

8 February 2024

Second Review of the Wheat Port Code

Thank you for the opportunity to provide Viterra's position to the Government's Second Review of the Wheat Port Code.

Is the Wheat Port Code still necessary?

1. *Should the Wheat Port Code be remade in its current form, remade with amendments, or allowed to sunset?*

Viterra believes the Code has fulfilled its purpose, is no longer relevant and should be allowed to sunset. It does not represent a coherent national policy that applies equally to all wheat export terminals and never has. This has caused distortions in the way the market has operated across grain exporting regions in Australia.

As early as 2010, the Productivity Commission identified the cost and diminishing benefits associated with mandating access to Australia's wheat export terminals via a Port Code. In its review of Australia's wheat export marketing arrangements in 2010, the Productivity Commission recommended the introduction of a voluntary code of conduct for industry from 2014 to assist industry to transition to full deregulation.

Despite the view of the Productivity Commission in 2010 a mandatory port code was introduced for bulk wheat exports in 2014. And even though significant changes and transitions have occurred right across industry, the Code is still in place.

In Viterra's view the Code has served its purpose and should be allowed to sunset. It is pleasing to see that the ACCC has come to the same conclusion in its submission to the review dated 14 December 2023.

The grain industry can be sufficiently managed under the Competition and Consumer Act (2010).

Appendix 1 shows the number of reviews within the grain industry since deregulation which demonstrates the ongoing oversight of the industry by various bodies.

2. *What changes (if any) have occurred to market conditions or business arrangements in the bulk wheat export industry since the Wheat Port Code's introduction that strengthen the case for either retaining the code as is, amending the code, or allowing the code to sunset (possibly with alternate arrangements in place)?*

There have been significant changes within the grain industry that strengthen the case for the code to sunset.

Since the Mandatory Code came into force in 2014:

- a. There has been a significant number of new port terminal operators. According to the ACCC's submission to the Second Review of the Wheat Port Code, at the time the Code commenced there were seven Port Terminal Service Providers (PTSP) and 21 operational facilities. There are now 16 PTSPs and 32 operational facilities.

When the Code was introduced in 2014, Viterra was the only grain export port operator in South Australia. There are now multiple supply chains for South Australian grain, both for export and domestic sales. In South Australia there is significant excess port capacity, and



there is sufficient capacity at the five competing port terminals to accommodate all non-Viterra trading export volumes.

- b. In South Australia there are now 11 grain port terminals – six operated by Viterra and five operated by other industry participants. We have seen a large increase in the number of exporters, port operators and volumes of grain moving through domestic and export supply chains.
- c. We have also seen the utilisation of new technology including shallow port barge operations (such as that used by T-Ports at Wallaroo and Lucky Bay) and mobile ship loaders that do not require any storage infrastructure at port and can load vessels simply by unloading grain from trucks into the hopper of the ship loader. An increase in on-farm storage of grain has also supported an increase in direct to port deliveries, bypassing upcountry storage facilities.
- d. The Government or ACCC have granted exemptions from the operation of Parts 3-6 of the Code for all port terminals in Australia, except Portland in Victoria, Gladstone and Mackay in Queensland and four of Viterra's six ports in South Australia. The Code applies to seven of 32 ports in Australia and has a disproportionate focus on South Australia. This disproportionate focus places the South Australian industry and South Australian growers at a clear disadvantage both within Australia and in the international marketplace.
- e. We have also seen a decrease in the volumes moving through the Viterra export system demonstrating the impact of competition, low barriers to entry and other available grain supply chains.

We have not seen any evidence that the industry would be better off if the Code were retained or amended or alternate arrangements were put in place.

3. *What are the costs and benefits in retaining, amending or allowing the Wheat Port Code to sunset?*

Viterra has experienced first-hand the costs and reduced operational flexibility of operating its ports both under an ACCC undertaking and under the full regulatory burden of the Port Code and has four significant examples.

- a. The introduction of an auction system for the allocation of port capacity:

For a number of years in the 2010s Viterra was required to operate a "revenue neutral" auction system whereby exporters had to 'bid' against other exporters for shipping capacity if they wanted slots at certain ports at certain times. The premiums were pooled, averaged and the 'average premium' was rebated back to exporters based on the volume shipped. Exporters were only entitled to the full rebate if they shipped their commitments. This mechanism created significant problems in low volume grain years.

