Viterra application seeking capacity allocation system approval

Final decision

3 December 2015

Contents

Summary

Under the Port Terminal Access (Bulk Wheat) Code of Conduct (the Code), the ACCC has made a final decision to approve Viterra Operations Limited's (Viterra's) application to introduce long term agreements (LTAs) for the allocation of port capacity at its six South Australian bulk wheat ports.

This decision follows a revised LTA proposal lodged by Viterra in September 2015 (and updated in November 2015) (the November protocols), which substantially addresses the concerns raised in the ACCC's draft decision to not approve the initial application.

Importantly, the key amendments included in the November protocols, together with other features and safeguards of the proposal, strengthen the negotiating position of smaller and medium sized exporters seeking long term capacity (LTC) and facilitate competition.

In particular, the November protocols include a mechanism for the ACCC to review the initial LTC allocation process, which provides a discipline on Viterra's LTC allocation decisions.

This decision means that Viterra's current auction and first-in-first-served (FIFS) processes for allocating port capacity will be replaced with a negotiation based framework using LTAs as the primary allocation method. The FIFS process to allocate a reserved amount of short term capacity (STC) on an annual basis will be carried over, with some modifications.

Process

Under the Code, the ACCC has a role in approving the system for allocating port terminal export capacity used by a port terminal service provider. Viterra formally lodged an initial proposal in March 2015 and made subsequent revisions in June, September and November.

Throughout this period the ACCC has engaged extensively with stakeholders and Viterra on the proposals, in addition to reviewing a number of related capacity allocation activities that occurred through the period, such as Viterra's initial call for LTC bids and the 2015-16 capacity allocation auctions.

The November protocols now include a suite of measures that balance the interests of stakeholders and facilitates competition in the South Australian bulk wheat export industry and related markets by providing a more transparent, equitable and accountable capacity allocation system.

ACCC assessment

In making its final decision, the ACCC has had regard to the matters listed at subclause 25(3) of the Code. In doing so, the ACCC's assessment of Viterra's proposal has considered the benefits and industry support for LTAs as well as the interests of a range of stakeholders.

The ACCC recognises the potential benefits of LTAs to both port terminal service providers and exporters. These can include greater certainty for exporters in planning their long-term grain export programs and assist infrastructure owners with supply-chain planning.

The ACCC notes that the concept of LTAs has broad support amongst exporters. In relation to Viterra's proposal, LTAs should be less costly for exporters than the current auction system and many exporters value the flexibility allowed by the protocols surrounding how an exporter can develop their LTC applications. The removal of the current auction system will also provide exporters greater scope to trade and transfer slots, due to the removal of rebates as a consideration in secondary trading.

Draft decision

The ACCC's draft decision noted a number of concerns with Viterra's proposed LTA system under the June protocols. In particular:

- The ACCC was concerned around the level of discretion that Viterra would have in relation to LTC allocation in the case of oversubscription. Viterra's proposal gave priority access to capacity to larger exporters who seek more capacity at more ports or months in their applications. As a vertically-integrated port operator, Viterra had the discretion and incentive to favour its own trading arm, Glencore, in any allocation. In any event, Glencore has been the largest exporter from South Australia in recent years and this is likely to continue to be the case.
- The ACCC also identified that the five year term of the proposed capacity allocation system would run the risk of effectively locking in a market structure dominated by the largest exporters for a significant period of time. This could have had implications for the ability of smaller exporters to grow or new exporters to enter the market.
- The ACCC was also concerned about the ability of all exporters to have adequate access to annual STC – including exporters who would be unable or unwilling to obtain LTC.

The draft decision also recognised certain benefits and safeguards of the proposal, including:

- The option for the ACCC to require an annual independent audit of the capacity allocation system.
- The ongoing use of a FIFS system to allocate annual STC.
- A range of transparency measures concerning the allocation of LTC.

The decision also considered the operation of Viterra's current auction system and acknowledged the support from most exporters for its replacement with LTAs.

Considering the interests of all stakeholders, including growers, the ACCC acknowledged that the draft decision was finely balanced but decided it was not appropriate to accept Viterra's proposed LTA system. The ACCC noted it would consider its final decision in light of feedback from stakeholders. The draft decision also noted that the ACCC may accept an amended proposal from Viterra that adequately addressed the concerns raised by the ACCC.

Revised proposal

Viterra's November protocols substantially address the ACCC's key concerns identified in the draft decision. The two key amendments included in the revised proposal are:

- An ACCC review process and objection notice, which if exercised would require Viterra to revert to the current auction system.
- A reduction in the overall long term agreement term from five years to three, followed by subsequent two year allocations.

These amendments, in conjunction with the other safeguards and features included in the proposal, will better serve the interests of all stakeholders. The ability for the ACCC to object to the continuation of the proposed LTA allocation system beyond the initial three year period provides a level of discipline over Viterra's initial LTA allocation decisions.

Viterra will also have incentives to provide LTC to a range of exporters, and all parties will have equal access to the reserved amount of STC though the FIFS process. In addition, it is likely that more exporters will be able to enter into LTAs for a greater proportion of their overall capacity requirements, meaning that STC is less likely to be oversubscribed.

Furthermore, the November protocols provide additional clarity around the proposed LTC arrangements and ensure they are consistent with the intent expressed in Viterra's September submission.

Considering the matters in subclause 25(3) against the revised proposal, the ACCC has made a final decision to approve Viterra's varied capacity allocation system included in the protocols submitted on 10 November 2015.

The ACCC's full assessment of Viterra's LTA proposal is set out in chapter 4 of this document.

1. Introduction

The Code was made under section 51AE of the *Competition and Consumer Act 2010* (CCA). It commenced on 30 September 2014 and regulates the conduct of bulk wheat port terminal service providers.

The Code provides for processes whereby the ACCC can approve the capacity allocation system for allocating a port terminal service provider's port capacity. See Appendix A for more information on the Code.

1.1 Capacity allocation under the Code

Under the Code, the ACCC has a role approving the system for allocating port terminal export capacity used by a port terminal service provider.

Subclause 25(5) of the Code provides that a capacity allocation system may be taken to be approved by the ACCC if it was included in an undertaking that was accepted by the ACCC and in force immediately before 30 September 2014. This means that some port terminal service providers are operating capacity allocation systems which were accepted by the ACCC as part of an access undertaking under the previous 'access test' regime.

If a port terminal service provider's capacity allocation system has not been approved by the ACCC in accordance with subclause 25(3), and is not taken to be approved by the ACCC under subclause 25(5), subclause 25(2) provides that the port terminal service provider may only allocate capacity up to six months in advance.

In deciding whether to approve a capacity allocation system under the Code, the ACCC must have regard to the matters specified in subclause 25(3) of the Code. These matters are:

a) whether the capacity allocation system will operate efficiently fairly and consistently with clause 10 (non-discrimination); and

b) whether the capacity allocation system will operate efficiently and provide sufficient information to exporters about the capacity of port terminal facilities owned or operated by the port terminal service provider to help exporters plan export activities and acquire required port terminal services; and

c) whether the capacity allocation system will operate efficiently and provide flexibility and transferability of shipping slots, including the ability to move allocated capacity of port terminal facilities owned or operated by the port terminal service provider across times or ports where appropriate; and

d) whether the capacity allocation system will operate efficiently and contains mechanisms to ensure that the provider takes all reasonable steps to ensure that capacity of port terminal facilities owned or operated by the port terminal service provider is not unused during times of peak use; and

e) the potential effects that the capacity allocation system has on upstream and downstream markets; and

f) the business interests of the port terminal service provider; and

g) the public interest, including the public interest in having competition in markets; and

h) the interest of exporters wanting access to port terminal services; and

i) the economically efficient operation and use of, and investment in port terminal facilities; and

j) any other matters that the ACCC considers relevant.

1.2 Viterra's application

Prior to the Code commencing and from September 2009, access arrangements at Viterra's facilities were governed by a series of access undertakings. Viterra (and its predecessor ABB Grain) was obliged to have an access undertaking accepted by the ACCC due to the fact that it was vertically integrated into exporting grain. Currently, Viterra's parent company Glencore is the largest exporter from South Australia.

From 2012 under the undertaking arrangements, Viterra has used an auction system and a secondary FIFS process to allocate capacity across its ports. From 30 September 2014 the Code has applied to Viterra's provision of port terminal services at the facilities.

Under the access undertaking regime, Viterra's facilities were subject to a number of requirements, some of which are similar to those contained in the Code. For example, in relation to third party port access, Viterra was required to comply with a non-discrimination provision. This is also a requirement under clause 10 of the Code.

Viterra's application to introduce long term agreements has undergone several iterations:

- On 12 March 2015, Viterra submitted an application to the ACCC seeking approval of its proposed capacity allocation system in relation to services provided at port terminal facilities (the March protocols).
- On 12 June 2015, following the release of the ACCC's issues paper (discussed below),[1] Viterra provided a revised capacity allocation system for the ACCC's approval (the June protocols).
- On 22 September 2015, Viterra submitted a submission in response to the draft decision and a revised capacity allocation system (the September protocols)
- On 10 November 2015, Viterra lodged an updated set of port loading protocols (the November protocols) for the ACCC's approval. These protocols are consistent with the September protocols but provide additional clarity around the proposed long term capacity arrangements.

Further details of Viterra's application are set out in chapter 2 and as relevant throughout this document. Viterra's full submissions in support of its application and the associated proposed port loading protocols are available on the ACCC's website at https://www.accc.gov.au/regulated-infrastructure/wheat-export/viterra-2015.

1.3 ACCC capacity allocation assessment timeline

On 16 October 2014, the ACCC released its Guidelines regarding the process for approving capacity allocation systems under the Code (the Guidelines).

[1] ACCC, Issues paper - Viterra application seeking capacity allocation system approval under the Port Terminal Access (Bulk Wheat) Code of Conduct, 2 April 2015.

The Guidelines set out that, when a port terminal service provider submits a proposed variation to a capacity allocation system, the ACCC will seek to conduct its assessment and decide whether to approve the system within 12 weeks.

This timeframe may vary where the ACCC consults on the proposed system application, and/or requests information from the port terminal service provider. Generally, the length of any consultation period(s) will extend the ACCC's timeframe for the assessment.

Each capacity allocation system assessment process may be different and may include requests for information, consultation with interested parties, and a draft determination before the ACCC makes its final determination. The Guidelines, which are available on the ACCC's website, provide further detail around the ACCC's process for approving capacity allocation systems.

Table 1: ACCC assessment to date

Date	Action
12 March 2015	Viterra lodged an application to introduce long term agreements.
2 April 2015	ACCC released an Issues Paper and invited public submissions by 24 April 2015.
30 April - 5 May 2015	ACCC published 12 public submissions received from interested parties.
12 June 2015	Viterra lodged a revised long term agreement proposal.
16 July 2015	ACCC published a draft decision on the capacity allocation system and invited public submissions on its preliminary views by 31 July 2015.
11 August - 24 Sept 2015	ACCC published three public submissions received from interested parties in response to its draft decision.
22 September 2015	Viterra lodged a further revised long term agreement proposal
10 November 2015	Viterra provided an updated set of port loading protocols for the ACCC's approval
3 December 2015	ACCC published a final decision on the capacity allocation system.

1.4 Public consultation

The ACCC released an Issues Paper on 2 April 2015 seeking public submissions on Viterra's application and related key issues. In response, the ACCC received twelve public submissions from:

- GrainCorp (exporter and vertically integrated port terminal service operator, transport and storage operator)
- CBH (exporter and vertically integrated port terminal service operator, transport and storage operator)
- Quadra (exporter)
- AvantAgri (Agribusiness consultants and grain marketers)
- Profarmer Australia (agricultural data and information services provider)
- Noble (exporter and vertically integrated port terminal service operator, transport and storage operator)

- Emerald (exporter and vertically integrated port terminal service operator, transport and storage operator)
- Grain Producers South Australia (grower representative group)
- Australian Grain Growers Co-operative (grain trader and pool manager)
- ADM (exporter)
- Bunge (exporter and vertically integrated port terminal service operator, transport and storage operator)
- Geoff Ryan (SA grower).

The ACCC released a draft decision on 16 July 2015 to not approve Viterra's application, noting that the draft decision was finely balanced. In response, the ACCC received three public submissions from:

- Viterra
- Grain Producers South Australia
- ADM.

Details of public submissions provided in response to the ACCC's draft decision, as well as the ACCC's response to stakeholder views, are set out in chapter 3 as well as throughout the rest of this document as relevant.

The ACCC also undertook market inquiries with a number of industry participants in relation to Viterra's revised September protocols, which were provided to the ACCC following release of the ACCC's draft decision to not approve Viterra's June protocols. This aspect of the ACCC's consultation process focused on stakeholders who previously raised concerns with Viterra's LTA proposal.

All public submissions received in response to the ACCC's various consultation processes on its Issues Paper and draft decision are available on the ACCC's website at https://www.accc.gov.au/regulated-infrastructure/wheat-export/viterra-2015

1.5 Outline of this document

The structure of this final decision document is as follows:

- Chapter 2 provides an outline of Viterra's proposed LTA capacity allocation system, including the revised proposal lodged by Viterra in September 2015.
- Chapter 3 outlines stakeholders views provided in response to the ACCC's draft decision, as well as the ACCC's response to stakeholder views.
- Chapter 4 sets out the ACCC's final assessment of Viterra's LTA proposal against the matters in subclause 25(3) of the Code.
    - The ACCC's final assessment draws on its draft decision, as well as a variety of information, analysis and findings presented in chapters 2 and 3, and information contained in Appendices B and C (see below).
- Chapter 5 sets out the ACCC's final decision.

- Appendix A provides background information on the Code.
- Appendix B outlines the current auction-based capacity allocation system framework and the ACCC's views on the operation of Viterra's auctions.
- Appendix C gives an overview of South Australia's bulk wheat export supply chain, including the characteristics of the SA port terminals, including their capacity and the demand for their services. It also outlines the level of competition in upcountry storage and handling, as well as the transport network.

1.6 Further information

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

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2. Viterra's proposed capacity allocation system

This chapter outlines the main features of Viterra's proposed LTA capacity allocation system.

2.1. Background

Viterra currently has approval to allocate its port capacity via a series of auctions, and to then allocate residual capacity via a FIFS process. Further information on the auction system is included in Appendix B.

This capacity allocation system was included in an access undertaking accepted by the ACCC in 2012. As at 30 September 2014, Viterra's current capacity allocation system was taken to be approved by the ACCC under the subclause 25(5) of the Code.

Viterra now proposes to replace the auction mechanism for allocating capacity with a negotiation based framework to allocate LTC as the primary method of capacity allocation. It carries over the current FIFS process to allocate a reserved amount of annual STC, with some modifications.

As noted in section 1.2, Viterra's proposal has undergone several iterations. The following sections outline the details of the November protocols as compared to earlier proposals (where applicable). It should be noted that, following the ACCC's draft decision to not approve the June protocols, Viterra allocated port capacity for the 2015-16 season using its current auction and FIFS capacity allocation process.

2.1.1. Changes to Viterra's proposed LTA system following draft decision

A key change to Viterra's LTA proposal included in the November protocols relates to the proposed term of the LTAs.

Viterra's revised protocols specify that:

- long term agreements will be available for an initial term of three years, for the period commencing 1 October 2016 and ending on 30 September 2019, and
- exporters' initial long term agreement applications will need to be for a minimum of 25,000 tonnes of capacity in each of the three years.[2]

Exporters requesting LTC after the initial allocation process, for both the first three year period and subsequent periods, will not need to apply for a minimum tonnage.

Viterra will also have the ability to run further additional long term capacity nomination processes for each subsequent two year period.

The November protocols provide additional clarity around clause 3.5(b) of the protocols to make it clear that initial applications for LTC must be for a minimum of 25,000 tonnes per year for three years. However, after this initial allocation, exporters can apply within the same three year period for any residual capacity they are interested in.

This amendment was to ensure the protocols are consistent with the intent expressed in Viterra's September submission.

[2] Viterra, Proposed Variations to Viterra's Port Loading Protocols to introduce Long Term Agreements: Submission on the Australian Competition and Consumer Commission's Draft Decision dated 16 July 2015, 22 September 2015, p. 8.

2.1.2. ACCC ability to object to the initial three year allocation

Viterra also amended its proposal to allow for an ACCC review process whereby the ACCC may issue an objection notice if it considers that the initial allocation process did not operate efficiently, fairly and consistently with clause 10 of the Code.[3]

This ACCC review process has the following features:

- Unless the ACCC issues an objection notice by 1 February 2017, Viterra may commence the long term application process for bookings in the subsequent two year allocation periods.
- If the ACCC issues an objection notice, all bookings relating to slots allocated via the initial three year allocation period will continue to apply, but bookings relating to the subsequent two year periods will be allocated in accordance with the current auction and FIFS system.
- Clients will not be permitted to move any booking made for the initial three year period to any slot occurring after the end of this initial period.[4]
- The ACCC may withdraw an objection within 40 business days if, in all the circumstances, it becomes aware that the reasons specified in the objection notice no longer exist.[5]

Viterra has also altered its protocols to remove the duration of proposed long term contracts as one of the factors relevant to assessing the allocation of initial long term capacity to oversubscribed slots under section 3.6(g) of the proposed protocols.[6]

Aside from the above changes and other more minor amendments, the November protocols are largely the same as the June protocols.

Further details of Viterra's application are set out below and as relevant in chapter 4 of this document. Viterra's submissions in support of its application are available on the ACCC's website at https://www.accc.gov.au/regulated-infrastructure/wheat-export/viterra-2015.

2.2. Proposal overall

In Viterra's initial submission supporting its LTA proposal it noted that:

> (i) The operation of the capacity allocation system will be transparent. Viterra will publish clear information about the capacity that is available for booking, the process for booking and the results of the booking process;
>
> (ii) Under the proposed capacity allocation systems, clients will all have an equal opportunity to acquire either long term capacity and/or short term capacity in order to satisfy their genuine exporting requirements;
>
> (iii) The proposed system for allocating long term capacity is designed specifically to be fair in the sense that it provides a high level of flexibility for clients to negotiate and acquire services to meet their individual requirements. This includes a flexible duration for agreements, no minimum tonnage requirements, no minimum port terminal requirements, and no minimum slot requirements (or requirement to spread tonnages across different periods);

[3] Viterra, November protocols, p. 37

[4] ibid, p. 38

[5] ibid, p. 37

[6] Viterra, submission on the ACCC's draft decision, p. 8

(iv) The fair operation of the proposed capacity allocation system is strongly promoted and protected by numerous safeguards that Viterra has included, in direct response to issues raised by clients and the ACCC;

(v) The fair operation of the proposed capacity allocation system will be further promoted and protected by the ability to appoint an independent person to audit Viterra's compliance with the non-discrimination provisions under the Code.[7]

Viterra however submits that, relative to its earlier LTA proposal, the changes included in its revised protocols regarding the term of the agreements (outlined in the section below) represent an approach that will provide less flexibility for its customers and reduced benefits for Viterra as infrastructure owner.[8]

Viterra further submits that:

> the changes are provided as a direct response to the ACCC's statement in the Draft Decision that reducing the term of the proposal (for example allowing three year contracts only) would resolve many of the [ACCC's] concerns.[9]

2.3. Long term capacity allocation framework

2.3.1. Application procedure for LTC

Similar to Viterra's previous LTA proposal (the June protocols) considered in the ACCC's draft decision, Viterra's revised protocols also propose relatively few parameters about an exporter's ability to seek long term capacity.

