a report on the grain supply chain in South Australia for Viterro as part of the ACCC's review of Viterro's application for exemption (**Attachment 1**).

CRA observed that the South Australian grain market is competitive, particularly when compared to five or ten years ago. There are more grain buyers competing for grower's grain and more terminal operators providing services to grain exporters. The ACCC has recently commented on the new entry of various port terminal service providers, including some exporters setting up their own facilities rather than wholly relying on obtaining access to the facilities of incumbent providers. These new entrants include Archer Daniels Midland and Cargill, at Port Pirie and Port Adelaide, respectively. T-Ports (through Lucky Bay) and Semaphore are also both relatively new entrants. These recent and significant examples of new entry mean that there are now 11 port terminals in South Australia (6 owned by Viterro and 5 owned and operated by others). These competing port terminals have all been exempted by the ACCC from compliance with Parts 3 to 6 of the Code. It is also worth noting that apart from the 11 port terminals in SA that grain ports in Portland and Geelong also compete for South Australian grain.

Accordingly, CRA found that Viterro no longer has substantial market power at port, if it ever did, as producers and exporters can, and do, access export markets through competing export terminals in South Australia and Victoria. And because of these new entrants, there is excess shipping capacity in South Australia.

The increase in port facilities is evidence that the cost of constructing a new terminal in South Australia is not prohibitive, which forces the incumbent terminal operators to be

disciplined to remain competitive. In this regard, there are also currently some further proposals for new port terminals, with T-Ports currently building a new port at Wallaroo capable of exporting 350,000 to 550,000 tonnes of grain per annum. In addition, Peninsula Ports is proposing a new port terminal at Port Spencer on the Eyre Peninsula and Portalis has proposed Cape Hardy as the site for another Eyre Peninsula grain terminal.⁴ This will substantially further increase the level of competition in South Australia.

4.2 There is significant excess capacity at terminals in South Australia

In addition, given the excess capacity available at its port terminals, Viterra is incentivised to provide transparent, reasonable and nondiscriminatory access to its port terminal services in order to encourage the use of its facilities to maximise throughput. Excess capacity at port terminals is increasing in South Australia with each new port terminal development listed in section 4.1.

In particular, capacity on the Eyre Peninsula has increased significantly in recent years with T-Ports completing a new port terminal facility at Lucky Bay on the Eyre Peninsula in 2020. This level of excess capacity may increase even further in the future – as noted above, there are proposals on foot from other companies to construct new ports at Port Spencer and Cape Hardy and another new port under construction at Wallaroo, adjacent Viterra's own Wallaroo port.

These upcoming developments will result in the level of excess capacity in South Australia – and alternative port terminals for exporters – continuing to increase. It is unclear why a Code is required to promote access to port terminal services given there is a substantial level of excess capacity both in peak and non-peak times.

4.3 Viterra has provided fair and open access to its port terminals prior to access regulation and will continue to do so

Viterra has been providing exporters with fair and open access to its port terminals since well before the introduction of access regulation. It is in the company's commercial interests to do so. Viterra has not received any dispute notifications under its Port Loading Protocols in relation to the allocation of capacity at its ports and ESCOSA's December 2018 review found no evidence of Viterra using any market power to disadvantage competition. Rather, ESCOSA found that Viterra was an efficient and well managed business that was receptive to customer needs and pursuing innovation. Likewise, the ACCC has recently acknowledged that "*exporters raised few concerns about access to port terminal services*".⁵ Viterra has continued to operate its supply chain with only modest increases in price, coinciding with significant investment in infrastructure and operational improvements, increased bookings by a range of customers, and increased output at its port terminals. Currently, Viterra's bulk handling facilities and bulk loader are subject to duplicative regulation – being subject to the state based MSAA access and pricing regulatory regime as well as the relevant port terminal facilities being subject to the prescriptive access requirements under the Code. Access regimes are typically limited to situations where only one access provider is commercially feasible

⁴ ACCC Bulk Grain Ports Monitoring Report, 2020-2021, p 40.

⁵ ACCC Bulk Grain Ports Monitoring Report, 2019-2020, p 18.

such that duplication of infrastructure is inefficient. Once access can be provided by a number of competing providers, the economic rationale for imposing restrictive requirements on a service provider diminishes and regulatory instruments should be applied in the most light-handed manner possible. At a minimum, Viterro considers this should include repeal of the Code and, to the extent the MSA regulatory regime is retained, the scope of the existing regulation should not be increased.

CRA's analysis also found that Viterro does not have an incentive to prevent competing exporters from accessing its port terminals, as exporters could, and would, easily switch to competing terminals in South Australia and Victoria, and/or establish new facilities. CRA calculated that preventing access to its terminals would result in substantial financial loss for Viterro. The market for the purchase of grain from producers would therefore remain competitive upon repeal of the Code, and the benefits of repeal would be passed through to producers.