The "revenue neutral" rebate system resulted in significant distortions in the marketplace. Customers became incentivised to "chase the rebate" rather than make end-customer, export and marketing investment decisions based on the physical execution of grain. This resulted in inefficient use of port terminal infrastructure. The system was extremely unpopular amongst exporters and resulted in many clients moving away from South Australia and going elsewhere for their port capacity.

- b. The transition from the auction system to long term agreements:

Allocating port terminal capacity through auction was producing outcomes that were both undesirable and unsustainable.



Viterra proposed a long term capacity allocation system that would be effected through long term agreements with customers with an amount of short term capacity being made available on a first in first served basis. Because of the procedural requirements of the Code it took over 18 months for the new system to be approved. During this period, exporters were required to continue using the auction system that they considered to be costly and promoted both uncertainty and inefficiencies.

At the same time, long term agreements were introduced in WA and other states on the east coast where port terminal operators had obtained (or would obtain) exemptions. As a result, some exporters that may otherwise have committed to exporting grain from South Australia entered into long term agreements to export grain from port terminals in other states or from other origins.

The lengthy period to approve the new system involved a high degree of regulatory scrutiny. This resulted in a further dilution of the long term capacity offering when compared to other states.

c. Viterra's application for exemption:

In July 2019, Viterra applied to the ACCC for an exemption in respect of its six port terminals. Submitted with the application was a report entitled extensive review of competition within the grain industry in South Australia prepared by Charles River Associates (CRA), a highly regarded firm that specialises in competition economics. The review by CRA clearly showed that two of the key requirements of the Code on non-exempt port services providers to:

- *not discriminate in favour of themselves or an associated entity while providing services to an exporter and;*
- *not hinder an exporter's access to port terminal services*

were not necessary due to the competitive environment that existed in South Australia that incentivised port terminal operators to do precisely what the Code was requiring. CRA also concluded in 2019 that the oversight of the Code was unnecessary and imposed costs without providing off-setting benefits.

Despite the compelling arguments for the reduction of the application of the Code on all of Viterra's ports, on 27 April 2021, the final determination was released granting exemptions for Viterra's facilities at Port Adelaide Inner Harbour and Outer Harbor and not granting exemptions for Viterra's facilities at Port Giles and Wallaroo.

On 20 July 2021, following consideration of the 2020-21 peak shipping period, the final determinations to not grant Viterra exemptions for Port Lincoln and Thevenard were released.

The financial and business cost of an exemption application cannot be underestimated. Significant legal and consulting fees along with business resources were expended on the application. The application was lodged because the competitive environment was at a level that meant Viterra was confident the application would be successful.

However, after a period of 21 months and 24 months respectively the outcome of the exemption application was determined with four of six ports failing to be exempted with no right of review. Because of the onerous procedural requirements imposed by the Code, the time taken for the exemption application ran over two harvests.



d. Application to amend Port Loading Protocols:

In 2021/22 Viterra worked with industry to make amendments to its Port Loading Protocols which were to bring significant benefits to the export industry in South Australia and more generally align its port loading protocols with other port operators in Australia.

After six months of industry consultation and finalising the form of its port protocols, Viterra as a courtesy, provided the ACCC with notice of the proposed amendments. In Viterra's view, given the minor nature of the changes, the only notification required under the Mandatory Port Code was a 20 business day notification period to industry before the changes could be implemented.

Upon the receipt of Viterra's notification, the ACCC wrote to Viterra requesting that it provide a submission to the ACCC on the changes and why they should be approved.

Our view was that the ACCC took a broader interpretation of the Code than was necessary but one it was open to take.

The variations were approved without any changes after the ACCC conducted a public consultation process.

The eight week timeframe for approval and the uncertainty created after Viterra had already consulted with industry demonstrates the procedural delays and issues that can arise when regulation is imposed upon a commercial, customer focussed industry.

4. *If required, are there alternative options, including non-regulatory options (such as a non-prescribed voluntary code), that could deliver better outcomes for the bulk wheat export industry than the Wheat Port Code?*

Viterra would be comfortable with Grain Trade Australia taking on an oversight role to ensure the export grain supply chain continues to operate as efficiently, flexibly and cost effectively as possible. Viterra would be happy to participate in any consultation process with GTA to create some form of industry managed oversight.