Viterra's revised protocols however propose certain changes to the application procedure for long term capacity. The main changes are set out above in sections 2.1.1 and 2.1.2.

The November protocols retain the following features of the June protocols:

- no minimum port terminal requirements;
- no minimum slot requirements (or requirement to spread tonnages across different periods);
- an ability to negotiate the terms of the long term agreement either before or after Viterra accepts the client's offer to acquire capacity on its published standard terms for long term agreements; and
- an ability to submit offers for long term capacity in respect of any grain.[10]

2.3.2. Caps on applications

As was the case in the June protocols, the November protocols propose the same cap thresholds for the maximum percentage of long term capacity that exporters could apply for when seeking initial LTC at any one port per quarter.

The long term capacity caps per exporter are defined in the protocols as follows:

> (a) 40%, at the Outer Harbor and Port Lincoln Port Terminals in the 6 month period commencing 1 January and ending 30 June; and

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[7] Viterra, submission, 12 March 2015, p.18.

[8] Viterra, submission on the ACCC's draft decision, p. 8

[9] ibid, p. 8

[10] Viterra, submission, 12 March 2015, paragraph 4.9 - 4.10, p. 7.

(b) 50%, in all other cases.[11]

The protocols also describe how the LTC caps may be exceeded:

> 3.5(d) Notwithstanding clauses 3.5(a) and 3.5(c), a Client may be allocated more than the Initial Nomination Cap as a percentage of the Initial Long Term Capacity available at a Port Terminal as a result of negotiations conducted in accordance with these Protocols.[12]

In accordance with the protocols, an exporter's share of total exports per port per quarter could increase above the 40% or 50% caps because of:

- the adjustments for efficiency during the initial LTC negotiations.
- successful FIFS applications.
- successful allocation of additional STC or LTC.
- secondary trading.

Information relating to stakeholder comments about the caps is included at section 4.2.3.3

2.3.3. Process for allocating LTC, including in case of oversubscription

Similar to the June protocols, the November protocols establish an allocation process for LTC. The process includes:

- Transparency measures to provide all exporters the opportunity to gauge the level of interest in LTC during and after the allocation process. For example, Viterra is required to publish the amount of aggregate tonnes for which it has received applications in respect of each Quarter at each port terminal.
- Opportunities for exporters to revisit applications, taking into account the overall demand for slots and/or potential spare capacity which might be available.
- An allocation process for oversubscribed LTC.

In the case of oversubscription for a particular LTC slot, Viterra has noted it will enter negotiations with exporters to see if there is scope for Viterra to accommodate an exporter's request or contemplate alternative arrangements.[13]

Where certain shipping slots remain oversubscribed after the negotiation process, Viterra will decide which exporters, from those that have applied, will be allocated the oversubscribed LTC at its ports. Viterra will allocate LTC in accordance with the following factors:

> (i) Viterra's overarching objective of maximising the amount of Long Term Capacity allocated and maximising the efficient operation of the supply chain;
>
> (ii) nominations for Long Term Capacity at multiple Port Terminals will generally be accepted in priority to nominations for Long Term Capacity at fewer Port Terminals;
>
> (iii) nominations for Long Term Capacity in more Slots in a Year will generally be accepted in priority to nominations of Long Term Capacity in fewer Slots in a Year;
>
> (iv) nominations for larger amounts of Long Term Capacity will generally be accepted in priority to nominations for smaller amounts of Long Term Capacity; and
>
> (v) Long Term Capacity will be allocated in priority to Clients who:

[11] Viterra, November protocols, p. 6

[12] Viterra, November protocols, p.13.

[13] Viterra, submission, 12 March 2015, p. 10.

(A) have a demonstrated ability to accumulate Grain at the relevant Port Terminal as required to utilise the Long Term Capacity sought;

(B) can reasonably demonstrate to Viterra that they intend to physically export Bulk Wheat or other Grains themselves and that there is a reasonable likelihood that they themselves will utilise the Long Term Capacity sought; and

(C) have demonstrated flexibility and responded promptly during the negotiation of their requirements in respect of over-demanded Slots.

(vi) In having regard to and balancing the factors listed in clause 3.6(g), Viterra may have regard to the requirements of individual Port Terminals and the weight attributed to the various factors may differ across Port Terminals.[14]

The effect of these factors is that, where LTC capacity is oversubscribed for particular slots, Viterra will provide preference to exporters who can make larger commitments to shipping across ports and across the shipping year.

2.4. Short term capacity allocation framework

Viterra currently operates a FIFS allocation process for residual capacity not allocated after the auction.

Consistent with the June protocols, the November protocols propose to use the same FIFS framework to allocate short term capacity (STC) on an annual basis, after conducting its negotiation based framework to allocate initial LTC. Viterra will also use the process to allocate any additional STC that becomes available, either after being surrendered by an exporter and/or developed by Viterra (for example in response to elevated seasonal demand).

Viterra has proposed the following process by which to allocate STC each year:

5.1 Any long term capacity that is not contracted at the time the shipping stem opens for the relevant year, together with all capacity that is reserved as short term capacity for that year (see section 4.4 above), will become available for booking on a first-in-first-served basis when the shipping stem opens for that year.

5.2 Viterra will publish details of all short term capacity that is available for booking at least 10 business days before the shipping stem opens.

5.3 To ensure that all clients have an equal and fair opportunity to book capacity through the first-in-first-served system, the Protocols will provide that, during the first 2 business days after the shipping stem opens, each client (together with its related entities - unless the related entity operates a commercially separate export function) will only be able to make one booking each 15 minute period commencing on the hour.

5.4 The Protocols will also provide that no clients will be able to move bookings during this 2 business day period. This will ensure that “moved bookings” do not reduce the opportunities for new bookings in the immediate period after the shipping stem opens (and during which demand for first-in-first-served bookings is likely to be greatest).[15]

Also in line with the June protocols, Viterra will make at least 500,000 tonnes of capacity per each quarter of the year as STC.

Viterra intends to spread STC across all port terminals broadly in line with the proportion of capacity offered at auction at each port terminal during the 2015-16 year. Viterra notes that for operational reasons, this cannot precisely reflect the proportion of capacity offered at

[14] Viterra, November protocols, pp. 14, 15..

[15] Viterra, submission, 12 March 2015, p. 12.

auction at each port terminal during the 2015-16 year. However, Viterra's intention is that it will broadly be in line with this proportion.[16]

While the provisions do not require Viterra to provide STC in particular proportions across ports, Viterra will provide information to the market as to why those proportions may have changed.[17]

2.5. Repositioning and tradability of capacity

As per current arrangements, Viterra will provide exporters the opportunity to reposition and trade their shipping slots. Exporters will be able to transfer:

> (a) long term capacity to any other client that, unless Viterra otherwise consents, has a long term agreement in place for the relevant marketing year in which the transferred slot occurs;
>
> (b) long term capacity to a client that does not have a long term agreement (or does not have a long term agreement in place for the period in which the transferred slot occurs) after the shipping stem opens for first-in-first-served bookings for the relevant marketing year; and
>
> (c) short term capacity after the shipping stem opens for first-in-first-served bookings for the relevant marketing year.[18]

However, in relation to LTC, Viterra has imposed certain timing constraints around when transfers can occur. Specifically:

> Except with Viterra's prior consent, clients will not be able to move long term capacity (e.g. to another month or port terminal) unless and until the shipping stem has opened for first-in-first-served bookings in respect of the marketing year to which the long term capacity relates. As set out above, clients will not be able to move bookings during the initial 2 business day period after the shipping stem opens.[19]

Otherwise, existing arrangements relating to transferability will continue under the proposed capacity allocation system. In essence, pending Viterra's approval, exporters may trade capacity and/or move capacity allocations over time and/or between ports (other than LTC being restricted as noted above).

Exporters will have the ability to surrender capacity to Viterra. The proposed protocols set out a range of possible refunds an exporter may obtain, subject to timing and the subsequent reallocation of the returned capacity.

2.6. Payment terms

Similar to the June protocols, the November protocols provide detail around when booking fees for long term capacity will need to be paid:

> 3.9 Long Term Agreements – Booking fees
>
> Unless agreed by Viterra and a Client in writing, Clients will be required to pay:
>
> (a) the booking fees for Long Term Capacity acquired in respect of any Year (as specified in the Pricing Document) by no later than 1 July of the previous Year.[20]
>
> (b) If a Client does not comply with clause 3.9(a):

[16] Viterra, November protocols, p. 18

[17] ibid, p. 18.

[18] Viterra, submission, 12 March 2015, p. 13.

[19] ibid, p 13.

[20] Viterra, November protocols, p. 17.

(i) Viterra may re-offer the relevant Long Term Capacity allocated to that Client to other Clients; and

(ii) the Client must pay to Viterra, as a debt due and payable, the booking fees payable in respect of the Long Term Capacity that was allocated to it (and which remains unpaid).

(c) Viterra may seek Credit Support in respect of the obligations set out in this clause 3.9.

Payment terms are addressed in greater detail at section 4.2.3.4.

2.7. Non-discrimination obligation and the appointment of an Independent Auditor

The November protocols retain the process whereby the ACCC can require Viterra to appoint an independent auditor to provide a report addressing Viterra's compliance with its non-discrimination obligations under the Code. In particular, the auditor will examine Viterra's approach to the allocation of oversubscribed LTC.

The protocols state:

> 13.3 Non-discriminatory access
>
> (a) The ACCC may by notice in writing require Viterra to appoint an Auditor to provide a report in relation to Viterra's compliance with clause 10 of the Code in undertaking the Capacity allocation processes set out in Parts B and C of these Protocols. If the ACCC requires Viterra to appoint an Auditor, the provisions set out in Attachment 3 will apply.
>
> (b) The ACCC may authorise any powers under this clause 13.3 on behalf of the ACCC.[21]

Detailed information about the scope of the role of the Auditor is set in Attachment 3 of the protocols. Specifically the Auditor in preparing a report is to have regard to the following matters:

> (i) the requirements in clause 10 of the Code;
>
> (ii) whether Viterra has complied with the terms of these Protocols;
>
> (iii) if the matter under consideration by the Auditor relates to the allocation of Long Term Capacity, whether that allocation is reasonable in all the circumstances, having regard to:
>
> > (A) the size and significance of Viterra as a Client that exports Grain through the Port Terminals;
> >
> > (B) whether any allocation of Long Term Capacity may involve a systemic, material or unreasonable outcome in favour of Viterra as a Client (noting that Viterra is entitled to use its own infrastructure and, as a significant Client, there are circumstances in which highly demanded Long Term Capacity will justifiably be allocated to Viterra);
> >
> > (C) the reasonableness of efforts made by Viterra to accommodate initial demand for Long Term Capacity and to negotiate satisfactory Long Term Capacity outcomes for both Viterra and other Clients; and
> >
> > (D) Viterra's reasons for allocating Long Term Capacity in the manner that it did. Viterra will document its reasons for any allocation of Long Term Capacity under clause3.6(g) of the Protocols at the time of such allocation, and will make those written reasons available to the Auditor.[22]

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[21] ibid, p. 36.

[22] ibid, pp. 50 - 51.

The protocols also set out the following limitation on the ACCC in regard to the audit process:

> (i) (Limit on audits) The ACCC must not require Viterra to appoint an Auditor to undertake an audit under clause 13.3 of the Protocols more often than once in each 12 month period.[23]

2.8. Transitional provisions

The November protocols set out that Viterra's capacity allocation period will commence from 1 October 2016. Viterra has already run its current auction and FIFS capacity allocation processes to allocate capacity until this date (i.e. for the 2015-16 season). The November protocols also set out the following process to facilitate a transition from the current capacity allocation processes to the proposed LTA system:

> (a) Notwithstanding any other provision of these Protocols, to effect the transition from the Auction system to the allocation system set out in these Protocols, the following transitional provisions will apply:
>
> (i) Viterra will continue to offer and allocate Capacity to clients on a first-in-first-served basis for Slots occurring on or before 30 September 2016;
>
> (ii) in relation to Port Terminal Capacity that has been allocated to a Client by Auction in accordance with the Previous Protocols:
>
> (A) a Client may transfer or move a Booking of that Capacity allocated by Auction;
>
> (B) an Auction Premium Rebate (if any) will be calculated and payable by Viterra to an individual Client in respect of that Capacity, or paid to a Transferee in respect of a transferred Booking of Capacity allocated by Auction (as applicable); and
>
> (C) the Auction Provider may disclose information about the Client to Viterra and Viterra may publish this information,
>
> in each case in accordance with, and subject to the rules and procedures, contained in, the Previous Protocols.
>
> (b) To give effect to clause 18.1(a), the Previous Protocols will continue to apply to all Bookings that are both made and executed on or prior to 30 September 2016.[24]

[23] ibid, p. 51.

[24] ibid, p. 38

3. Industry response to the ACCC's draft decision

Viterra, Grain Producers South Australia and ADM provided public submissions on the ACCC's draft decision. The views set out in these submissions are outlined below, together with the ACCC's response to these views.

The ACCC has also addressed certain stakeholder views directly in its final assessment of Viterra's LTA proposal and refers readers to chapter 4 for further explanation of the ACCC's views.

3.1. Viterra's views

Viterra provided a public submission on 22 September 2015 addressing various aspects of the draft decision.

3.1.1. Availability of commercial choices

Viterra submits that the draft decision overstates the need for particular exporters to acquire capacity at particular port terminals at particular times. Viterra further submits that the draft decision:

> appears to proceed on the mistaken view that only capacity at Outer Harbor and Port Lincoln during the February to May period is "meaningful capacity" [25]

Viterra also notes that:

> Over the past 4 years, at least 10 exporters have secured either all or more than 80% of the capacity they acquire from Viterra at port terminals other than Outer Harbor and Port Lincoln between the February to May period. In addition, of the 24 exporters to use Viterra's port terminal facilities between 2012 and 2015, 18 acquired the majority of their capacity at other ports or in other periods. This has not had any apparent impact on their ability or willingness to participate "meaningfully" in the exporting of grain from South Australia.[26]

ACCC view

The ACCC remains of the view that a key element of its assessment is the consideration of demand for export capacity, and the likely capacity constraints at Port Lincoln and Outer Harbor during the peak shipping period.

Regarding the focus on Port Lincoln and Outer Harbor terminals, the data presented in the draft decision shows over the three seasons to 2013-14, Viterra's Port Lincoln and Port Adelaide (Outer Harbour) terminals have exported the most grain of the six Viterra port terminals in South Australia. A likely key reason for this is the advantage of both of these terminals being located at deeper water harbours, and therefore able to accommodate larger vessels, and also that both terminals have rail access.

Viterra's website notes that Port Lincoln, as a natural deep water harbour, is attractive to large bulk grain carriers for topping up loads from shallow ports in South Australia and Victoria.[27] Viterra also notes that Port Adelaide is the major port of South Australia's capital city and that Outer Harbor was custom-built on the deep-water berth to allow larger vessels to load.[28]

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[25] Viterra, submission on the ACCC's draft decision, p. 2

[26] ibid, p. 2

[27] Viterra, http://www.viterra.com.au/ports-shipping/viterra-port-terminals-2/port-lincoln

[28] Viterra, http://www.viterra.com.au/ports-shipping/viterra-port-terminals-2/outer-harbor

While the ACCC understands that exporters have also used Viterra's other port terminals to execute shipments, it is clear that overall, Port Lincoln and Outer Harbor are the most popular SA bulk wheat port terminals. Several interested parties supported this view in their submissions to the ACCC's Issues Paper.

This view was also evident in the recent 2015-16 auction and FIFS capacity allocation processes where capacity booked at Port Lincoln and Outer Harbor represented 85.3 and 80.6 per cent of capacity on offer at each terminal respectively.[29] These were the highest proportions of capacity booked at the SA terminals, with the third highest being Port Giles, where 47.8 per cent of capacity was booked.

The ACCC's analysis of demand for export capacity is foremost concerned with situations where there is, or there is likely to be, excess levels of demand and capacity constraints. In such situations, the ACCC's key concern is the extent to which a vertically integrated service provider can discriminate in favour of its own trading business by allocating itself the majority of capacity. The ACCC's view is that these situations are most likely to occur at the Port Lincoln and Outer Harbor terminals.

Regarding the focus on a peak shipping period, the data presented in the draft decision also indicates a cyclical nature to shipping activity in South Australia, where, like in other regions of Australia, more grain exports occur in the first half of the calendar year. This view was also supported by a number of stakeholders.

The ACCC has previously recognised that exporting wheat during the peak period (in the first half of the calendar year) will generally provide the best returns for marketers. As noted above, a key concern from the ACCC's perspective is therefore the extent to which a vertically integrated service provider can discriminate in favour of its own trading business, in this context by allocating itself the majority of peak period capacity and allowing it to obtain the best prices.

In addition, the rebate mechanism in the current auction system was intended to incentivise exporters to execute shipments across the year, and not focus solely on peak period shipping. The ACCC considers that to the extent that the rebate incentive had a practical effect, removing this incentive to spread shipments over the year further suggests that access to peak ports in the premium shipping period is a very relevant consideration.

3.1.2. Potential for oversubscription

Viterra submits that the draft decision appears to be based on incorrect assumptions about the likely demand for export capacity and the potential level of oversubscription for export capacity. Viterra submits that this is due to four main factors.

