

**Senate Economics Legislation Committee**

**ANSWERS TO QUESTIONS ON NOTICE**

**Treasury Portfolio**

Additional Estimates

2014 - 2015

**Department/Agency:** ACCC  
**Question:** AET 47  
**Topic:** EBITDA  
**Reference:** Hansard page no. 135 - 25 February 2015  
**Senator:** Williams, John

**Question:**

Senator WILLIAMS: You looked at that EBITDA multiple for JBS, did you?

Mr Sims: We were aware of it, yes.

Senator WILLIAMS: That should have prompted you into undertaking extremely serious scrutiny of the deal, when they were prepared to pay so much to take out their opposition to get more buyer power. This is a problem. This is my final question. In 2009 the ACCC approved the purchase of ABB in South Australia by Viterra. This was an environment of deregulation of the Australian Wheat Board single desk. Your outfit got it wrong. For the next four years, parliamentary committees were dealing with the competition bottleneck issue that you created. In 2012 you had a further opportunity to review the mess, and it stayed the same. To your credit, you recognised your mistake. I read from your media release that said: The ACCC recognised a number of concerns raised during its public review process. In particular, Viterra is in a strong position in South Australia with a monopoly—  
100 per cent—

Mr Sims: Correct.

Senator WILLIAMS: The media release goes on:

... position in bulk grain port terminal services and significant market share in up-country grain storage and handling.

However ...

Section 50 cannot address issues arising from existing market power, only competition concerns that are likely to result from the proposed acquisition which is being assessed.

So you made a monopoly; then you were stuck with it and you admitted your mistakes.

Mr Sims: I will check and get back to you, but I do not believe we made the monopoly. I think we have only ever allowed takeovers that were already a monopoly, but I will get back to you on that.

**Answer:**

The ACCC's assessment of whether to oppose or not oppose an acquisition is confined to the legal test set out in section 50 of the *Competition and Consumer Act 2010* (Cth) (CCA). Section 50 limits the ACCC's focus to the likely effect of the proposed acquisition on competition, that is, whether a result of the acquisition will be a substantial lessening of competition. The ACCC therefore cannot use the powers provided under section 50 to address competition or market power issues that already exist in the market. As part of its competition assessment of any proposed acquisition, the ACCC compares the likely state of competition if the proposed acquisition proceeds with the likely state of competition if the proposed acquisition does not proceed. Viterra's market power arose primarily from the enduring impact resulting from the historical legislative arrangements regarding South Australian Co-Operative Bulk Handling and the Australian Barley Board.

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The ACCC decided not to oppose Viterra's acquisition of ABB Grain Ltd (ABB) in September 2009 because there was a bare transfer of power and as such there would be no change to the state of competition in the relevant market. The ACCC found that as Viterra did not have any interests in Australia and therefore did not overlap horizontally with ABB in any relevant market, the proposed acquisition would have no impact on market concentration in any Australian market. On the vertical side, the ACCC found that the proposed acquisition would not alter ABB's existing level of vertical integration and therefore was unlikely to increase or enhance the merged firm's ability or incentive to foreclose rivals' access to storage and handling at South Australian port terminals.

The ACCC's assessment also noted the existing and proposed access undertakings provided to the ACCC under Part IIIA of the *Trade Practices Act 1974* (Cth), covering third party access to these facilities and services.

In 2012 the ACCC conducted a public review of Glencor's acquisition of Viterra and looked closely at the issues raised by market participants. The investigation revealed that these issues related to Viterra's existing market position in South Australia and that the proposed acquisition was unlikely to have a material impact on those issues.