5. *What justification is there to continue the operation of the Wheat Port Code over and above the protections provided under the Competition and Consumer Act 2010?*

In Viterra's view, the grain industry can be sufficiently managed under the Competition and Consumer Act (2010).

What effect has the Wheat Port Code had?

6. *What effect has the Wheat Port Code had on access and competition (including the promotion of competition in upstream and downstream markets)?*

Our view is that the Code has increased duplication of unnecessary port infrastructure and reduced grain volumes moving through existing ports by artificially restricting the flexibility of existing infrastructure owners and supporting new entrants. The environment created by the Code has increased costs for existing infrastructure owners and users of the system including exporters and grain growers.



7. *What effect has the Wheat Port Code had on the operation, use and investment in port terminal facilities?*

In our view the Code has had a direct impact on encouraging the duplication of unnecessary port infrastructure.

Reduced service offerings to customers due to the inflexibility and rigidity of the Code has caused exporters to either create their own export supply chains or created an opportunity for new port operators to commence operations because Viterra has had restrictions on its service offerings under the Code.

There is no commercial business case for duplicating already existing expensive port infrastructure which is volume driven and has high fixed running costs.

8. *Has the Wheat Port Code had any unintended (or unexpected) consequences?*

In our view the Code was always going to impose extra cost on industry and make it more difficult for exporters to do business in Australia. This has proven to be the case and was always foreseeable.

A consequence that appears not to have been considered when the Code was introduced was that Australia operates in a global marketplace and any local regulation that restricts flexibility to export grain is ultimately going to make Australia less competitive with other grain growing countries.

Could the Wheat Port Code be improved?

9. *Could the Wheat Port Code be amended to improve its operation? If so, what would be the focus of these improvements?*

No. Viterra's experience with the Code is that it has had a negative impact on port operator/customer relationships and no amendments would make the Code workable or add value to the Australian grain export supply chain.

10. *How relevant are the amendments to the Wheat Port Code recommended by the 2017-18 review to the operation of the Wheat Port Code now?*

Given the significant changes that have occurred in the grain industry, both at a domestic and global level we believe all recommendations from the 2017/18 review should either be dismissed or reassessed as the context of that review is no longer relevant.

However we do comment on some of the recommendations from the 2017/18 review:

a. The suggestion that increased penalties should be considered:

As far as Viterra is aware, there has not been any enforcement action taken, or remedies sought, by the ACCC in relation to potential breaches of the Code since the Code was introduced. This is evidence that the industry has matured and the export options for exporters are many, meaning the maintenance of a Code is unnecessary. Given there is already demonstrated compliance with the Code, it is not clear how the introduction of pecuniary penalties would increase the likelihood of compliance.

Without any evidence that there is a problem, the introduction of heavy handed penalties would be both unnecessary and a further step away from both the Government's and Productivity Commission's vision for industry deregulation.



The ACCC has a range of other means available to it for pursuing any problematic conduct by industry players that may have market power, including under s46 of the Competition and Consumer Act (2010).

- b. The recommendation that Grain Trade Australia take a leading role:

Viterra agrees with the recommendation that Grain Trade Australia should take the lead in engaging with industry to ensure upcountry storage operators, third party exporters and port terminal service providers have a set of industry standards and expectations to which they can comply.

11. *Should the ministerial power to exempt cooperatives under the subclause 5(1) of the Wheat Port Code be retained?*

It is an unusual situation where an entity providing the same services as other large port terminal providers is exempt based solely upon its cooperative status rather than on the level of competition which was the intent of the Code. To ensure exporters are encouraged to buy grain from Australia there should be consistency across states and this ministerial power should be abolished.

Australia competes in an international environment and Australian states compete against one another to export their grain onto the international market. Regulation that is imposed inconsistently creates artificial market distortions. States that are more heavily impacted by the Port Code are disadvantaged compared to other states where the reduction in regulatory oversight results in more flexibility and less cost.

12. *Should the access related regulatory requirements that exempt service providers are not required to comply with (i.e., Parts 3 to 6 of the Wheat Port Code) be retained or amended?*

Viterra position is that the Wheat Port Code including Parts 3-6 should be abolished.