- Viterra believes that the ACCC's analysis appears to place undue weight on the level of initial demand for port terminal capacity in the 2010-11 season, and that this particular season could be identified as an outlier and could be excluded. Further, Viterra considers that other seasons (prior to 2010-11) should be considered.[30]
- Viterra claims that the ACCC's analysis of likely future oversubscription of capacity are based on the levels of capacity made available in previous seasons, rather than the higher amounts of capacity that will be made under the long term proposal (as reflected in Viterra's notice dated 9 July 2015).[31]

[29] Viterra, submission on the ACCC's draft decision, p. 16

[30] Viterra, submission on the ACCC's draft decision, p. 2

[31] ibid, p. 3

- Viterra considers that the ACCC's analysis of "tonnes actually shipped" does not accurately reflect the previous or future demand for initial bookings. Viterra notes that:

  > There are a range of matters that may result in shipments occurring in a month that differs from the initial booking (including the grace period, booking movements, shipping queues, vessels failing survey, vessels arriving at the end of their allocated slot, delays in loading or re-prioritisation of loading). A further range of operational matters (e.g. exporters deciding to split bookings and/or use the 10% tolerance) can also create a material divergence between the tonnes booked for, and tonnes executed in, any particular period.[32]

- Viterra also notes that the draft decision does not appear to consider fully the significant risks (such as production risk, drought, global price risk, and marketing and execution risks) for exporters in entering into long term take-or-pay agreements.

Overall, Viterra considers that:

> The ACCC's decision should be based on a reasonable and realistic view of likely demand for long term capacity. The fact that there is limited evidence available (e.g. because the current auction arrangements do not require any assessment by exporters of long term risks, and the current auction rules in fact specifically contemplate that exporters will reduce or move their initial demand in subsequent rounds) does not mean that the ACCC's decision should be based on theoretical or unsupported worst-case assessments.[33]

Viterra also notes that the ACCC's decision should take into account the recent experience of CBH's long term agreements as well as the experience of Viterra's 2015-16 auctions where neither the auction nor first-in-first-served system resulted in full subscription across the peak period.[34]

ACCC view

The ACCC recognises that its analysis of the potential for oversubscription presented in its draft decision is based on certain assumptions. To a large degree however, the ACCC considers that this is unavoidable as the actual outcome of a future capacity allocation process is unclear. Accordingly, the ACCC considers it necessary and appropriate to consider the historical evidence available to it to determine the most likely outcome of the capacity allocation process.

Further, given the uncertainty of future capacity allocation processes, the ACCC considers it necessary and prudent to consider all possible outcomes permissible in accordance with the protocols. In the case of the Viterra protocols, this includes the possible outcome that LTC is allocated between only a few exporters.

In response to certain points raised by Viterra around the data and assumptions the ACCC has considered in its assessment, the ACCC notes the following:

- Considering the multitude of factors that can affect the demand for port terminal services in any given year, the ACCC has taken what it considers to be an informed but objective approach to considering the likely demand for future port terminal services.

  The ACCC considers that an analysis which excludes a particular large harvest year (for example, 2010-11) would be less objective.

[32] ibid, p. 3
[33] ibid, p. 3
[34] ibid, p. 4

The ACCC notes that 2010-11 was a large harvest year in South Australia, but also considers that given the uncertain nature around the outcomes of the LTC allocation process, it is appropriate to consider the potential of such an outcome, and the possibility of a larger harvest in future years. The analysis therefore endeavours to test the possible allocation outcomes against peak harvest conditions, for it is at these times where capacity allocation will be most scrutinized and an equitable outcome most desirable.

The ACCC's also notes that its approach of considering the previous four to five shipping seasons as an indication of the future level of demand for port terminal services is consistent with its assessments of other processes under the Code.

- Contrary to Viterra's submission, the ACCC's analysis presented in the draft decision is based on the long term capacity amounts that Viterra provided in its notice dated 9 July 2015.

  The only difference between the amounts of LTC published by Viterra and the amounts of LTC considered in the ACCC's draft decision is that the ACCC aggregated the individual shipping slot capacities published by Viterra and provided capacity figures for the six shipping slots across each quarter.

  The ACCC took this approach to allow a more practical assessment of the LTC proposal which included quarterly LTC threshold caps.

- The ACCC understands that an analysis of monthly tonnes shipped does not always reflect initial bookings as shipments may be transferred or deferred to alternative times or ports.

  The ACCC notes, however, that its analysis presented in the draft decision does not seek to identify particular months of shipping activity and capacity. As noted above, the analysis is aggregated to certain degree to present historical shipments and indicative capacity on a quarterly basis, rather than on a monthly basis.

3.1.3. Access to short term capacity

Viterra submits that the ACCC's draft decision:

> makes incorrect assumptions about the likelihood of larger exporters who already have long term capacity acquiring short term capacity "ahead of exporters who rely solely on access to STC"). [35]

In particular, Viterra considers that the ACCC appears to misunderstand, or not attribute realistic weight to, the purpose and operation of the "15 minute rule" that will apply for the first 2 business days after short term capacity bookings open. This rule means that any exporter is not likely to get more than one FIFS booking for capacity that is genuinely highly demanded before other exporters also have an opportunity to submit bookings for their preferred slots.[36]

ACCC view

The ACCC's draft decision noted concerns around the potential for a small number of exporters acquiring the majority of LTC, and the possibility of those exporters plus all other exporters vying for the limited amount of STC through the FIFS process.

The ACCC recognises that there is a 15 minute rule which applies to FIFS bookings of STC. The ACCC however also notes that the FIFS process also has an inherent random element to it. While an exporter may apply for STC it is not necessarily the case that the exporter will

[35] ibid, p. 4

[36] ibid, p. 4

be successful in acquiring the relevant bookings, if, for example, other exporters also apply for the same bookings.

The ACCC's concern was that some larger exporters could exponentially benefit from having access to both LTC ahead of other exporters, together with the opportunity to participate on a relatively even playing field for STC.

The 15 minute rule would not have alleviated the concerns of exporters who did not secure LTC and were solely reliant on securing STC in a very competitive process.

The ACCC has considered its position in relation to this concern in light of the revisions that Viterra has made under its November protocols. The ACCC's consideration of this concern is explained further in section 4.2.4.

3.1.4. Ability to meet reasonable export requirements

Viterra submits that the ACCC's draft decision appears to interpret the non-discrimination obligation in a way that, in practice, will limit Viterra/Glencore's ability to use its own infrastructure to meet its reasonable export requirements.

Specifically, Viterra considers that:

> It is highly unlikely that the current protections specified in Viterra's proposal would enable Glencore to obtain the capacity that it legitimately acquired in the 2015/2016 auction process (which was required by the ACCC). It is therefore not at all clear why the Draft Decision appears to proceed on the basis that the proposal needs to contain even further restrictions.[37]

ACCC view

The ACCC notes that its assessment of the November protocols must have regard to a range of factors under subclause 25(3) of the Code including the interests of the service provider, the efficient operation of the capacity allocation system, the interests of exporters wanting access to port terminal services and in having competition in markets.

The current ACCC approved auction system is designed to allow for a level playing field for all exporters to acquire capacity. All auction participants have a nominally equal starting position in the auction which means that (subject to prudential requirements) both traditionally larger and smaller exporters are able to participate on an annual basis in the SA port terminal allocation process.

The ACCC's draft decision considered that Viterra's proposed LTA system had certain features in its design which would not facilitate an efficient and fair allocation of capacity and represented an uneven playing field among exporters seeking capacity. This was particularly the case for LTC and the process of allocating oversubscribed LTC.

The ACCC acknowledges that through the 2015-16 auctions Viterra/Glencore acquired amounts of capacity which may have exceeded what it could have acquired through the proposed LTA process given the threshold caps. However, the ACCC notes that Viterra/Glencore achieved such a result under a level playing field where all exporters at least had the equal opportunity to bid for capacity. Additionally, it is possible under the LTA proposal for an exporter to acquire additional long term capacity beyond the threshold caps as well as short term capacity and traded capacity.

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[37] ibid, p. 4

3.1.5. Consideration of the level of regulation outside South Australia

Viterra submits that the ACCC's draft decision does not involve any real consideration of the need for Viterra to meet competition from other grain origination regions, or the impact of regulatory distortions on Viterra's ability to compete with unregulated supply chains in South Australia and other regions.[38]

Viterra notes that the level of regulatory intervention is focussed primarily on South Australia as CBH in Western Australia, and a range of port terminals in Queensland, New South Wales and Victoria, have been granted exemptions from certain provisions of the Code.

Viterra considers that the differences in regulation have the potential to create significant distortions in relation to the acquisition and exporting of grain. One of Viterra's key purposes in introducing long term agreements is to meet these customer requirements and to address these regulatory distortions.

ACCC view

The draft decision considered the business interests of Viterra in implementing its proposed LTA system and recognised that the proposal would clearly benefit Viterra.

The draft decision also noted the presence of alternative port developments in South Australia.[39] The ACCC however understands that these port facilities are currently not operating on an ongoing basis, and at this stage have only executed trial shipments. Additionally, these port developments are significantly smaller operations compared to the scale of port and upcountry infrastructure owned and operated by Viterra.

Regarding the impact of the level of regulation on port terminals in other parts of Australia, the ACCC notes the recent decisions to exempt certain port terminals from Parts 3 to 6 of the Code.

Upon implementation on 30 September 2014, the Code applied equally to all port terminal service providers. The ACCC notes that its subsequent exemption assessments of port terminals have largely consisted of an assessment of the level of competition affecting each specific port terminal, having regard to the matters set out in subclause 5(3) of the Code. The ACCC's exemption assessments of port terminals were informed by submissions from a wide range of industry stakeholders. In general, the ACCC's competition assessments found that port terminal service providers operating terminals that are located in similar geographic regions are able to compete with each other for grain produced in certain catchment areas.

The ACCC notes that CBH, which operates four port terminals in Western Australia, was granted an exemption from the Minister for Agriculture under subclause 5(1) of the Code. The ACCC does not have any role in exemptions under subclause 5(1) of the Code.

At this time no port terminal service providers located in South Australia have applied to the ACCC for an exemption from parts of the Code.

3.1.6. Level of industry support

Viterra submits that the ACCC's draft decision also undervalues the significant industry support in favour of Viterra's proposal. Viterra notes that:

> Given this strong support for long term agreements, the significant industry opposition to continuation of auctions and, critically, the limited substantive concerns expressed in relation to the way either that long term capacity has been allocated by GrainCorp or CBH

[38] ibid, p. 4

[39] ACCC draft decision, p. 40

> or will be allocated in South Australia, Viterra disagrees with the ACCC's view that the decision is "finely balanced".
>
> Viterra also questions the weight that the ACCC appears to have placed on a small number of submissions that do not appear to contain any evidence or facts to support the assertions contained in them.[40]

ACCC view

The ACCC considers that its consideration of industry views has been appropriate. Given that at the time of the ACCC's draft decision Viterra's proposal was to implement a new capacity allocation system for a period of five years, the ACCC considers it particularly important to take the views of all stakeholders into account.

The ACCC notes that while there was strong support for long term agreements in principle and exporters had concerns with the auction, stakeholders were equally concerned with Viterra's LTA proposal. As the proposal was for five years, its introduction would have had significant ramifications for industry.

The ACCC's draft decision noted that the decision to not accept was finely balanced and sought confirmation from exporters around their preference for long term agreements and the Viterra proposal.

The ACCC considers that it has given industry response appropriate consideration in its final assessment of Viterra's proposal, which has been amended to address certain ACCC and industry concerns. The final assessment is set out in chapter 4 of this document.

3.2. Grain Producer South Australia's views

Grain Producers South Australia (GPSA) provided a submission to the ACCC on 25 August 2015. GPSA requested that the current (auction) capacity allocation system continue to apply until a new system is proposed that is at least as efficient and equitable to all parties involved and offers definitive benefits to South Australian grain producers.[41]

GPSA, however, also recognise that other industry participants support a move away from the auction system to an LTA system. Accordingly, GPSA provided a list of concerns with the proposed LTA system as well as some recommended remedies.

These concerns and recommended remedies are outlined below, along with the ACCC's response to each concern.

3.2.1. Equitable access and execution

The GPSA submits that there needs to be a level commercial playing field for access to port capacity. The GPSA also submits that in any new port capacity allocation system there must be a mechanism that rewards and penalises all parties equally for executing performance against booked capacity.[42] The GPSA suggests that, similar to the pooling and rebating of auction fees under the current capacity allocation system, LTA allocation charges could be pooled and rebated to those that execute under the proposed LTA system.

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[40] Viterra, submission on the ACCC's draft decision, p. 7

[41] Grain Producers South Australia (GPSA), submission on ACCC draft decision re Glencore/Viterra application for Long Term Agreements, 25 August 2015, p. 1

[42] ibid, p. 2

ACCC view

The ACCC noted concerns with Viterra's LTA proposal in its draft decision around the scope for all exporters to access port terminal services and compete in the South Australian export market.

Viterra has since revised its LTA proposal and provided updated protocols which provide a number of safeguards to allow exporters a greater ability to negotiate access to LTC. Following the draft decision, key amendments to the proposal include a shorter initial maximum term of three years followed by subsequent two year allocations and an ACCC review process of the initial LTC allocation. These amendments add to the provisions that were already included in Viterra's proposal to facilitate access such as the threshold caps on LTC as well as the independent audit function.

The ACCC's consideration of the revisions to Viterra's LTA proposal and the likely impact on the ability for exporters to access port terminal services is largely set out in section 4.2 as well as throughout the ACCC's assessment in chapter 4 of this document.

Regarding the execution of capacity, Viterra has not included a rebate mechanism in its LTA proposal as a means of encouraging exporters to execute shipments. The ACCC notes that under the current auction system, exporters have expressed concern with the operation of the rebate mechanism and the fact that it ties up large amounts of capital in auction premiums for significant periods of time.

The ACCC also notes that Viterra, as the port operator, has other incentives to attract throughput at its ports. If Glencore was likely to default on shipping, it would be most likely be preferable for Viterra that the export capacity does not go unused and for it to be contracted to other customers through long term take or pay agreements.

Additionally, the inclusion of the ACCC review process of the initial LTC allocation provides a further incentive on Glencore to not acquire excess capacity that it does not intend to use.

3.2.2. Transparency around Long Term Capacity Availability

GPSA submits that, under the June protocols, the LTA proposal lacks transparency around available LTA volumes. GPSA submits that, unlike the short term capacity (STC) aspect of the proposal, there is no obvious "rhyme or reason" to the indicative LTA volume available. GPSA is seeking a published rationale for the indicative LTA volume levels.[43]

ACCC view

The ACCC understands that the general amount of LTA capacity proposed was determined by taking the existing offered annual auction capacity less the 2 million tonnes of STC on offer (see below).

Table 2: Capacity made available by Viterra under the auction system.

Auctions	Tonnes of capacity offered
2013-14	6,535,000
2014-15	7,000,000
2015-16	7,200,000

[43] ibid, p. 2

The ACCC noted in its draft decision that not including details in the protocols around likely LTC amounts was less than desirable.

The ACCC acknowledged that on 9 July 2015 Viterra separately published the amount of LTC that Viterra intended to make available in its foreshadowed LTA process (even though that process did not eventuate). At that time Viterra announced that it would make a total of 5,490,000 tonnes of LTC available across its six port terminals each year.

The ACCC considered that publishing this information provided industry with an appropriate level of transparency around the amount of LTC that would be made available across ports and throughout the shipping year.

While the November protocols do not include any provision to indicate the amount of LTC that Viterra will make available, Viterra has committed to publishing this information at least 15 business days prior to the closing date for initial LTC applications.

The ACCC's has considered this alongside transparency measures across Viterra's overall proposal. The ACCC has set out views on transparency measures in section 4.3 of this document.

3.2.3. Auction results

GPSA submits the auction system has not been evaluated in detail. GPSA note the auction for 2015-16 recently concluded on 12 August 2015 with 3,639,000 tonnes of capacity (from an offer of 7.2 million) with premiums ranging from $0.50 up to $7.00 per tonne.

GPSA recommends the ACCC undertake additional consultation with exporters of the effects of the much lower premiums paid in the seasons 2012-13, 2013-14 and 2015-16.

ACCC view

The ACCC has considered the outcomes of the recent 2015-16 auction as well as the outcomes of all auctions held from 2012-13.

In short, the ACCC recognises that there was limited support from other industry participants, including exporters, for the continuation of Viterra's auction system. The ACCC however notes the results of the 2015-16 auction indicate that under certain circumstances the auction system can allocate capacity to a range of exporters, including in peak periods. Also, in the most recent auctions, premiums were not excessive and the auctions were resolved relatively promptly.

The ACCC's consideration of the operation of the auctions is set out in its assessment of other matters under subclause 25(3)(j) in section 4.8. Further analysis of the auctions and their results is provided in Appendix B.

3.2.4. LTA implementation timeframe

GPSA also submits that the initial LTC time frame of five years is too long. GPSA recommends that the LTA system be introduced first for two seasons at the Glencore/Viterra proposed indicative volumes, with the subsequent three seasons at a limit of half the proposed indicative volumes.[44]

GPSA propose that the ACCC would also undertake ongoing annual consultation and then a formal review after two seasons before further LTAs are entered into.

[44] ibid, p. 3

ACCC view

The draft decision noted that the proposal for LTAs to last up to five years was of concern to exporters and the ACCC and that there may be scope for a phased introduction of long term agreements, shorter agreements and/or review mechanisms. The ACCC also understands, on the other hand, that for the benefits of long term agreements to be realised and sufficient certainty provided to industry participants, LTAs should extend for a reasonable time period.

The November protocols seek to address concerns around the term of the proposed LTAs. As noted above, the revised protocols now propose LTAs for a shorter initial term and an ACCC review process of the initial allocation of LTC.

On the GPSA's point about reviewing the allocation of capacity, the ACCC notes that under the November protocols, the initial LTC allocation will be subject to an ACCC review and objection opportunity where an ACCC objection would require Viterra to revert to the current auction system after the three years.

LTC allocation is also subject to an annual independent audit function which has the potential for the ACCC to consider and act on Viterra's compliance with the non-discrimination provision in the Code.

The ACCC considers that both of these processes provide adequate opportunity to review the capacity allocation outcomes. Additionally, these processes may inform the Government's review of the Code, due to commence by the end of September 2017.

The ACCC's full consideration of the amendments to Viterra's proposed LTA system is largely set out in section 4.2 as well as throughout the ACCC's full assessment in chapter 4.

3.2.5. Upcountry infrastructure and concerns around upcountry services and charges

GPSA submits that under the proposal, following the allocation of LTA capacity there is a lack of transparency surrounding negotiations and pricing arrangements for upcountry and transport services, as well as port capacity.[45]

GPSA also submits the linkage between port capacity allocation and upcountry logistics needs strengthening. Specifically GPSA notes that Viterra can alter transport costs to disadvantage competitors and highlights the nett change of cost to transport grain from Caltowie to Outer Harbour vs. Caltowie to Wallaroo was 16 percent (up 4 down 12 percent respectively) from season to season.[46] GPSA argues that farmers and grain exporters should be afforded greater certainty regarding prices through the publishing of prices and discounts for services rendered by grain exporters or other third parties.