Importantly, even if the Code is repealed, the ACCC will continue to have broad powers to detect, investigate and take appropriate enforcement action in respect of any conduct that raises competition concerns under the CCA, including any concerns around access to terminal facilities.

4.4 Port terminal operators operate in a competitive global environment

CRA's analysis notes that all exporters of grain from Australia, including from South Australia, sell their grain into highly competitive world markets. As the Australian bulk grain industry is a price taker, it is imperative that all operators minimise costs and operate as efficiently as possible. Despite being a price taker globally, CRA identified that there are no other export terminals in the world subject to as onerous regulation as applies in South Australia.

4.5 Increased domestic demand has changed the flow of grain and the significance of ports

Domestic demand for grain in SA is growing significantly and bulk grain exports out of South Australia is reducing year on year. Domestic consumption of South Australian grain increased by 9% during 2020-2021 to 1.3 million tonnes.⁶ The increasing volume of grain being consumed domestically has reduced the relative importance of ports to traders and growers. Accordingly, the possibility that grain may be transported domestically imposes a significant competitive constraint on South Australian port terminals and will continue to do so even if the Code is repealed.

5 Concluding remarks

The Code was introduced to ensure that exporters had access to port capacity. However, South Australia now has numerous port operators and ports, with export capacity significantly exceeding the average export task. Any concern as to access to port capacity that might have existed at the introduction of the Code no longer exists.

There is a significant incentive for Viterro to allow access and negotiate commercial agreements with access seekers. This is because:

⁶ Bulk Grain Monitoring Report 2020-2021, p 42.

- (a) There is significant competition amongst grain ports in South Australia and exporters have a number of other port options if Viterra does not negotiate a mutually beneficial commercial outcome;
- (b) The economic report prepared by independent experts Charles River Associates and provided to the ACCC during Viterra's recent exemption application under the Code made it clear that Viterra is incentivised on economic grounds to encourage access to its facilities; and
- (c) There are low barriers to the development and expansion of port terminal services, as evidenced by the significant entry of new grain port terminal operators that has occurred, and continues to occur, in South Australia.

The risks of retaining the Code when there are no demonstrable benefits of having it in place and the distortion it creates are significant. It is well understood that market outcomes are vulnerable to distortion if regulation is burdensome, results in uncertainty, or is applied unequally.

The removal of the Code will enable South Australia (and Australia) to compete more effectively in the global marketplace by simplifying the rules around exporting grain and capacity allocation at port making it more attractive for exporters to do business here, it will reduce competitive distortions and create a stable environment for long term investment.

If the Productivity Commission has any questions about this submission or would like a complete copy of CRA's submissions to the ACCC, Viterra would be pleased to assist.

Yours sincerely

Damian Fitzgerald
Company Secretary

Key Points: CRA Code Exemption Report for Viterro

- Market forces should be relied upon to allocate economic resources to the maximum extent feasible. Regulation should only be considered when a market failure has been clearly identified, and, if necessary, regulatory measures should be minimally intrusive, efficient, and effective.
- Australian wheat exporters are price takers in a highly competitive world market: increases in Australian supply chain costs cannot be passed on to export customers.
 - Intense pressure to minimize costs in Australia. Supply chain efficiencies flow through to producers, exporters, and infrastructure owners
- Exempt port terminals use more efficient and flexible capacity allocation practices, including longer-term capacity contracts. This supports terminal and exporter investment, planning, and more efficient use of capacity.
- Repeal of Code would allow successful exporters to achieve economies of scale, reducing costs and increasing service quality.
 - ACCC enforcement of the Code artificially supports smaller and less efficient exporters in the name of fairness and equal access. This encourages fragmentation of the exporting sector.
 - Smaller exporters will survive and flourish in an unregulated market if they are efficient and innovative.
- Substantial transformation of Australian wheat industry since elimination of single desk in 2008 and introduction of Code in 2014
 - Producers have become fewer, larger, and more sophisticated; exporters have deepened their operations in Australia
 - Entry by several new port terminals, including in South Australia; several other port terminals proposed
 - Concerns about terminal market power have been mitigated – no need for heavy-handed and prescriptive regulation to protect exporter access
- Competition among exporters to purchase wheat from producers would remain strong with repeal of the Code; competition would cause benefits from elimination of Code to flow primarily to producers in the form of higher prices/higher-quality service.
- A more efficient supply chain resulting from repeal of the Code would also increase Australia's competitiveness in world export markets
- Bottom line is that there is no convincing evidence of market failure in the Australian wheat supply chain and stakeholders and the Australian economy would be best served by reliance on market forces
 - This would bring Australia into line with its competitors in export markets, where, as far as we are aware, no other wheat export terminals face heavy-handed regulation, even where the terminal operator is vertically integrated