13. *Should the requirement for all port terminal service providers to make available a port loading statement each business day under clause 7 of the code be retained or amended?*

If the industry believes it is worthwhile, Viterra would continue to provide a port loading statement each business day as it has since the Code was introduced. This would be done on the basis that all port terminal operators are required to provide the same information.

Questions for Wheat exporters/access seekers

1. *As an access seeker have you, or do you expect to, rely on aspects of the Code to facilitate the export of bulk wheat? If yes, please outline which provisions and/or entitlements are beneficial to your operations.*

As an exporter of bulk wheat, Viterra has not and does not expect to rely on the Code for its export activities. Viterra has full confidence that the industry participants can continue to provide effective and efficient port access, indeed a high proportion of Viterra's physical exports are already occurring via exempt ports.

2. *As an access seeker do you use the information published under the Wheat Port Code? If so how, and is this information available elsewhere?*

The information is of some use to Viterra's market analysis and export related planning activities, it would not be regarded as business critical however. The information is eventually available through other avenues such as the ABS.



3. *As an access seeker have you exported from exempt and/or non-exempt port terminal facilities? Did your experience differ between exempt and non-exempt facilities and, if so, how?*

Viterra has exported from both exempt and non exempt ports. The experience is different, while the provision of information and requests is about the same, the process in non-exempt ports is more complicated and less timely. We find non-exempt ports to be more rigid and structured. As an exporter, the more flexibility a port operator can offer the more attractive it is to do business through their terminal. Flexibility enables exporters to take advantage of opportunities as they arise or manage existing commitments and changed circumstances - both of which can increase the ability to generate better returns for growers. Dealing with external variables such as vessels, weather, schedules is complex and ever changing. Exempt ports have more options to commercially negotiate beneficial outcomes and flexibility.

Questions for PTSPs

1. *Which aspects of the Wheat Port Code (if any) impose costs on your port terminal services operations? Please outline the nature (and scale) of these costs.*

It is difficult to estimate the costs of the Code but we would suggest that in Viterra's case the estimate of \$360,000 per year (AEGIC report Australia's Grain Supply Chains pg35) is an underestimate.

Viterra has been involved in a number of applications to the ACCC that have resulted in significantly more costs (legal, consultant, employee costs) than the \$360,000 annual estimate in the AEGIC report.

2. *Does being an exempt or non-exempt PTSP affect your port terminal service operations? If so, how?*

- a. Two of Viterra's six ports in South Australia are exempt under the Code. This partial exemption of Viterra's ports brings its own difficulties.

Viterra has chosen to maintain the same port loading protocols across all of its ports to assist in reducing confusion amongst exporters where different port loading rules could apply to exempt and non-exempt Viterra's ports.

One of Viterra's key goals is to simplify the manner in which it does business with its customers. This approach supports Viterra's goal of making South Australia more attractive to exporters who then compete to purchase South Australian growers' grain. This means that Viterra has not been able to pass on the port loading flexibility that could be available under exempt status to exporters (including its own exporting arm).

- b. Operating 4 non-exempt port terminals has meant we have been required to apply to the ACCC for variations to port loading protocols.

See response above at 3. *What are the costs and benefits in retaining, amending or allowing the Wheat Port Code to sunset?*

3. *Should PTSPs be required to publish shipping stem information? What, if any, are the consequences of this reporting obligation on your port terminal service operations?*

As stated in 13 above. If industry considered it worthwhile for shipping stem information to continue to be published, then Viterra would maintain that practice in its current form. This



would be done on the basis that all port terminal operators are required to provide the same information.

Other issues

1. *The availability and transparency of relevant market information to participants in the export supply chain.*

There is sufficient information available to market participants to enable the industry to function effectively while balancing the risks associated with providing the global marketplace with too much detail of stocks and volumes within Australia.

2. *The effectiveness of, and level of competition existing under current arrangements for the transport, storage and distribution of wheat in contributing to a sustainable supply chain from farm gate to export load port.*

There are significant competitive constraints on Vitterra's operations in South Australia.

There are significant competitive constraints from alternative uses of grain, such as domestic consumption (which is increasing) or containerised exports.

There are a range of options available to growers and exporters who wish to bypass Vitterra's bulk export supply chain, including alternative storage providers, on-farm storage and direct to port shipping.

There are low barriers to entry in both upcountry storage and port operations and these barriers are getting lower with the introduction of new technology such as barge operations and mobile ship loaders.