GPSA submits a number of further concerns regarding access to, and fees related to upcountry services in South Australia. These concerns are summarised below:

- GPSA submits that Glencore/Viterra's third party access regime has historically stifled upcountry infrastructure investment.[47] GPSA indicates the lack of upcountry investment needs to be addressed. GPSA propose that non-Viterra up country storage competitors should be able to access the ports directly and bypass the Viterra delivery assessment and storage and handling system.
- GPSA also submits the FOB costs continue to increase despite reduced risk and increased efficiencies. GPSA note that there is no formal mechanism for negotiation

[45] ibid, p. 3
[46] ibid, p. 3
[47] ibid, p. 4

(with growers) to occur and this “needs to change as there are a number of unjustifiable expenses within the system that need addressing directly between Glencore/Viterra and the grain producers of South Australia.”[48]

- GPSA also notes specific concerns with the Viterra’s warehouse monthly charge and the Client to Client Transfer in-store Admin fee.[49]
- GPSA also submits more broadly that a taskforce be established to build a ten year strategic plan for the grain industry of South Australia.[50]

ACCC view

The ACCC acknowledges the broader concerns identified by the GPSA, and that similar concerns have been expressed by stakeholders in other parts of Australia. The ACCC notes however, that under the Code it does not have a role in price setting or price negotiations. Furthermore, the Code is premised on the basis of negotiation between port terminal service operators and exporters. These features were the decision of the Minister for Agriculture when the Code was developed.

Similarly, under the Code, the ACCC does not have a role in relation to the setting or application of upcountry fees and charges. It also does not have a role in relation to at port receival prices for grain delivered from third party storage.

These are matters for Government and might more appropriately be considered in the 2017 review of the Code.

However, competition issues more broadly may be subject to provisions under other parts of the *Competition and Consumer Act 2010* (the CCA). For example, if a port terminal operator is operating in a way that may be considered a misuse of market power, this behaviour could breach section 46 of the CCA and may be further investigated by the ACCC.

The ACCC also notes its intended bulk wheat port terminal monitoring activities that were outlined in its recent exemption assessments regarding certain port terminal facilities in Victoria, New South Wales, Brisbane and Bunbury. These activities will consider, among other things, market concentration of exporters and the level of competition at various port terminal facilities.[51]

3.3. ADM’s views

ADM provided a relatively short submission outlining its preference to avoid Viterra running its current auction system to allocate capacity for the 2015-16 season and move to a new long term capacity allocation system.

Specifically, ADM submits that:

> Whilst we had concerns with aspects of Viterra’s Long Term Agreement (LTA) proposals, which are covered in the ACCC’s draft decision, our clear preference was to avoid auctions for the coming (2015-16) season as they have proven to be an ineffective, labour-intensive and cost-prohibitive mechanism for allocating export capacity.
>
> Assuming the ACCC’s draft decision in confirmed and Viterra amend and re-submit their application to vary the Port Loading Protocols for subsequent seasons, ADM would hope

[48] ibid, p. 5

[49] ibid, p. 5

[50] ibid, p. 5

[51] ACCC, Final determinations: GrainCorp Operations Limited and Queensland Bulk Terminals at the Port of Brisbane - Exemption assessments of bulk wheat port terminal facilities under the Port Terminal Access (Bulk Wheat) Code of Conduct, 24 September 2015, p. 5

> that the process to move to Long Term Agreements is finalised in a timely manner to provide exporters with greater clarity.[52]

ADM also expressed concerns about the time taken to discuss a new export capacity allocation system for Viterra's ports:

> ADM are concerned with the 18 month time lapse between the communication of the original LTA concept and the ACCC's draft decision released on the 16th of July 2015. It is unacceptable for the industry to spend 18 months discussing a capacity allocation system that has almost unanimous support, only to revert to status quo less than 3 months from the beginning of the South Australian harvest period.[53]

ACCC view

The ACCC's assessment of Viterra's revised proposal is set out in full in chapter 4.

Regarding the time taken to discuss and consult on introducing a new export capacity allocation system at Viterra's port terminals, the ACCC notes that Viterra engaged with stakeholders and also the ACCC leading up to the lodgement of the application. However, the ACCC notes that its formal assessment process under the Code only began after Viterra lodged its initial proposal on 12 March 2015.

The ACCC acknowledges that the process from Viterra's initial lodgement has taken some time, however the ACCC considers that the nature and various iterations of the proposal required thorough assessment and comprehensive consultation with industry. Specifically:

- It is a long term proposal, which initially allowed for the potential undesirable outcome where certain LTC could be allocated between only two exporters. Under the November protocols, this outcome is less likely.
- While stakeholders supported LTAs in principle, they expressed various concerns with the various iterations of the proposed LTA system.

Table 1 on page 8 sets out the stages of the ACCC's assessment process, which included a number of consultation periods where parties could respond to both the issues paper, draft decision published by the ACCC and the various iterations of the proposal lodged by Viterra.

As noted in section 1.4 on pages 8 and 9, in response to its issues paper on the proposal the ACCC received 12 stakeholder submissions, most expressing concern with the Viterra proposal. It was important the ACCC consider and balance the views of all stakeholders when assessing Viterra's proposal, including through the release of a draft decision. In the draft decision the ACCC highlighted that the decision was finely balanced and sought direct input from stakeholders of their willingness to proceed with a capacity allocation process with identified limitations, but also opportunities. Viterra's decision to proceed with the auction for the 2015-16 then mitigated the urgency to resolve 2015-16 capacity allocation decisions.

Following the release of Viterra's decision to proceed with the auction for 2015-16 capacity, the ACCC provided stakeholders with an extended period to review the draft decision and prepare submissions. The ACCC acknowledged that exporters were extremely busy during this period. As noted in the GPSA submission, this extension also allowed Viterra and GPSA further opportunity to engage in discussion concerning the LTA process and proposal. Viterra then provided the ACCC with a revised proposal in late September, which was then updated in November.

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[52] ADM, submission of the ACCC's draft decision, p. 1

[53] ibid

Overall, the ACCC considers the final proposal provided by Viterra on 10 November 2015 is substantially better that that originally proposed and that this has reflected the process of consultation and engagement of the ACCC.

4. ACCC's assessment of Viterra's proposed long term capacity allocation system

4.1. Overview

This chapter sets out the ACCC's final views on Viterra's proposed variation to its approved capacity allocation system to introduce long term agreements as a means of allocating capacity. This final assessment relates to the November protocols.

Where relevant, the ACCC has drawn on information in chapters 2 and 3, and appendices B and C of this document to inform its assessment.

The ACCC's assessment is set out against the matters in subclauses 25(3)(a) to (i) of the Code, which the ACCC must have regard to. The ACCC has considered several factors together where the relevant matters are closely related and involve similar considerations.

In summary, having had regard to the 25(3) matters in the Code, the ACCC's views are that the November protocols:

- Go a significant way to addressing the ACCC's previous concerns outlined in its draft decision about the level of discretion Viterra will have to allocate LTC and the ability for all exporters to effectively negotiate for LTC, including oversubscribed LTC.
    - The amendment to reduce the maximum initial term of LTA allocations to three years will allow a range of exporters to better compete for LTC as they would likely be more willing to commit to an initial agreement of three, rather than five years, and then to two year agreements in subsequent years.
    - A greater amount of LTC overall is more likely to be taken up by a greater number of exporters, considering that the overall reduction in term, should facilitate the participation of a broader range of exporters in the initial LTC allocation process. Consequently fewer exporters will be reliant on access to STC as their primary means to securing shipping capacity.
    - The inclusion of an ACCC review process provides a further level of discipline on Viterra to engage and negotiate with exporters on a constructive and equitable basis.
    - These amendments, along with the threshold caps on initial LTC, the independent audit function and the ability to trade shipping slots and acquire capacity on the secondary market, strengthen the negotiating position of exporters seeking LTC.
- Provide benefits to exporters in terms of certainty for planning and flexibility to trade capacity and acquire capacity in the secondary market.
- Provide sufficient information to exporters, including on the amount of STC available. The ACCC notes Viterra's has not included detail around the amount of LTC in its protocols, but is required to publish the amount of available LTC 15 business days before the closing date for LTC applications.
- Are likely to provide exporters flexibility to manage their shipping programs. The protocols carry over a number of existing arrangements that operate successfully in the current protocols.

- Regarding subclause 25(3)(d), the protocols are likely to allocate capacity at times of peak use.
- Will be in the business interests of Viterra, by ensuring throughput for the initial three year period at its port terminals and along its vertically integrated supply chain.
- May assist Viterra to realise greater efficiencies at port overall, and across the supply chain. This in turn, should ensure better services, potentially lower costs for Viterra, and possibly additional capacity at port.
- the proposed LTA system is not likely to significantly alter the level of competition in upstream storage, transport and handling services. Exporters who secure large long term agreements with Viterra may enter agreements relating to upcountry services and/or transport, foreclosing opportunities for new entrants and existing small operators in those markets. However, the ACCC notes the strong market position already held by Viterra in these upstream markets.
- May, in relation to competition in related markets prompt existing or new entrant exporters, who do not receive adequate capacity allocation, to develop alternative export pathways. However, given the extent of Viterra's vertical integration, barriers to entry along the bulk wheat export supply chain are already high in SA, meaning that at least over the short to medium term it is unlikely that any competing port terminal facilities will be developed. The ACCC does acknowledge ad-hoc and temporary alternative export pathways have been trialled in South Australia.

4.2. Efficient and fair operation, non-discrimination and the interests of exporters

This section sets out the ACCC's key findings on the proposal and possible implications of its implementation having regard to the matters set out at subclauses 25(3)(a) and (h) of the Code.

Matter (a) relates to whether the capacity allocation system will operate efficiently fairly and consistently with clause 10 (non-discrimination), and matter (h) the interest of exporters wanting access to port terminal services.

4.2.1. Overview

The ACCC believes it is appropriate to consider both subclauses 25(3)(a) and (h) of the Code concurrently as it is in the interests of exporters that access to port terminal facilities is provided fairly and consistently in accordance with clause 10 (non-discrimination).

The following discussion also raises issues that are also relevant to the other matters that the ACCC must have regard (in particular subclause 25(3)(e).

Under subclause 25(3)(h) the ACCC must consider the interests of exporters wanting access to port terminal services when considering a capacity management proposal.[54] This involves considering whether, under the new arrangements, exporters will still be able to compete in the grain export and acquisition market on their relative merits. Competition on the relative merits of exporters would be hindered if terms and conditions of access unduly favour one or more exporters over others, thereby distorting the competitive process.

As discussed in the draft decision, public submissions received from exporters during the ACCC's consultation process raised a number of issues concerning access. Some exporters supported the proposal and do not believe their access opportunities will be compromised.

[54] See cl 25(3)(h) of the Code.

However, others submitted views to the contrary. GPSA also expressed concerns about the scope for future competition under the proposed regime.

The ACCC must also consider, whether the capacity allocation system will operate fairly and consistently with clause 10 (non-discrimination) of the Code. This is especially relevant given that Viterra is a vertically integrated terminal operator and exporter (and is dominant across the whole of the bulk wheat export supply chain in SA). This includes through the operation of it associated entity Glencore, to date the largest grain trader in SA.

Viterra therefore has an incentive to favour its trading entity, Glenore, over other exporters at its port terminal facilities.

There have been two small-scale alternative export operations in South Australia in recent times.[55] However, absent significant competition at the port or across the supply chain, Viterra will be unlikely to be sufficiently incentivised to allow third party exporters fair access to its ports, in the absence of appropriate regulatory oversight. The ACCC must accordingly consider if the terms of the protocols support Viterra's adherence to the non-discrimination obligation.

Relevant to the ACCC's assessment are a number of its findings and analysis in chapters 2 and 3, as well as in appendices B and C, around the nature of the South Australian bulk wheat export market. In summary, these indicate that:

- There is limited spare capacity at some of Viterra's ports at peak shipping periods, although spare capacity is typically available at less premium ports. However the auction rebate has distorted at some ports the cycle of peak and non-peak shipping activity from SA.

- It is difficult to determine what the overall level of demand will be for LTA in SA. The auction system has prevented some exporters participating in a significant way in SA. Others have also found themselves overcommitted in a bid to maximise rebates. However, as expressed during consultation, many exporters are interested in the prospect of securing capacity via a long term agreement. This is because it will be at a lower cost than the equivalent capacity if acquired via the auction system.

- There are no established alternative bulk export pathways in SA. However some trial export operations have been undertaken. Container exports are not significant. Some grain from SA can also be transported to Victoria for domestic consumption and/or export.

Additionally, the features of Viterra's LTA proposal indicate that:

- The oversubscription allocation process favours exporters who can make the largest shipping commitments. Prima facie the factors that Viterra will have regard to when determining capacity will favour Glencore, Viterra's associated entity, who has consistently exported the most grain from SA. Viterra's largest customers (Cargill, CBH and ADM) are also well positioned to negotiate LTC agreements with Viterra. These entities have all exported significant throughput at Viterra's ports across the last three years.

- Customers who export the largest volumes of grain are likely to be in the best position to negotiate LTC access. Other customers may not all seek LTC in the first place (or may only seek small amounts) and can also seek capacity via the STC FIFS process and the secondary market. Ultimately, it will be up to Viterra to decide the level of LTC the exporter obtains.

[55] Viterra, Submission, 12 March 2015, p. 4 and Attachment 4.

These features are taken into account below in the ACCC's consideration of subclauses 25(3)(a) and (h).

In this section the ACCC has set out its analysis of the following key areas of Viterra's revised LTA capacity allocation system as proposed in Viterra's November protocols:

- the overall allocation processes for LTC, including the oversubscribed LTC process
- LTC payment terms
- Duration of LTC agreements
- The amount of information about available STC and LTC
- The allocation process for STC
- The possible appointment of an independent auditor in relation to the non-discrimination obligation.

The section concludes with overall views having regards to subclauses 25(3)(a) and (h).

4.2.2. Broad support for long term capacity agreements

Introduction

The ACCC has previously recognised the potential benefits of long term agreements to both port terminal service providers and exporters, and that these types of arrangements may be appropriate in some cases. Potential benefits of long term agreements can include greater certainty for exporters in planning their long-term grain export programs and assist the infrastructure owner with supply-chain planning.[56]

Viterra's submissions highlight previous comments by the ACCC on the merits of long term arrangements, including:

> (a) greater certainty in planning longer-term export programs;
>
> (b) a greater ability to build long term relationships with overseas customers;
>
> (c) a greater ability to align booked capacity more closely with supply chain planning; and
>
> (d) creation of a commercial environment that encourages investment in, and expansion of, infrastructure. This, in turn, can facilitate improvements in the efficiency of port terminal facilities and the availability of additional capacity.[57]

Viterra's submission on the ACCC's draft decision notes further notes the benefits of its LTA proposal:

> Viterra considers that the enhanced certainty and planning offered by long term agreements will facilitate continued and longer-term investment by exporters in the South Australian industry. With greater certainty (involving longer term financial commitments to the South Australian supply chain), this will provide an environment for exporters to develop longer term commitments with growers and further markets for South Australia grain.[58]

Submissions and analysis

Exporters generally support the introduction of long term agreements to allocate capacity. The level of support for long term agreements is bolstered by exporters' view that the current auction system should be replaced. Viterra submits that:

[56] "ACCC allows GrainCorp to introduce long-term port access agreements", ACCC media release, 30 November 2012.

[57] Viterra, submission, 12 March 2015, p.1. Viterra, submission on the ACCC's draft decision, p. 9

[58] Viterra, submission on the ACCC's draft decision, p. 9

> Feedback from Viterra's clients has overwhelmingly indicated that they desire the certainty of longer-term contractual arrangements and the flexibility of commercial negotiations in preference to the current auction system.[59]

This is also borne out by submissions from exporters. GrainCorp, CBH and Emerald express, with limited reservation, support for Viterra's proposal. ADM, Quattro, Noble, Bunge and AGG also support long term capacity allocation but express a greater level of concern about specific aspects of the Viterra proposal. Confidential submissions were also lodged with a mixed level of support and concern for the proposal outlined above.

Some exporters have greater confidence than others that the Viterra long term agreement proposal will meet their exporting needs. For example, GrainCorp supports the proposal and submits that the proposal will deliver the following benefits:

- Greater certainty and forward-planning ability for industry participants, including GrainCorp, who are seeking to build long-term export programs from South Australia through Viterra's ports;
- Greater flexibility and ability to negotiate commercially in the event of oversubscription; and
- Additional investment by exporters from South Australia in customer relationships and international market development for South Australian grain, as a direct result of increased certainty.

Avant Agri outlines the benefits of long term capacity agreements, noting:

> LTC will allow major exporters to have a similar risk profile for their trading activities as if they owned the facilities, without having to duplicate systems that are already in place and large enough to service the Australian grain industry. [60]

As noted above, the ACCC has recognised that there are a range of potential benefits for exporters in moving to long term agreements.

The ACCC's draft decision noted that under Viterra's previous iteration of its LTA proposal (the June protocols), not all exporters were equally likely to realise the benefits of long term agreements. However, the changes Viterra has made under its November protocols go to addressing this balance to ensure benefits can be realised by a greater number of exporters. The implications for the specific changes made to the protocols are explained in further detail below.

As outlined in the draft decision and in Appendix B of this document, exporters are very critical of the auction system, especially the system of premiums and rebates. If long term agreements were introduced, exporters would not be subject to this cost of premiums and associated risks. However, the ACCC also notes that long term agreements themselves are not without risk for third-party exporters due to the 'take-or-pay' nature of the agreements.

As noted in chapter 3, the grower group GPSA previously raised concerns about Viterra's LTA proposal, but also recognise that other industry participants support a move away from the auction system to an LTA system. GPSA also noted that it does not intend to stand in the way of the proposed LTA system if its key concerns can be alleviated.[61] The possible benefits of the proposal for growers are explored in more detail below, and separately in relation to subclauses 25(3)(g) and (e).

[59] Viterra, submission, 12 March 2015, p.1.

[60] Avant Agri, submission in response to ACCC Issues Paper, p.4.

[61] GPSA, submission on the ACCC's draft decision, p. 1

Conclusion

The ACCC noted in its draft decision that there were risks associated with the LTC allocation process under Viterra's previous June protocols, and that these risks may affect the spread of benefits to industry. However, as explained in the section below, the ACCC considers that the changes made under the November protocols mitigate some of these risks, and increase the potential for the proposed LTA system to benefit a wider range of exporters.

The ACCC notes that support for long term agreements is also influenced by exporters' opposition to the current auction system.

Overall, the ACCC's view is that Viterra's revised capacity allocation system using long term agreements can provide a range of potential benefits to all stakeholders and is therefore in the interests of a range of exporters.

4.2.3. Long Term Capacity

The long term capacity (LTC) allocation process is negotiation based. Subject to exporters agreeing to reduce their interest in a particular slot, oversubscribed capacity will then be allocated to exporters who can make the biggest commitment to shipping from SA.

Having regard to the matters set out in subclauses 25(3)(a) and (h) the ACCC's key findings on LTC are set out below and relate to:

- the length of time of the proposed agreements
- the oversubscribed capacity process
- the use of caps to allocate LTC
- payment terms for long term capacity
- the amount of information about and the amount of LTC available.

The section concludes with a view on the LTC allocation process as a whole.

4.2.3.1. Term of the agreements

Introduction

The revised allocation process allows exporters to seek LTC for an initial maximum period of three years. This has changed from the Viterra's previous LTA proposal set out in its proposed June protocols where exporters could seek capacity for between two and five years.

Exporters can also request LTC throughout each year, subject to certain timing parameters relating to STC.

Viterra has also amended its proposal so that, unless the ACCC issues an objection notice (and does not withdraw it) regarding the initial three year allocation process by 1 February 2017, Viterra will have the ability to run ongoing LTC nomination processes for each subsequent two year period.

In having regard to 25(3)(a) and (h), the ACCC must consider how the revised terms for LTC agreements may affect all exporters' ability to access LTC capacity.

Submissions and analysis

Viterra has argued that the proposal overall is flexible and caters to the needs of a range of exporters.

The ACCC's draft decision noted submissions from various industry stakeholders raising concerns with the previous LTA proposal of up to a five year term, while several exporters supported that proposed term.[62]

Following its analysis of the proposal the ACCC noted in its draft decision that the five year term may be too long and may have had the effect of entrenching a particular market structure for a long period of time.

The ACCC has previously expressed concern about the term of agreement in relation to other port operators' long term agreements. GrainCorp decreased its initial five year term to a three year proposal term following stakeholder submissions that a five year term would create a barrier to entry for small to medium exporters looking for growth opportunities.[63] Also the ACCC draft decision to approve CBH's long term proposal (subsequently withdrawn) incorporated three year agreements.[64]

The ACCC also noted in its draft decision that if Viterra reduced the term of its proposed LTAs (for example allowing three year contracts only) it would resolve many concerns of both the ACCC and of industry.

In response to the ACCC's draft decision, GPSA agreed that the five year term of the proposed agreements were too long, and suggested a shorter, alternative model:

> The initial LTC time frame of five years is too long. With any system there are issues and opportunities from "teething challenges to past use by date" scenarios. Having this in mind GPSA's recommendation is to introduce this proposed change to the port allocation system carefully and in a measured way.
>
> GPSA recommend the LTA system be introduced first for two seasons at the Glencore/Viterra proposed indicative volumes, with the subsequent three seasons at a limit of half the proposed indicative volumes with both ongoing annual consultation as well as a formal review after two seasons by the ACCC before rolling out a further 3 years.[65]

As outlined in chapter 2, Viterra submitted a revised LTA proposal which reduces the maximum term to three years commencing from 1 October 2016:

> Viterra is prepared to modify the proposal so that long term agreements will be available for an initial fixed term of 3 years, with clients required to apply for a minimum of 25,000 tonnes of capacity in each of the 3 years. This is a very modest minimum requirement (effectively one vessel each year), which is designed to ensure at least some level of commitment to export from South Australia over multiple seasons.[66]

Viterra notes that, compared to previous five year term proposal, this revised approach will provide less flexibility for its customers and reduced benefits for Viterra as infrastructure owner.[67]

Conclusion

The ACCC notes that exporters expressed support for long term agreements, but at the same time expressed, both in submissions and in discussions with the ACCC, several concerns with the previously proposed five year term of Viterra's LTAs. The ACCC noted in its draft decision that the prospect of LTAs with a five year term would allow some exporters to realise the benefits of long term certainty over an extended duration. However, exporters who may have missed out on accessing LTC due to either not being willing to enter into a

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[62] ACCC, draft decision, pp. 51, 52.

[63] ACCC, decision not to object to GrainCorp long term agreement proposal, 30 November 2012.

[64] ACCC, draft decision on CBH long term agreement proposal, 26 June 2014.

[65] GPSA, submission on the ACCC's draft decision, p. 3

[66] Viterra, submission on the ACCC's draft decision, p. 8

[67] ibid, p. 8

five year agreement, or not able to effectively negotiate for capacity under an agreement with a shorter term, would equally be disadvantaged in the South Australian market.

The ACCC considers that an outcome providing a term of up to five years, in conjunction with other aspects of the proposal such as the allocation of oversubscribed capacity, would likely have been at the expense of new entrants and smaller exporters, which may be important for facilitating competition in the bulk wheat export industry.

The ACCC considers the newly proposed three year initial maximum term will allow more exporters to compete for key LTC shipping capacity as it is more likely that a greater proportion of exporters would be willing to commit to an agreement of three, rather than five years. This in turn would have a positive effect on competition in the related grain acquisition market and therefore be in the interests of growers.

The ACCC understands that a reduction to an initial three year term, with the option for subsequent two year terms, compared to a five year term, is of greater benefit to exporters than to the infrastructure owner. However the ACCC considers that the revised proposal provides a more appropriate balance of providing certainty and addressing the potential risk of entrenching a market structure over a longer period.

The proposed review and objection opportunity that Viterra has included in its LTA proposal also provides the ACCC with the chance to revisit the initial allocation process by February 2017. The ACCC could then require that Viterra revert the capacity allocation system back to the current auction model after three years if the ACCC considers the initial allocation did not operate efficiently, fairly and consistent with clause 10 (non-discrimination) of the Code. The ACCC also notes that a Government review of the Code is to commence no later than 30 September 2017.[68]

The ACCC has also considered the term of the revised LTA proposal in light of the process used for allocation of long term capacity (as discussed in the next section).

4.2.3.2. Oversubscription allocation process

Introduction

As set out in Chapter 2, the long term agreement proposal caters for an allocation process in the case of the likely oversubscription of LTC. Historical shipping data, as well as the most recent auction results for the 2015-16 season suggests that oversubscription is more likely to occur for shipping slots at the more highly sought after Port Lincoln and Port Adelaide (Inner and Outer Harbour) port terminals across the period of January to June.[69]

In the event of LTC oversubscription, Viterra will apply a decision making process that culminates in it exercising discretion as to the allocation of the oversubscribed LTC shipping slots. Given the oversubscription allocation framework, this decision making process could be used to allocate the majority of the LTC available.

Submissions

As noted in the ACCC's draft decision, submissions from stakeholders discussed the oversubscription process, the level of discretion Viterra will have under the protocols and the level of uncertainty surrounding how overall LTC allocation process will operate.

[68] Competition and Consumer (Industry Code—Port Terminal Access (Bulk Wheat)) Regulation 2014.

[69] As noted on page 96 of the ACCC's draft decision, shipping data relating to Port of Adelaide (Inner and Outer Harbour) should be considered in conjunction with each other.

- Quadra expressed the concern that under the proposed protocols "The market is relying on the BHC being completely objective in fairly awarding export stem in over-bid months (Jan- Mar period)."[70]
- Noble queried how historical exports will be taken into account, noting that:

> … under clause 3.6 point g (vi) allows Viterra to review in respect to the ability to accumulate grain at the respective Port which ultimately underpins bulk exports. … The subjective measurement on allocation of capacity does not provide confidence to the participant that largely remains on historical performance, where capacity was awarded to those under auction with the deepest pockets …[71]

- AGG submitted that "there is too much discretion on how Viterra can allocate oversubscribed capacity. Certainty and transparency is required for fairness."[72]
- GPSA submitted that the LTC allocation process is "Unlikely to be fair and definitely not transparent. All negotiations are behind closed doors and only open to the entire market after the negotiations and arrangements have been concluded."[73] GPSA also argues that the "discretion afforded Glencore/Viterra is extraordinarily broad" and argues the allocation process will benefit:

> Large incumbent exporters e.g. Glencore… These allocation principles are subjective, lack transparency and favour a reduction in competition.[74]

- Avant Agri submits that the proposed system will not be fair unless it is modified and submits that the 40 and 50 per cent caps are too high.[75]

However CBH submitted that "the proposed LTC allocation process generally provides for the fair and transparent allocation of capacity.

Along with the changes to term proposed, and the inclusion of an ACCC review process in Viterra's November protocols, Viterra has also proposed an amendment to the process of allocating oversubscribed capacity.

The amendment has removed one factor (the duration of the agreement) from the list of factors at clause 3.6(g) of the protocols. These factors set out that Viterra will consider in allocating oversubscribed capacity. The removal of one of these factors means that the duration of a proposed long term contracts is no longer relevant to Viterra in assessing LTC for oversubscribed slots.[76]

Viterra will still be able to allocate LTC in accordance with all the other factors listed in section 2.3.3 (noted on pages 14 and 15). These factors were considered in the ACCC's draft decision.

ACCC analysis

The ACCC considers that the main issue in relation to the LTC oversubscription allocation, process, having regard to subclause 25(3)(a) and (h), is how exporters will need to compete for oversubscribed LTC, and the process that Viterra will then use when considering how to allocate that oversubscribed LTC.

The amount of total capacity sought and spread of capacity across ports and months are key factors Viterra will consider when allocating oversubscribed LTC.

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70 Quadra, submission in response to ACCC Issues Paper.

71 Noble, submission in response to ACCC Issues Paper, p.3.

72 AGG, submission in response to ACCC Issues Paper, p.1

73 GPSA, submission in response to ACCC Issues Paper p.9

74 ibid.

75 Avant Agri, submission in response to ACCC Issues Paper, p.10

76 Viterra, submission on the ACCC's draft decision, p. 8

The ACCC considers that even with a reduced maximum term of three years, the largest incumbent exporters (including Glencore) will find the proposed LTC allocation process most aligned to their existing approaches to shipping from SA. Appendix C shows that Glencore, CBH, Cargill and ADM have all executed large shipping programs and will be well poised to satisfy the LTC oversubscription capacity allocation criteria and related decision making factors set out at clause 3.6(g) of the protocols.

Some large exporters can be confident that they can consistently accumulate and export large tonnages from SA, and through the LTAs could do so at a lower cost and risk than the current auction mechanism. Given this, the ACCC considers that large exporters will seek premium slots across preferred ports for the initial three year term.

However, as noted in the above section, the reduced maximum initial term of three years is likely to mean a greater number of other exporters will be willing commit to an LTA without having to match the longer five term agreements favoured by the larger exporters in order to compete for oversubscribed slots. This is supported by Viterra's further amendment under its November protocols to remove the duration of agreements as a factor when allocating oversubscribed capacity.

Accordingly, compared to the potential allocation outcomes under the June protocols, the ACCC considers that medium and smaller exporters are likely to be able to better position themselves to negotiate with Viterra for oversubscribed shipping slots under the November protocols. The ACCC however acknowledges that, generally, the historically larger exporters are likely to have stronger abilities to negotiate.

The ACCC notes that the reduced term of the agreements also means that if an exporter is unable to negotiate access to particular shipping slots under an LTA, there is a shorter wait until they are able to reapply for LTC, and until this time there are options to access capacity through STC and the secondary market.

The ACCC's noted in its draft decision that larger exporters may be placed in a position to secure LTC in excess of their own expected needs. This is because the larger an exporter's application, the more likely they will be successful in securing capacity.

Against this is the take-or-pay nature of the long-term contracts that may limit the incentive of larger exporters to effectively overbid for capacity, although this will not be a significant disincentive for Glencore given its vertical integration with Viterra.

However, the ACCC notes that Viterra has included a range of safeguards to prevent such behaviour occurring including the use of port capacity cap thresholds, transparency measures and the scope for an audit to be conducted on an annual basis.

Additionally, the November protocols also include an ACCC review process which provides the opportunity for the ACCC to object to the continuation of the proposed LTA system beyond the initial three year period. The ACCC considers that this safeguard should further provide for a more equitable allocation process than under the previous LTA proposal under the June protocols.

Conclusion

The ACCC's draft decision highlighted its concerns with the oversubscribed capacity allocation process, noting that it appeared to overly favour larger exporters and thereby reduce the likelihood that other smaller exporters could secure LTC over a shorter period of time.

The ACCC notes while the current auction system has limited support, it has facilitated the participation of many exporters in the SA grain industry, even if this came about because a significant proportion of capacity was allocated through the residual FIFS process. Under the auction exporters have at least had the option of targeting specific slots of particular importance to their shipping plans.

The changes made by Viterra included in its November protocols have gone a significant way to addressing concern raised about the process of allocating oversubscribed LTC.

The ACCC considers that the reduction of the maximum initial term from five to three years should provide smaller exporters a greater opportunity to bid for LTC that meets their needs and be able to engage in negotiations and compete with other larger exports for oversubscribed shipping slots.

The ACCC considers that while it is likely that larger exporters (such as Glencore) will still be best positioned to negotiate for oversubscribed slots, and that Glencore will likely seek to secure the maximum allowable LTC, the reduced term at least provides a greater opportunity for other exporters to actively compete in negotiations. The revised LTA proposal, like the current auction system, now provides all exporters a greater opportunity to participate in the allocation process.

Further, the proposed ACCC review process and objection notice included in the revised LTA proposal provides an additional incentive for Viterra to engage and negotiate with exporters on a constructive and equitable basis. In the short term, while the review will not affect LTC agreements already made for the initial three years, the review process may provide input into a Government review of the Code which is scheduled to commence no later than 30 September 2017.

These key amendments included in the November protocol, together with other safeguards such as the LTC threshold caps and independent audit function strengthen the negotiating position of smaller and medium sized exporters seeking LTC.

Overall, with the revisions which are included in the November protocols the ACCC's view is that the oversubscription process will not favour larger exporters to the extent that it could have under the previous June protocols. While larger exporters may be the best placed to acquire oversubscribed LTC, the ACCC considers that other exporters will have the opportunity to compete. As such, under the revised protocols more exporters will have a greater opportunity to apply for and negotiate with Viterra for LTC.

4.2.3.3. Long term capacity allocation caps

Introduction

As outlined in the ACCC's draft decision, the protocols set out that no single exporter can acquire more than 50 per cent of LTC at any port per quarter and no more than 40 per cent per port per quarter at two premium ports (Outer Harbour and Port Lincoln) for the period January to June.

There remains scope for the initial LTC allocation to exceed the 40 per cent and 50 per cent caps for a range of allocation and operational reasons.

Submissions

The protocols identified peak shipping period occurring across the first six months of the year. This is consistent with submissions as well as with historical shipping data analysed by the ACCC.[77]

Prior to the ACCC's draft decision, a number of stakeholders raised concerns with the proposed cap thresholds.

[77] Noble, submission in response to ACCC Issues Paper.

GPSA submitted that the 50 per cent cap is not appropriate, stating that "… the risk is only a very few exporters would be able to secure meaningful capacity.[78] GPSA also submits the 40 per cent arrangement is not appropriate and notes:

> It is highly likely 80 percent of this prime capacity will be taken up by the largest incumbent organisations for the entire five years immediately, effectively reducing competitive pressures for grain from farmers for half a decade. [79]

Avant Agri also supports a reduction of the cap to "below 40 percent and believe that no exporter should have access to 50 per cent of initial LTC, it submits the cap:

- goes against the intent of the legislation;
- could mean that potentially 2 exporters could control initial capacity;
- could create/increase oligopolistic behaviour;
- could create less completion for grain and thus reduce grower returns; and
- would increase barriers to entry. [80]

Avant Agri references a cap of 30 percent or less is sufficient for initial LTC capacity, noting that exporters then have access to STC. Such arrangements will allow more exporters to commit to LTC.[81]

Viterra submits it must maintain the 50 per cent cap in order to:

- Secure throughput from third party exporters, a key purpose of the long term agreements. Allocating some capacity at certain less popular times of the year is already difficult. Historically there has been unused capacity at both Thevenard and to a lesser extent Wallaroo.
- Provide exporters shippable capacity parcels, at some ports allocating less than 50 per cent parcels per quarter will result in impractical capacity allocations.

The draft decision noted that under the previous June protocols, Viterra could allocate Glencore 50 per cent of capacity and then one other exporter the remaining 50 per cent share of total LTC for five years. And that this may be against the backdrop of 15 exporters competing for LTC.[82]

Viterra submits this would be an extremely unlikely outcome.[83] Viterra notes that:

> If the ACCC were to place any weight on this theoretical concern, it would critically ignore the fact that:
>
> (a) the South Australian shipping stem has not, since the de-regulation of grain exports, involved providing capacity to only two exporters in a particular season, let alone over a multiple year period;
>
> (b) the acquisition of 50% of all available long term capacity over multiple years would involve enormous financial risks for any exporter, such that Viterra cannot see any realistic likelihood of them taking this risk; and
>
> (c) it would involve very significant financial risks for Viterra as infrastructure owner to supply long term capacity to only 2 exporters. Viterra's incentives to provide meaningful access to a

[78] GPSA, submission in response to ACCC Issues Paper, p.9.

[79] ibid.

[80] Avant Agri, submission in response to ACCC Issues Paper, p.10.

[81] ibid.

[82] ACCC, draft decision, p. 58

[83] Viterra, submission on the ACCC's draft decision, p. 11

> number of different exporters is clearly demonstrated by the level of open access that it has always provided.[84]

Viterra also notes the results of the 2015-16 auction (where Glencore acquired more capacity that it could have acquired as LTC under the proposed LTA system). Viterra submits that:

> the initial nomination caps have been set at a reasonable and, in fact, low level having regard to Glencore's existing and demonstrated requirements. It is not reasonable or appropriate that they be reduced further. [85]

As noted previously, following the ACCC's draft decision Viterra revised its protocols to reduce the term of the initial LTAs and introduce an ACCC review process of the initial LTC allocation. These changes also impact on ACCC's view of the appropriateness of the LTC allocation caps.

Analysis

The ACCC notes that while the level of overall oversubscription for LTC is difficult to quantify, Port Lincoln and Outer Harbour are likely to remain as the most sought after ports to ship from, especially across the peak shipping period. This was evident in the most recent auctions for capacity for the 2015-16 season. Consistent with this observation there is currently little remaining available capacity at Outer Harbor during the 2016 peak period, and there is no remaining available capacity at Port Lincoln from February to July 2016.[86] It is therefore probable that shipping slots at these ports will be oversubscribed in the LTA process, at least for the most desirable time periods.

The full extent of the level of oversubscription will only be realised when exporters lodge their LTC applications with Viterra. It will be at Viterra's discretion then as to how LTC is allocated between exporters. This decision will be made against the cap parameters of the protocols.