Vitterra has a long track record of operating an effective, efficient, quality assured and responsible export supply chain that benefits growers in South Australia. Vitterra has operated its supply chain responsibly in both a non-regulated monopoly environment and a highly regulated, highly competitive environment. Vitterra takes a long term view of its role in the Australian grain industry and looks forward to improving its services to exporters once the Mandatory Port Code is removed.

Damian Fitzgerald
General Counsel



Reviews of the grain industry since deregulation

						Port code exemptions: CBH Geraldton, Kwinana, Albany, Esperance GrainCorp Newcastle					GPSA – Grain Industry Blueprint			Standing Committee on Agriculture – inquiry into food security in Australia commenced Oct 2022 – Nov 2023	Infrastructure SA 20 year review	
	ESCOSA Rail Access Review					Senate inquiry Grain networks				State Select Committee review of Moratorium on GM –commenced Sept 18	Port code exemption assessment Feb 19 – Jan 20 Graincorp Portland	NCC–SA Port Access Regime 22 Jan	ESCOSA Ports Pricing and Access Review Dec 2021 – Oct 2022	ACCC review of Commodity Ag Port Terminal Services at Albany – March 2023		
	First ACCC Access Undertaking		Second ACCC Access Undertaking	ESCOSA Port Pricing and Access Review		Mandatory port code	ESCOSA Rail Access Regime Review		ESCOSA Port Pricing & Access Review		Port code exemption assessment April 19 – April 20 T-Ports, Lucky Bay	GPSA Grain Industry Blueprint	Productivity Commission Inquiry into Australia’s Maritime Logistics System Dec 2021 – Oct 2022	ACCC review of T-Ports exemption application for Wallaroo, South Australia – April 2023		
	Viterra acquisition		Senate inquiry –Export grain networks	Glencore acquisition	Senate inquiry – Wheat export bill	ACCC Access Extension & Variation	ACCC LTA agreements in SA	Port code exemptions: GrainCorp Port Kembla Patricks Port Adelaide	Port code exemptions: Riordan Geelong Semaphore Pt Adel	ACCC –Third Bulk Wheat Ports Monitoring report	ACCC – Fourth Bulk Wheat Ports Monitoring report	ACCC – Fifth Bulk Wheat Ports Monitoring report	Infrastructure SA 20 year strategy	Standing Committee on Economics – Inquiry into promoting economic dynamism, competition and business formation – Commenced Jan 2023 and ongoing		
2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	➔
Single Desk ends		Productivity Commission inquiry – Wheat export marketing arrangements	SA Port Access Regime	ACCC Viterra port capacity auction variation	Wheat industry taskforce*		Port code exemptions applied: GrainCorp Brisbane, QBT Brisbane, Bunge Bunbury, NAT Newcastle Qube Newcastle, GrainCorp Geelong Emerald Melbourne	ACCC Bulk Wheat Ports Monitoring report	ESCOSA inquiry into bulk grain export supply chains March 17 – Feb 19	Port code exemption assessment July 19 – Ongoing Viterra 6 Ports	Port code exemption assessment Feb 2021 – Ongoing ADM Port Pirie	NCC Port Access Regime Review Jan 22				
			Parliamentary Select Committee – Grain handling					ACCC Review Long Term Agreements in SA	First DAWR review of wheat port open until 2022 federal election					Second DAFF review of wheat port code		
							Ag Competitiveness Issues Paper & Green Paper & White Paper	ACCC 2nd Bulk Wheat Ports Monitoring report		Port code exemption assessment Oct 18 – Mar 20 Riordan’s Portland	Port code exemption assessment Mar 19 – July 20 Cargill		ACCC Sixth and Seventh Bulk Warrants Monitoring Report	ACCC – Bulk Grain Ports Monitoring Report update 2021-22 released 9 Dec 2022		
								AEGIC Supply Chain report			GrainGrowers –Behind Australian Grain		ACCC review of Qube’s acquisition of Newcastle agri-terminal – October 2021	ACCC review of Bulk Cargo Services exemption application for Pinkenba, Queensland – 26 August 2022		

* Wheat industry taskforce inquiries included: 2014 – Inquiry into wheat export quality management practices; 2013 – Inquiry into grain pools as financial products; 2013 – Inquiry into wheat stocks information