While previously noting the concern that under the cap thresholds Viterra could allocate LTC between only two or three exporters, the ACCC also acknowledged that concentrating LTC allocation strictly in accordance with the caps may not be the most desirable position for Viterra to adopt.

For example, one of the key criteria Viterra will consider when allocating oversubscribed capacity is "Viterra's overarching objective of maximising the amount of long term capacity allocated and maximising the efficiency of the supply chain"[87] To realise this objective, and to avoid potential risk of financial trouble for any given exporter, Viterra (as it has stated) would be prudent to allocate capacity across more than just a few larger exporters.

As noted in the previous section, the ACCC considers that the revisions made under the November protocols will enable a greater number of exporters to seek more meaningful LTC allocations. In particular:

- reducing the maximum initial term of the LTAs to three years, and removing the duration of an LTA application as a factor in the allocation decisions of oversubscribed slots, is likely to provide medium and smaller exporters with the opportunity to apply for LTC and present stronger cases to secure oversubscribed capacity.

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[84] ibid, p. 11

[85] Viterra, submission on the ACCC's draft decision, p. 17

[86] Viterra, Available Shipping Capacity / Practical Port Terminal Capacity, as at 6 November 2015 http://www.viterra.com.au/uploads/PDFs/Ports%20And%20Shipping/Shipping%20Stem/Available_Capacity_Table.pdf?ts=1446773906220&ts=1446773983109#abcdefgh

[87] Viterra, Submission , 12 March 2015, p.10.

- also, the proposed ACCC review of LTC allocation should reduce the likelihood that Viterra will allocate all oversubscribed capacity between only a few exporters.

The ACCC also notes that the current auction system does not impose caps on the amount that a particular exporter may obtain. Accordingly, as Viterra has indicated, it is possible that the current auction could allow one exporter to obtain all of the available capacity if it bids more than all other exporters. While the results of the 2015-16 auction in part demonstrate this possible outcome, a range of exporters were still able to participate in the capacity allocation process and secure capacity, including during peak shipping periods.

Conclusion

In determining the appropriateness of the caps the ACCC has considered stakeholders views and historical exports, including the outcomes of the 2015-16 auctions. The ACCC notes that it is difficult to determine what the precise cap thresholds should be. However the decision seeks to ensure the caps are not too high as to limit the number of exporters able to compete in the market. At the same time the ACCC acknowledges Viterra's concern that shipping capacity allocations must not be set below what is practical, given the particulars of each port terminal.

Ultimately the effect of the caps on the market and the extent of oversubscription will be contingent on:

- the level of interest expressed by exporters in LTC
- if Viterra will make available additional LTC to address oversubscription concerns
- to what extent the smaller exporters and new entrants want to procure LTC.

While Viterra has considerable discretion with respect to how oversubscribed LTC is allocated in practice it is unlikely that Viterra will concentrate LTC across two or three exporters. The ACCC considers that this is particularly the case now with the revisions Viterra has made under its November protocols. As outlined above, the revisions provide a greater number of small and medium sized exporters the opportunity to bid for LTC that meets their needs and allow them to better engage in negotiations to compete with other larger exports for oversubscribed shipping slots.

Ultimately the November protocols now include both the annual independent audit function and the ACCC objection notice provision, through which the initial LTC allocation process can be considered in greater detail.

The ACCC also notes that the caps only relate to the initial LTC allocation process. Exporters can seek additional LTC, capacity through the FIFS STC process and the secondary market.

Viterra also has incentives to use LTAs to satisfy existing exporters in order to reduce the likelihood that competing ports will be established in or near SA. In other markets, new port developments have come about because exporters could not secure sufficient certainty and/or they considered that prices were too high at existing port terminals.

Finally, the ACCC notes that Glencore has managed to acquire around 40 per cent of capacity under the current auction system and that in the 2015-16 auctions Glencore acquired more than 50 per cent of capacity offered at certain ports. Unlike the November protocols, there are no caps on the potential capacity shares of any given exporter under the auction system.

The ACCC recognises that an appropriate capacity allocation system must balance the interests of all stakeholders, including the infrastructure owner and exporters. While the 40 and 50 per cent caps on LTC still provide an option for Viterra to allocate capacity among a few exporters (including its own trading arm) for the reasons outlined above, this result seems unlikely. Compared to the June protocols, the November protocols allow a greater number of exporters will be able to bid for and negotiate LTC agreements.

4.2.3.4. Long term capacity payment terms

Introduction

Consistent with the previous iteration of Viterra's LTA proposal (in the June protocols), the November protocols contain the following reference to payment terms.

> 3.9 Long Term Agreements – Booking fees
>
> Unless agreed by Viterra and a Client in writing, Clients will be required to pay:
>
> (a) the booking fees for Long Term Capacity acquired in respect of any Year (as specified in the Pricing Document) by no later than 1 July of the previous Year.
>
> (b) If a Client does not comply with clause 3.9(a):
>
> (i) Viterra may re-offer the relevant Long Term Capacity allocated to that Client to other Clients; and
>
> (ii) the Client must pay to Viterra, as a debt due and payable, the booking fees payable in respect of the Long Term Capacity that was allocated to it (and which remains unpaid).
>
> (c) Viterra may seek Credit Support in respect of the obligations set out in this clause 3.9.[88]

Submissions and analysis

Previously, exporters expressed uncertainty about whether booking fees would be required annually (as is presently the case) or alternatively to be paid upfront now for the length of any agreement.

Viterra subsequently amended this provision to clarify any uncertainty, and specify that all exporters will have the opportunity to provide booking fees on an annual basis, unless otherwise agreed to with Viterra.

Conclusion

The ACCC supports the reference to payment terms as they appear in the November protocols.

4.2.3.5. Amount of long term capacity available

Introduction

Under the current auction system Viterra made approximately 7.2 million tonnes of capacity available for the 2015-16 season, with scope for additional capacity to be created. This was against the backdrop of a total annual average crop production of 7.63 million tonnes.[89]

For example, Viterra's auction catalogue for the 2014-15 shipping year made available 4,635,000 tonnes of capacity in the non-harvest auction and 2,365,000 tonnes of capacity in the harvest auction.

[88] Viterra, November protocols, p. 17

[89] GPSA submission to ESCOSA Rail Access Review.

The November protocols require Viterra to identify at least 15 business days before initial applications close how much initial LTC will be made available. The protocols also allow scope for additional capacity to be created. The ACCC notes Viterra did not amend the protocols to include a specific reference to how much LTC will be made available.

Prior to the ACCC's draft decision however, Viterra did publish on its website, and communicated directly with exporters, the details of the amount of LTC available across the proposed five year term. Viterra indicated it would make 5,490,000 tonnes available as LTC and 2 million tonnes available as STC.

Submissions and analysis

Prior to the ACCC issuing its draft decision, several submissions highlighted uncertainty regarding the amount of capacity Viterra would make available, and what the ramifications could be for the export market and competition along the supply chain generally.

In addition to matters 25(3)(a) and (h), this is also relevant to the discussion on matters in clause 25(3)(e) and (g).

The ACCC notes that, under the auction system, Viterra would annually announce the amount of capacity available for the upcoming season. This level of disclosure under the auction system provided exporters a level of comfort to exporters in relation to developing their shipping programs and it also provided an overall level of transparency surrounding shipping from SA. However, while the publication obligation was included in the protocols the information itself was not specifically set out in the protocols.

Disclosing the amount of capacity available also benefits growers, in that it provided some insight into how much export capacity Viterra would offer, how much was taken up via each auction and what residual amount of capacity would be made available via the FIFS processes.

As noted above, Viterra published on its website, and communicated directly with exporters, the details about the amount of LTC it intended to make available across its previous iteration of its LTA proposal.

The ACCC considers that Viterra's decision to publish LTC would likely have alleviated the concerns raised with the ACCC. With the amount of LTC known, exporters can gauge whether Viterra can provide sufficient long and short term capacity to satisfy their demands.

In response to the draft decision Viterra submits that:

> the level of long term capacity that is available reflects the maximum level of capacity that can be made available at each port within existing operational constraints and subject to reserving a specified minimum of short term capacity.[90]

Most recently Viterra, in correspondence with GPSA, has signalled making LTC capacity broadly available as per the amounts published in the previous iteration of its proposal.[91]

The ACCC understands that it is not always practical to guarantee a minimum amount of capacity that will be made available in future years, and notes that Viterra will make information available on the amounts of LTC closer to the time of allocation.

[90] Viterra, submission on the ACCC's draft decision, p. 23

[91] Appendix to GPSA submission in response to the draft decision, Letter from Viterra to GPSA dated 6 August 2015, p. 3

Conclusion

For the following reasons it is important for the industry to understand how much LTC Viterra will make available:

- to appreciate how total LTC can be allocated in accordance with the threshold caps and therefore how many exporters can secure meaningful LTC allocations.
- to understand how much LTC will be available relative to STC.
- to understand how much capacity Viterra will make available across the five years and if there is scope for additional LTC to be made available.

While Viterra has not provided greater certainty in the November protocols on the actual amount of LTC available, Viterra has included a commitment to a process of informing industry of its intended LTC offering.

Also, Viterra publishing the initial LTC prior to the ACCC's draft decision was well received by industry and the ACCC. This may well provide an approximation of what LTC Viterra will offer in the future under its LTAs, although it is subject to be changed by Viterra.

The ACCC's full consideration of the transparency measures included in the Viterra's revised LTA proposal is set out in section 4.3.

4.2.3.6. Overall conclusion on Long Term Capacity

The ACCC has previously expressed support for the introduction of long term agreements. GrainCorp has long term agreements in place and the ACCC expressed support for long term agreements in the draft decision to approve CBH's long term proposal for three year agreements.

Those systems included a range of measures to ensure all exporters had scope to participate in the market via entering a long term agreement and/or via access to short term capacity. In response to oversubscription both models had safeguards in the way that oversubscribed capacity was then allocated – prorating in the case of GrainCorp or reversion to an auction allocation in the case of CBH.

Having regard to the matters set out at subclause 25(3) (a) and (h) of the Code, considering stakeholder views, and the recent revisions that Viterra has made to its LTA proposal, the ACCC acknowledges a range of potential benefits and is more comfortable with those concerns on the Viterra LTA model outlined in the ACCC's draft decision.

Key benefits include:

- Apart from the requirement in the initial allocation process for exporters to commit to 25,000 tonnes of LTC in each year, there are relatively few LTC application parameters or prerequisites in the proposal. As a result more exporters will have scope to apply for and potentially acquire LTC than under the current auction system.
- The revised three year term will provide a level of certainty for both Viterra, LTC exporters, and have a range of potential positive flow on effects for growers.
- LTC agreements are less costly for exporters than the auction system.
- Greater certainty for industry as a whole, including in upstream markets. This may facilitate additional investment along the supply chain.

Given the revisions Viterra has made under its November protocols, a number of the key risks that were identified in the ACCC's draft decision now appear less likely. These include:

- While Viterra will have considerable discretion under the protocols, the shorter maximum initial term of the LTAs as well as other safeguards such as the allocation caps and independent audit function promotes more exporters being able to participate and influence negotiations for LTC. Accordingly the risk of entrenching a less competitive market environment by allocating LTC only to a few large exporters is less likely.

- While Viterra could allocate Glencore the maximum possible LTC as allowed in the protocols, which may raise concern under the Code in relation to the non-discrimination obligation, the shorter term plus other factors provides other exporters with a better ability to compete.

- The proposed ACCC review process is an additional safeguard against Viterra allocating premium LTC between a few large exporters.

Overall, with regard to the LTC allocation process, the November protocols go a significant way to address the key concerns noted in the ACCC's draft decision to not approve the LTA system.

4.2.4. Allocation of Short Term Capacity

The STC allocation process is based on the current FIFS system used by Viterra to allocate residual auction system capacity. Exporters are familiar with this approach.

In the March protocols, Viterra proposed a number of amendments to the FIFS system which is in operation today. Briefly, the amendments were made to the FIFS process to prevent or limit exporters with LTC improving their shipping slots via the FIFS process prior to other exporters having the ability to seek to obtain STC.

The key findings on short term capacity are discussed below. They include:

- that there is broad support for First in First Served
- that the STC distribution across ports has been largely addressed in the protocols
- the revisions Viterra has made under its November protocols, compared to the June protocols, provide more exporters with a greater opportunity to acquire LTC. As such exporters are likely to be less reliant on solely securing STC.

The section concludes with a view on whether the STC process is appropriate.

4.2.4.1. Broad support for First in First Served

Introduction

There is broad support for the ongoing use of a FIFS system for the allocation of STC in SA. However such support has been qualified by some exporters and other stakeholders. A key concern relates to how Viterra will distribute STC between ports (as discussed below).

Submissions and analysis

A number of stakeholders have expressed support for the FIFS system.

Quadra particularly supports FIFS as a fair and transparent method of awarding capacity. Specifically it supports FIFS overall ahead of other allocation methods and submits that:

> The market is relying on the BHC being completely objective in fairly awarding export stem in over-bid months (Jan-Mar period).[92]

Some exporters expressed support for the fact that the FIFS process allowed for greater opportunities to obtain capacity, when compared to the auction system. In contrast to the allocation of LTC, where Viterra will decide on allocations in the case of oversubscription, the FIFS system has a greater element of chance, in that it depends both on the relative speed of applying each round, as well as how many other exporters apply for a particular piece of capacity.

A key observation about FIFS is that it does not carry the same risk for exporters as the auction or LTC processes. In the case of the auction system, the risks are potentially high premiums, risk of rebate forfeiture and delayed return of the rebates. In the case of LTC agreements, the risk is the adoption of take or pay terms against the risk of limited production. This is in addition to other general risks associated with operational and regulatory uncertainty over an extended period of time.

Conclusion

The ACCC recognises that exporters are supportive of the FIFS system. This is understandable as a FIFS process is well understood by exporters and will:

- allow a broad cross section of exporters, subject to their own shipping needs, the opportunity to apply for shipping slots on a nominally level playing field (although not all exporters will necessarily obtain FIFS shipping slots).
- not rely on Viterra making decisions relating to STC capacity
- likely provide a broad range of exporters some amount of STC
- facilitate access for a range of exporters
- represent a low barrier to entry to the STC market
- allow exporters to respond flexibly to a dynamic market within a short timeframe
- provide exporters with LTC the scope to top it up.

4.2.4.2. Distribution of STC across ports

Introduction

Viterra has allocated 500,000 tonnes per quarter, or two million tonnes annually, to STC. The ACCC's draft decision noted the changes Viterra made to its initial proposal to provide more information around the distribution of STC across ports.[93]

Consistent with the previous iteration of Viterra's LTA proposal (in the June protocols), the November protocols include the following clause:

> 3.12 (b) Viterra's intention is that the Short Term Capacity referred to in clause 3.12(a) will be spread across all Port Terminals broadly in line with the proportion of Capacity offered at Auction at each Port Terminal during the 2015/2016 Year. For operational reasons, this cannot precisely reflect the proportion of Capacity offered at Auction at each Port Terminal during the 2015/2016 Year. However, Viterra's intention is that it will broadly be in line with this proportion.[94]

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[92] Quadra, submission in response to Issues Paper, p. 1.

[93] ACCC draft decision, p. 65

[94] Viterra November protocols, p. 18.

In addition, the protocol states that:

> 3.12 (c) If, in any Quarter, the proportion of Short Term Capacity offered at a particular Port Terminal varies from the amount offered at that Port Terminal in the corresponding Quarter of the previous Year by more than 10%, Viterra will publish reasons for that variance on the Viterra Website.[95]

Viterra submits that this transparency measure will provide exporters greater certainty about the amount of STC available.

Submissions and analysis

The ACCC and stakeholders previously noted the lack of clarity in the term "reasonably" in relation to the allocation of STC, as set out in Viterra's initial proposal in its March protocols.[96]

As Viterra has amended the protocols in response to these concerns, exporters will be able to consider how much STC will be available each year across the port terminals. Viterra has also included a transparency safeguard surrounding the amount of STC available. For example Viterra will explain why and if STC is not maintained in accordance with the proportions of 2015/2016 shipping activity, subject to a 10 per cent threshold.

Like the June protocols, the November protocols also allow exporters to consider in greater detail what opportunities on a port by port basis may be available via the FIFS allocation process. It also may inform how they engage in LTC oversubscribed capacity allocation negotiations.

Conclusion

The ACCC considers that the November protocols, in relation to the distribution of STC, will alleviate the previous concerns expressed by stakeholders (as well as the ACCC). While the amendment does not specify exact amounts of capacity to be allocated at each port, the ACCC considers that the transparency measures to be appropriate and provide a level of oversight of any change from historical distribution of capacity between ports.

A greater understanding of how capacity will be allocated for STC is also important to allow exporters to develop their applications for both LTC.

4.2.4.3. Amount of STC capacity

Introduction

Viterra submits that the nominated two million tonnes is a sufficient amount of STC to cater for the needs of small exporters and new entrants. It also notes that any residual LTC becomes STC, which may mean that more than two million tonnes is actually offered in any given year.

As set out in Chapter 4 of the draft decision, Viterra segregates the top five exporters' SA shipping task from that of the remaining ten (on average) exporters. Viterra argues that the average shipping needs of the remaining exporters can be readily met by the proposed two million STC tonnages.

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[95] ibid.

[96] ACCC draft decision, pp. 65-66

Submissions and analysis

Exporters have highlighted concerns with the amount of STC to be allocated via the FIFS process. For example, AGG submits on the amount of STC that:

> STC of 500,000 mt is insufficient. Viterra's own figures bear this out with smaller exporters' market share growing from 10% in 11/12 to 24% of total exports in 14/15 to date. A continuation of this trend sees STC requirements exceeding the 500,000 mt per quarter proposed, especially in a large production year. [97]

AGG also queries the distribution of STC across the year:

> As the premium months for shipping occur in the first half of the calendar year having STC in the Jul-Sep or Oct-Dec quarters is not attractive. We see no safeguards for LTC holders having preferential treatment in the premium first half of the year putting STC holders at a disadvantage. [98]

Viterra submits that it is not in its interest to provide additional STC. Its preference is to allocate as much LTC as possible. It believes providing additional STC will be a deterrent to allocating LTC to exporters. This is because Viterra believes exporters would be reluctant to apply for LTC, given the risk of not being able to accumulate enough grain. It is Viterra's interests to allocate as much capacity as possible to the LTC allocation process. This is outlined below in response to matter 25(3)(f).

The ACCC's draft decision noted a level of concern around the amount of STC. The concerns around STC were mainly in light of other concerns about the long term capacity allocation process. Under the June protocols the ACCC considered that a situation could have occurred where a number of exporters may not have been unable to secure LTC, which could have led to a lot of oversubscription with respect to the allocation of STC.[99]

Viterra subsequently submitted on the ACCC's draft decision, noting that:

> (f) a minimum of 2.2 million tonnes (including tolerance) of short term capacity will be reserved every year – spread across all port terminals. Rather than selling this capacity now, Viterra will make this available every year;
>
> (g) all exporters will have an equal and fair opportunity to acquire short term capacity. For the first 2 business days after the shipping stem opens, individual clients will only be able to make one booking every 15 minutes. With 135 short term capacity slots across 6 port terminals, Viterra considers that this will provide ample opportunity for different exporters to obtain short term capacity at different ports and in different periods;

The ACCC notes the amendments Viterra has made under its November protocols in relation to the allocation of LTC, most notably the reduced maximum initial three year term but also the inclusion of an ACCC review process. As noted previously in this final decision, the ACCC considers that under the November protocols (compared to the previous June protocols) medium and smaller exporters are likely to be in a better position to negotiate with Viterra for LTC. If sufficient numbers of exporters can access LTC, it would likely reduce the level of demand for STC, although STC at peak ports and times would likely still be in high demand.

As previously noted by the ACCC, there will be in the order of 135 slots available in the short term allocation process. With peak shipping typically occurring between January and June and up to 15 exporters vying for around 1 million tonnes of capacity in approximately 60 slots

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[97] AGG, submission in response to ACCC Issues Paper.

[98] ibid.

[99] ACCC draft decision, pp. 67-68.

of STC in sought after months, this would provide exporters with, on average, around four STC slots each.[100] The ACCC also notes that not all ports may be as desirable to exporters, meaning that the number of desirable STC slots smaller.

Conclusion

The ACCC notes that it is not feasible that all exporters get all of the capacity that they would ideally like to have. There is a finite level of capacity in the Viterra system and there is evidence that most exporters should be able to obtain some STC.

The ACCC's draft decision notes that the demand for STC would likely depend on how Viterra exercises its discretion allocating oversubscribed LTC, which was a key concern with the June protocols.

The ACCC considers that the November protocols better balance the bargaining power of the port operator and all exporters. While larger exporters may still be the best placed to acquire oversubscribed LTC, the ACCC considers that with a reduced maximum initial three year term and the oversight of an ACCC review process, other exporters should have a better opportunity apply for, negotiate and secure LTC.

Accordingly, the ACCC considers that with the amended LTC allocation process, more exporters will be better able meet their capacity requirements through a combination of both LTC and STC. As such there is less of a case for additional STC being required. Furthermore, additional STC may be made available if it is not taken up as LTC.

The ACCC's view is that with the amendments to the LTC allocation process, the amount of available STC is likely to be appropriate.

4.2.4.4. Conclusion on Short Term Capacity

Having regard to the matters set out in subclauses 25(3)(a) and (h) of the Code, the ACCC considers there are a range of benefits associated with making STC, in conjunction with LTC, available to exporters on a FIFS basis.

STC is a less risky prospect for many exporters, particularly compared to take-or-pay LTC or the current auction system. Through access to STC, exporters can be responsive to their end user markets. Subject to capacity being available, access to STC can allow exporters to respond to changes in production, to global demand and/or any crises in the industry. The biggest risk for some exporters is the prospect of not securing capacity through this process.

The ACCC notes that exporter support for the FIFS process in part stems from the fact that it has elements of process and transparency that support objectives of fairness and is not decided by the exercise of broad discretion in the manner of the LTC oversubscription process.

Moreover, the amendments Viterra has made under its November protocols appear to have improved the bargaining position of smaller and medium sized exporters and provide them with a better opportunity to acquire LTC.

The ACCC considers that this improved position for exporters to be able to access LTC reduces the concerns the ACCC had on potential oversubscription of STC as more exporters are likely to be able to utilise a combination of LTC and STC.

[100] ibid, p. 67

4.2.5. Non-discrimination obligation and the appointment of an Independent Auditor

Introduction

Viterra's protocols include an audit function in relation to its compliance with clause 10 of the code (non-discrimination).

Under the protocols the ACCC can initiate an audit once every 12 months to be undertaken by an independent third party. The audit provision is designed to alleviate concerns that Viterra will allocate oversubscribed LTC to Glencore in a discriminatory manner.

In providing port terminal services Viterra must adhere to non-discrimination and no hindering obligations (clause 10). Further, when considering a capacity allocation system, the ACCC must have regard to the whether the system will operate consistently with clause 10.

If an audit found that Viterra has not complied with clause 10 of the Code, it would lead to an ACCC investigation into a breach of the Code.

As previously noted, the November protocols allow for an ACCC review process whereby the ACCC may issue an objection notice if it considers that the initial LTC allocation process did not operate efficiently, fairly and consistently with clause 10 of the Code. The ACCC can also withdraw an objection notice if it becomes aware that the reasons for the objection no longer exist.

The protocols now include both the ACCC's review process of Viterra's initial LTC allocation process, as well as the annual audit function.

Submissions

Avant Agri supports the idea of an independent audit, but noted that "the ACCC needs to appoint the auditor, the auditor needs to be hired by the ACCC and only responsible to the ACCC".[101]

The GPSA notes that it assumes the audit function would be valued by exporters. However the GPSA believes this is alone is an inadequate safeguard.[102]

Conclusion

Having regard to the subclauses 25(3) (a) and (h) of the Code, the ACCC's view is that the audit function can partly address concerns about potential discrimination arising from Viterra's approach to allocating oversubscribed capacity to Glencore.

The audit will provide additional scope for greater transparency about the capacity allocation process. It should provide some additional confidence that Viterra will allocate capacity in a fair and transparent manner. However, confidentiality concerns may limit what information can be published and made available to industry.

The ACCC also notes that the audit function adds a level of discipline on Viterra to comply with the Code given the threat of remedial action.

The inclusion of the ACCC review process of the initial LTC allocation adds to the oversight of Viterra's approach to allocating LTC. From the ACCC's perspective, the review process is likely to carry more weight compared to the independent audit function given the potential

[101] Avant Agri, submission in response to ACCC Issues Paper, p. 12.

[102] GPSA, submission in response to ACCC Issues Paper, p. 11.

ramifications of the ACCC review, which could result in a reversion of the capacity allocation system back to the current auction system. The ACCC however notes that given its objection opportunity will not affect LTC agreements already made for the initial three year period, the practical effect of the review may be somewhat limited over this period.

The ACCC believes the audit function, together with the ACCC review process will improve the operation of the capacity allocation overall, will be in the interests of exporters and helps to ensure that the capacity allocation system is consistent with clause 10 of the Code.

These mechanisms should provide industry with confidence in Viterra's management of the LTC allocation process.

4.2.6. ACCC views on matters (a) and (h)

The above discussion set out the ACCC's considerations in relation to a number of elements of Viterra's LTA proposal to which the ACCC must have regard to under subclauses 25(3)(a) and (h) of the Code. The ACCC's key findings on these subclauses are set out below.

The ACCC acknowledges the support from exporters for the removal of the auction system. The auction system has imposed costs on exporters which have affected how some exporters' access capacity from SA. The current auction capacity allocation system overall has equally facilitated the participation of many exporters (on average 15 a year) to execute shipping slots at Viterra's ports. Capacity is also only allocated for 12 months, providing new opportunities for all exporters on an annual basis.

However, compared with the auction system, the proposed LTA system has the potential to enable more exporters to access capacity in accordance with their shipping plans. The ACCC notes that a number of exporters have indicated that they would not be prepared to participate in any further auction processes, given the types of premiums paid in previous auctions.

During the ACCC's consideration of Viterra's LTA proposal, many stakeholders expressed support for long term agreements in South Australia, though many exporters also raised concerns with some the specific details of Viterra's proposal.

The ACCC's draft decision noted these concerns, namely:

- the level of Viterra's discretion in the protocols concerning the allocation of LTC in the case of oversubscription.
- the previously proposed five year term, and its potential effect on the oversubscribed LTC allocation process
- equity concerns relating to access to STC.[103]

The amendments that Viterra has now included under its November protocols have substantially addressed these concerns.

The reduction of the maximum initial term of LTA allocations to three years under the November protocols will allow a range of medium and smaller exporters to better compete for key LTC shipping capacity as a greater proportion of exporters would likely be willing to commit to an initial agreement of three, rather than five years, and then to two year agreements in subsequent years.

A maximum three year term provides greater opportunities for smaller exporters to bid for LTC that meets their needs while allowing them to more effectively satisfy Viterra's criteria

[103] ACCC draft decision, p. 71

for allocating oversubscribed capacity. These exporters could therefore better negotiate with Viterra to acquire portions of that oversubscribed capacity.

In addition, the further safeguard by way of the ACCC review process and objection opportunity in the November protocols provides a further level of discipline on Viterra to engage and negotiate with exporters on a constructive and equitable basis.

Given that the this objection opportunity will not affect LTC agreements already made for the initial three year period, the ACCC considers its effect to be somewhat limited in practice over this period. Nevertheless, the ACCC considers that the review process, as well as the independent audit function will provide industry with a level of transparency around Viterra's actions and could provide input into the Government's review of the Code to commence by September 2017.

If the ACCC issues an objection to the initial three year allocation (and does not withdraw it), over the longer term the objection would require Viterra to revert to the current auction system after the three years.

Overall the ACCC considers that the combination of the revisions made to the LTC allocation process, as well as the existing threshold caps on initial LTC, will benefit the STC allocation process. Fewer exporters will solely rely on STC to satisfy their entire demand and will likely be able to use a combination of LTC and STC to fulfil their shipping requirements.

The ACCC's draft decision noted that Viterra's proposed LTC allocation system could provide greater scope for all exporters to compete in the SA export market. The ACCC's view is that the amendments included under the November protocols have largely set out adequate processes for exporters to negotiate and compete for LTC in the SA export market.

Accordingly, the ACCC overall considers that Viterra's revised LTA proposal is likely to operate in the interest of exporters wanting access to port terminal services in SA and that the system will operate efficiently, fairly and consistent with clause 10.

4.3. Availability of information

This section sets out the ACCC's key findings on the proposal having regard to subclause 25(3)(b) of the Code.

Subclause 25(3) (b) relates to whether the capacity allocation system will operate efficiently and provide sufficient information to exporters about the capacity of port terminal facilities owned or operated by the port terminal service provider to help exporters plan export activities and acquire required port terminal services.

4.3.1. Transparency measures

Introduction

The inclusion of transparency measures in the protocols helps exporters plan export activities and acquire port terminal services. Key measures that can assist exporters include:

- The provision of information about the amount of capacity available, when it is available and at which port terminal facility.
- The processes by which capacity can be acquired.
- Outcomes of capacity allocation processes and the shipping stem.

Transparency measures can also offset the information asymmetry held by a port terminal operator, and with it scope for discrimination. This is particularly relevant in relation to the

Viterra proposal, which will allow Viterra to undertake concurrent LTC negotiations with multiple exporters for a scare resource at certain times of the year, at certain ports.

Transparency measures can also negate the potential for discrimination and potential disputes. Greater information about how capacity is allocated may alleviate exporters concerns about discrimination.

Submissions and analysis

Viterra submits that the protocols provide substantial transparency about the process applying to both long and short term capacity. Viterra outline in its submission a range of information it will publish and also highlights key transparency measures included in the protocols, these are:

- the aggregate demand for capacity received during the application process for long term capacity;
- the outcome of any long term capacity allocations on a per slot and per port terminal basis;
- details of any special conditions applying to that short term capacity;
- the outcome of allocations of short term capacity, and any short term capacity that remains available for booking; and
- any available additional capacity (short term or long term) that becomes available for booking.[104]

Stakeholders noted that Viterra's previous March protocols did not include sufficient detail concerning the amount of long or short term capacity that would be made available, and was unclear around payment terms.[105] There were also concerns around the transparency of the allocation process for oversubscribed capacity.

Australian Grain Growers Co-operative submitted that:

> There is no definition of total capacity or Long Term Capacity, at least in tonnage terms.[106]

GPSA submitted:

> The Glencore/Viterra Application is not prescriptive enough to give clients and consumer enough knowledge to make well informed decisions, there are many unknowns, leading to many questions.[107]

Furthermore in relation to the LTC process, GPSA argued:

> These allocation principles are subjective, lack transparency and favour a reduction in competition.[108]

Some concerns on transparency measures were addressed by Viterra prior to the ACCC's draft decision. In particular Viterra made amendments to its protocols to provide additional transparency surrounding:

- the amount of STC that is available and the allocation process
- clarification on payment terms

[104] Viterra, Submission, 12 March 2015, p. 19.

[105] ACCC, draft decision, p. 73

[106] Australian Grain Growers Co-operative submission, p. 1

[107] GPSA, submission in response to ACCC Issues Paper, p. 3.

[108] ibid, p. 9.

These amendments are contained in the November protocols.

Regarding LTC, the ACCC notes that the November protocols do not outline the amount of LTC that Viterra will make available. The protocols however note that Viterra will provide this information to industry no later than 15 business days before the closing date for LTC applications.[109]

At the time the ACCC made its draft decision, there were concerns about Viterra not specifying the actual amount of LTC it would make available. These concerns were ultimately mitigated by Viterra separately publishing this information in relation to its planned LTC allocation process for the 2015-16 and subsequent four seasons, although this allocation process did not eventuate. Specifically, the ACCC's draft decision noted that:

> Viterra's decision to not include specific references to the amount of available LTC in the protocols is less desirable, compared to the potential inclusion of this information in the protocols. However, Viterra's decision to publish this information on the Viterra website and communicate this information to clients should result in the same outcome of improved transparency surrounding the LTC allocation process.[110]

Regarding transparency of the allocation of oversubscribed capacity, the ACCC notes that this process will be run by Viterra, who will have a significant information advantage over its various clients seeking LTC. However, the processes included under the November protocols that allow for Viterra's capacity allocation process to be reviewed – by both the ACCC and an independent auditor – provide a level of oversight on the allocation of capacity for oversubscribed shipping slots.

Conclusion

In the case of Viterra's proposal, appropriate transparency measures are important given the level of discretion that the protocols give Viterra, especially in relation to the oversubscribed LTC allocation process.

The November protocols include measures that provide exporters with an understanding of the amount of STC available and how it is allocated. The protocols also remove any uncertainty relating to payment terms.

The lack of specific references to the amount of available LTC in the protocols remains less than desirable compared to the potential inclusion of this information in the protocols. Viterra has, however, committed to informing industry at least 15 business days before the closing date for LTC applications

The ACCC also considers that Viterra previously indicating the amount of LTC it would offer (albeit in an allocation process that did not eventuate) provides industry with some guide as to what Viterra might offer as LTC in a future allocation process. Accordingly, this may ease some stakeholder concerns around the levels of LTC Viterra will make available. The ACCC notes, however, that the amount of LTC Viterra offers in the future may be different.

While the LTC oversubscription allocation process will not be transparent to all parties and Viterra will have a significant information advantage as it negotiates individually with exporters, this is not uncommon in commercial negotiations. The ACCC's concern under the proposal is to improve the negotiating position of exporters.

Additionally, the November protocols include multiple review processes that can scrutinise the results of the allocation process. The ACCC review process in particular enables it to object to Viterra's initial LTC allocation, which will result in a reversion of Viterra's capacity

[109] Viterra, November protocols, p. 11

[110] ACCC, draft decision, p. 73

allocation system to back to the current auction system after three years. The ACCC also notes that a Government review of the Code is to commence no later than 30 September 2017.

4.3.2. ACCC views on matter (b)

The ACCC's view is that overall the November protocols provide exporters sufficient information about the capacity of the port terminal facilities, and about the broad process for allocation of LTC and STC.

The ACCC considers that there is a lack of upfront transparency in the protocols around the amount of LTC available. The ACCC also notes the allocation of oversubscribed LTC lacks full transparency.

However, the ACCC considers that the key concern resulting from insufficient transparency – that certain exporters may be disadvantaged in the course of the allocation process – is addressed to a significant degree by the changes Viterra has included under its November protocols. In particular, the ACCC considers that the reduced maximum initial term of the proposed LTAs provide greater opportunities for all exporters to secure LTC and the ACCC review process should provide a level of discipline on Viterra to engage in constructive and fair negotiations with exporters for LTC. This should also include the disclosure of adequate information.

4.4. Transferability of shipping slots

This section sets out the ACCC's key findings on the proposal having regard to subclause 25(3)(c) of the Code.

Subclause 25(3)(c) relates to whether the capacity allocation system will operate efficiently and provide flexibility and transferability of shipping slots, including the ability to move allocated capacity of port terminal facilities owned or operated by the port terminal service provider across times or ports where appropriate.

4.4.1. Arrangements relating to flexibility and transferability of shipping slots

Introduction

The November protocols carry over existing arrangements from the current capacity allocation system relating to flexibility and transferability of shipping slots. It also extends these provisions to allocated LTC.

No additional changes have been made to transferability provisions in the protocols over the course of the Viterra's LTA proposal.

Viterra submits:

> Exporters will continue to be able to trade and move slots freely, as they can under the current Protocols. The existence of this liquid secondary market will significantly ameliorate any adverse impacts that may arise in connection with the initial allocation of capacity.[111]

Viterra also submits that:

> …there is a clear ability for clients to acquire slots at the times they need, even if they do not acquire those slots at the time of initial allocation. The existence of this liquid secondary

[111] Viterra submission accompanying application to vary protocols, p. 5

> market will further facilitate the efficient operation of the proposed long term and short term capacity allocation system.[112]

The November protocols also include an additional provision relating to LTC, whereby in the initial allocation process, clients will be required to apply for a minimum of 25,000 tonnes in each year during the relevant allocation period.[113] Viterra submits that:

> this is a very modest minimum requirement (effectively one vessel each year), which is designed to ensure at least some level of commitment to export from South Australia over multiple seasons.[114]

Viterra notes that its revised proposal, which offers a maximum initial three year term for LTC, provides its customers with less flexibility when compared to its previous proposals which allowed for a five year term.[115]

Submissions and analysis

Few exporters indicated concern with the carryover of these related provisions with CBH and ADM only raising issue on the potential flexibility of LTC arrangements when supply was not available.[116]

The ACCC notes that many exporters will value the flexibility allowed by the protocols surrounding how an exporter can develop their LTC applications. The following issues are equally relevant to matter 25(3)(c), which relates to the flexibility of the protocols.

The revised term of the proposed LTAs allow for exporters to apply for initial LTC for three years. Following the initial three year allocation period, and if the ACCC does not object to the allocations, Viterra can allocate LTC every two years for shipping slots in each subsequent two year period.

The ACCC notes that the protocols allow exporters to apply for terms shorter than three years after the initial LTC allocation process, across any number of ports or otherwise. The only minimum requirement is for an exporter to book at least 25,000 tonnes of capacity in each year of requested LTC in an initial allocation process. After the initial LTC allocation, an exporter could in theory apply for as little as one shipping slot at a single port in one year.

The LTC process is likely to provide exporters increased certainty about future shipping not currently possible under the auction system. This may be of particular benefit to smaller exporters, who at the moment only access capacity via the current FIFS system, but also of benefit to exporters of all sizes.

As noted in the above consideration of subclauses 25(3)(a) and (h), the ACCC considers that the concerns noted in the its draft decision around the LTC oversubscription process have been largely addressed by the amendments included under the November protocols. Accordingly, more exporters should be better able to use the flexibilities contained in Viterra's proposal while operating within their own business interests.

Conclusion

There has been broad support from exporters for the carryover of existing provisions relating to the flexibility and transferability of shipping slots.

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[112] ibid, p. 13

[113] Viterra, November protocols, p. 12

[114] Viterra, submission on the ACCC's draft decision, p. 8

[115] ibid, p. 8

[116] CBH, submission in response to ACCC Issues Paper, p. 3. ADM, submission in response to ACCC Issues Paper, p. 4

The ACCC notes that there are a range of provisions in the Viterra protocol that promote and enable exporters to execute their shipping slots with limited constraint. Exporters can:

- Move their shipping slots (where practicable, subject to capacity being available).
- Transfer their shipping slots to other time periods and/or ports (check ports option).
- Surrender their shipping slots, and subject to timing possible secure some form of refund.

The ACCC considers that while the three year maximum term of the proposal may provide relatively less certainty, and potentially less flexibility for Viterra (compared to Viterra's previously proposed maximum five year LTC term), the reduced term is likely to allow a greater range of exporters to acquire LTC and will provide additional certainly and flexibility across exporters. The ACCC also considers that allocating LTC for a three year period provides Viterra with a significantly larger degree of flexibility compared to the current auction system.

The ACCC also considers that the minimum requirement included in the November protocols to book 25,000 tonnes of capacity in each year of requested LTC in an initial allocation is reasonable.

While exporters are concerned about the risk associated with the auction system, it appears long term agreements are equally not without risk, particularly in relation to production risk. Exporters must consider this before entering a long term agreement. The ACCC does not consider that it is necessary to have a procedure for forfeiting capacity in drought years. This is because of the nature of the take-or-pay arrangements and the capacity allocation factors that Viterra will employ in the case of oversubscription. It would be undesirable if certain large exporters were able to 'over-apply' for capacity, excluding smaller exporters, without much downside risk. A failure to accumulate may also be better dealt with through contractual arrangements for upcountry storage and transport.

Essentially long term agreements are a take or pay agreement with Viterra. In accordance with the standard agreement for access Viterra will make available shipping services and incur relevant costs and risks associated with the provisions of this service. Equally an exporter must uphold their obligations and commitment to use capacity acquired. However, given Viterra's willingness to promote LTC arrangements, it might also be willing to engage in negotiations with exporters over the terms of the standard agreement.

4.4.2. ACCC views on matter (c)

It is the ACCC's view that the protocols include sufficient measures to facilitate flexibility and transferability of shipping slots. Exporters have expressed support for familiar processes, which should be equally effective when rolled out to long term capacity.

The removal of the auction system will also provide exporters greater scope to trade and transfer slots, due to the removal of rebates as a consideration in secondary trading.

4.5. Use of capacity during peak times

Subclause 25(3)(d) relates to whether the capacity allocation system will operate efficiently and contains mechanisms to ensure that the provider takes all reasonable steps to ensure that capacity of port terminal facilities owned or operated by the port terminal service provider is not unused during times of peak use.

Introduction

The November protocols contain a number of mechanisms to facilitate the allocation of capacity of port terminal services during times of peak use, through:

- Making up to three years of LTC available in the initial allocation process
- Making STC available through FIFS on an annual basis
- Providing for surrendered capacity to be made available to the market (subject to Viterra's discretion)
- Allowing Viterra to develop additional capacity
- The provision for transfers to support secondary trading.

Appendix C sets out information on South Australian bulk wheat port terminal services and shows that there has been significant demand for capacity during the peak shipping period, especially at Port Lincoln and Port Adelaide Outer Harbour.

Submissions and analysis

Viterra submits the following factor is addressed because:

> The Protocols provide an open, transparent, fair and non-discriminatory opportunity for clients to acquire capacity across all periods, including periods of peak use;
>
> The Protocols do not include any requirements that could operate as disincentives to acquire capacity during peak periods (e.g. auction premiums or restrictions on use);
>
> The commercial negotiation process to facilitate the initial allocation of long term allocation process will further assist in ensuring that clients have access to capacity across a range of port terminals and periods. Viterra anticipates that this process will further assist in "spreading the peak" across a range of slots;
>
> If capacity is not sold as long term capacity, it will remain available for booking as short term capacity on a first-in-first-served basis when the shipping stem opens for the relevant year. This will further reduce any risk of capacity not being utilised, particularly during periods of peak demand.[117]

Some exporters have expressed concern that Viterra will not provide any certainty or scope to make arrangements linking LTC with Export Select. This may constrain some exporters, particularly smaller exporters from seeking LTC. However, given the high level of demand for capacity at times of peak use, this will not hinder the uptake of port terminal services capacity overall.

Conclusion

Firstly, based on existing demand levels it is likely that capacity at Viterra's port terminal facilities will not be unused during peak times. As outlined in Appendix C, there have been on average 15 exporters operating from SA. Several ports are typically at or near estimated capacity across the peak shipping period, and already cannot accommodate the existing level of demand, even given the current concerns surrounding the auction system.

Secondly, the protocols include a range of mechanisms to facilitate the use of both LTC and STC, especially at peak times. This includes the initial allocation processes for LTC and the FIFS allocation process for STC. In addition a range of secondary options exist to allow exporters to move their bookings and/or trade them on the secondary market. Viterra also make available partial refunds to encourage exporters to surrender capacity, which in turn Viterra can make available to other exporters. However, given that it is not a full refund, this will encourage use of the capacity or trade to other exporters.

[117] Viterra, Submission, 12 March 2015, p. 20.

4.5.1. ACCC views on matter (d)

The ACCC's view is that the proposed variation includes a sufficient range of processes which will facilitate the allocation of capacity overall, including capacity at peak times of use.

4.6. Business interests and efficient operation

Subclause 25(3)(f) relates to the business interests of the port terminal service provider; and subclause 25(3)(i) relates to the economically efficient operation and use of, and investment in port terminal facilities.

The ACCC believes it is appropriate to consider both subclauses 25(3)(i) and (f) of the Code concurrently, as the two matters are related. In many circumstances, it is in the interests of the port terminal service provider that the protocols allow for the economically efficient operation and use of, and investment in port terminal facilities.

The ACCC considers that, when having regard to the legitimate business interests of the port terminal service provider, the following may be relevant:

- the ongoing commercial viability of services provided from the relevant port terminal facilities.
- the likely impact that the current and proposed capacity allocation system may have on any investment decisions made by the port terminal service provider.
- the likely impact of the costs incurred by the service provider arising from maintaining and/or departing from the current arrangements.

Submissions

Viterra submits that approving the proposed variation to the protocols is in its legitimate business interests, as it will:

- Increase certainty about long term activity at the port
- Provide greater certainty to build long term relationships with clients
- Aid supply chain planning
- Promote investment in infrastructure at port and along the supply chain.
- Likely lead to increased certainty and increased access to capacity at its ports, including premium capacity.
- Remove risk associated with uncertainty surrounding the operation of the auction, including for Glencore as an exporter and associated entity of Viterra.[118]

Viterra also submits:

> As an infrastructure owner, [Confidential] it is clearly in Viterra's interests to obtain greater certainty about the use of that infrastructure. This, in turn, will facilitate further efficient decisions about investment in, and expansion of, the export supply chain for the benefit of Viterra, exporters, growers and the South Australian economy.[119]

[118] Viterra, Submission, 12 March 2015, p. 4

[119] ibid.

Viterra reiterated its legitimate business interests when responding to the ACCC's draft decision, noting that its LTA proposal will result in:

- Improved access arrangements to port terminal services which will bring South Australia into line with other grain growing regions in Australia and globally.
- Enhanced supply chain planning.
- Further incentives for investment in the South Australian industry in the form of investment in accumulation models, infrastructure, human resources and/or product offerings to growers.
- Increased levels of capacity when compared to the auction and FIFS system over the past two years.
- Increased stability in the price of grain over a longer period.[120]

Viterra, however, also noted that its revised proposal contains reduced benefits for Viterra as the infrastructure owner when compared to its previous proposals under the March and June versions of the proposed protocols.[121]

Conclusion

The ACCC considers that the proposal will clearly benefit Viterra. It will provide Viterra greater certainty regarding throughput at its ports and along its upstream supply chain. Viterra can also have greater confidence to explore investment opportunities at the port, and also upstream in related markets.

While benefits of certainty through long term agreements may not extend to a five year period, as previously proposed by Viterra, the ACCC considers that the revised LTA proposed still provides consideration benefits for Viterra. The structure of the revised LTA proposal – with a three year initial term followed by subsequent two year terms – provides Viterra with insight into the demand for its services beyond the current annual auction allocation process. In addition, given that the auction has not operated as intended in some years, Viterra has at times faced a higher level of uncertainty than if the auction always functioned as envisaged. Adopting a LTA based system, without any auction mechanism, would resolve much of this uncertainty.

The proposal will allow for the economically efficient operation and use of, and investment in port terminal facilities. The long term capacity allocation system should provide Viterra greater information about its future export needs, and therefore confidence to undertake investment in the port terminal facilities. The carryover from the current protocols of slot transferability, in addition to the likelihood that the long term agreements will allocate peak capacity in particular, should allow for the economically efficient operation and use of the Viterra port terminal facilities.

Long term agreements for port capacity will also benefit Viterra as they will encourage the use of the Viterra ports and related network, thereby maintaining efficiency across the supply chain. The ACCC notes that the ports are not fully utilised across all time periods, and that long term applications may encourage use of ports across a broader range of time periods.

4.6.1. ACCC views on matter (f) and (i)

The ACCC's view is that approving Viterra's LTA proposal under the November protocols is in Viterra's legitimate business interests.

[120] Viterra, submission on the ACCC's draft decision, pp. 9 - 10.

[121] ibid, p. 8

4.7. The public interest and competition in markets

Subclause 25(3)(g) relates to the public interest, including the public interest in having competition in markets; and subclause 25(3)(e) relates to the potential effects that the capacity allocation system has on upstream and downstream markets.

4.7.1. Overview

The ACCC considers that subclauses 25(3)(e) and (g) relate to the promotion of competition in markets, including the market for bulk wheat exports as well as for upstream and downstream related markets. In particular, the ACCC is interested in the effect that the protocols may have on the upstream grain accumulation market, and the potential impact on competition for farmers' grain.

Equally relevant to the assessment against these criteria is the assessment undertaken in relation to subclauses 25(3)(a) and (h) above. If the interests of exporters are appropriately considered under the proposal, the public interest may also be served through the realisation of competition in markets.

The ACCC considers the following matters are relevant to the public interest:

- Whether there is sufficient competition in upstream and downstream markets such that there is a constraint on the exercise of market power in the provision of port terminal services.
- Whether the introduction of the proposed LTA capacity allocation system will allow the port terminal service provider to better compete in upstream or downstream markets such that it would also promote competition.
- Whether the introduction of the proposed LTA system will better allow other firms, including exporters to compete in the upstream and downstream markets.

Relevant upstream and downstream markets in SA are the:

- Grain acquisition market
- Upcountry storage and handling services market
- Transport and logistics market.

4.7.2. Grain acquisition market

Introduction

To understand the effect of the proposal on the grain acquisition market, it is important to consider the current level of competition for SA grain under Viterra's current auction system. Based on the ACCC's analysis of the grain acquisition market set out in Appendix C, it appears that:

- Growers have decreased production risk and increased supply overall, subject to periods of drought.[122]
- On average 15 exporters annually export grain for export from SA growers. However, around three to five exporters export most of the grain task.

[122] GPSA, submission in response to ACCC Issues Paper, p.7.

- There are other companies and organisations that acquire and accumulate grain, but do not directly access port terminal services.
- There is limited domestic demand for grain in SA. The industry is export oriented, with the overwhelming majority of exports in bulk, rather than by containers. SA growers do not have the benefit of access to a large number of domestic consumers, nor does the sector significantly constrain the export market.

Many exporters query their ongoing involvement in the SA grain export market and consequently the SA grain acquisition market should Viterra's current auction system continue.[123] For example, many exporters found themselves overcommitted in previous auctions and, considering the uncertainty surrounding the operation of the Viterra auction process, would be unlikely to seek capacity in the long term via this mechanism.

Submissions and analysis

Viterra submits that the proposal will benefit competition in upstream and downstream markets, as:

> a) Viterra considers that the Protocols provide an open, transparent, flexible, efficient and non-discriminatory opportunity for clients to acquire access to its port terminal services;
>
> (b) This is consistent with the objective of promoting the competitiveness of South Australian grain and the ability for grain exporters to compete with Glencore and each other in relation to the global sales of South Australian grain.[124]

Viterra also submits that the "proposed changes to the capacity allocation system will result in substantial benefits to growers, Viterra and grain exporters and that:

> Creating an environment to support increased opportunities for investment in the South Australian grain industry (arising from greater investment certainty, a reduction financial risks for exporters, the "freeing up" of industry funds, and the spreading of production risk), is a matter of significant public interest.[125]

The GPSA previously submitted that Viterra's previous LTA proposal, under the June protocols, would lead to a negative impact on the grain acquisition market.[126]

Avant Agri believes the long term agreements "... will provide long term, increased commercial certainty and reduce risk margins. This will hopefully reflect in higher and/or less volatile prices to growers."[127]

Viterra further submitted on the ACCC's draft decision that:

> the enhanced certainty and planning offered by long term agreements will facilitate continued and longer-term investment by exporters in the South Australian industry. With greater certainty (involving longer term financial commitments to the South Australian supply chain), this will provide an environment for exporters to develop longer term commitments with growers and further markets for South Australia grain.[128]

[123] ADM, submission in response to ACCC Issues Paper.
[124] Viterra, Submission accompanying application to vary protocols , p. 20.
[125] ibid, pp. 20 - 21.
[126] GPSA, submission in response to ACCC Issues Paper.
[127] Avant Agri, submission in response to ACCC Issues Paper, p. 6.
[128] Viterra, submission on the ACCC's draft decision, p. 9

Conclusion

The ACCC's draft decision noted that it was difficult to ascertain the effect the introduction of the protocols would have on competition in the grain acquisition market, particularly given the level of discretion that Viterra had provided itself in the June protocols combined with the fewer safeguards of those protocols.

However, given the revisions Viterra has made to its LTA proposal now included under its November protocols, the ACCC considers that it is now more likely that the proposed LTA system will promote competition in the grain acquisition market.

If the proposal is not approved and the current auction system continues, the ACCC considers that the current level of competition may remain in the grain acquisition market but there are risks that an increased number of exporters may no longer participate in the auction, especially if they face high auction premiums as they have in some years. Over the longer term, some exporters could withdraw from the SA market.[129]

As noted in the ACCC's consideration of subclauses 25(3)(a) and (h), in addition to the incentives on Viterra to allocate LTC for throughput across its ports, the November protocols contain further provisions that should ensure that Viterra allocates LTC between more than a few exporters. These exporters can then compete for grain in the upstream market, and provide increased competition, and benefits for growers in the grain acquisition market. There will also be the ability for a range of exporters to access levels of STC.

The ACCC considers that Viterra could, as a result of increased certainty of the LTA system, decrease prices over time, improve services, develop infrastructure at the port and upstream.

Overall, the ACCC considers that the revised LTA proposal could increase the prospect that competition in the grain acquisition market is sustained and/or increased.

4.7.3. Upcountry storage and handling services market

Introduction

Viterra has a strong and dominant presence in storage and handling services across SA. Viterra has a broad network of storage facilities across SA, and several sites in Victoria. There are few competing operators in this market.

Submission

In its press release relating to its new rail access arrangement with G&W, Viterra outlines that:

> In South Australia, Viterra's grain storage and handling network provides the vital link between growers and consumers, utilising significant infrastructure across grain receival, storage, quality control, logistics and ship loading.[130]

Viterra also notes that:

> We manage our upcountry grain storage and port terminal network as an integrated supply chain to best meet the requirements of our grower and commercial customers.[131]

The GPSA submitted that Viterra's previous LTA proposal, under the June protocols, raised concerns in relation to upcountry storage and handling services, in addition to the related

[129] ACCC draft decision, pp. 81-82.

[130] "Viterra makes long term SA rail investment", Viterra press release (1 July 2015).

[131] ibid.

logistics market.[132] At that time, the GPSA submitted that a decision relating to Viterrra's long term agreements should be postponed.

Following the ACCC's draft decision the GPSA submitted further key issues of concern, but accepted the industry support for an LTA system and noted proposed remedies to the system proposed by Viterra. As noted in chapter 3, the ACCC considers the changes that Viterra has made to its LTA proposal, now included under the November protocols, go a large way to addressing relevant concerns expressed by the GPSA.

Also noted in chapter 3 are the GPSA's more specific concerns it has with certain upcountry services. These concerns fall outside the scope of the Code, which relates to access to bulk wheat port terminal services.

Analysis

The existing footprint Viterra has in SA will make it difficult for new entrants to enter the upcountry storage and handling market, under either the current auction system or the proposed LTA system. Existing sites are close to growers across the state. There is sufficient storage capacity across SA and Viterra can also develop additional capacity with limited forewarning. The SA Government also recently announced a range of funding commitments to improve access to Viterra upcountry storage sites.[133]

Furthermore, there appear few obvious port catchment areas that could sustain a single port operation and have access to sufficient upcountry storage and transport services across the longer term.

As discussed in Appendix C, there is a greater need in SA to source grain from across the state to offset production risk, rather than concentrate on one specific port catchment area. Several port catchment areas are isolated and or dislocated from other port terminal services either by distance and/or lack of connecting rail services (in the case of Thevenard and Port Lincoln).

There are some other storage and handling operators, including Cargill's GrainFlow sites. However Viterra provides customers a bundled storage and logistics service with a rebate program, making it difficult for Viterra's customers to justify operating outside of the Viterra supply chain.

If the long term agreement proposal is accepted the following two possible scenarios could ensue:

- Viterra could enter long term agreements for upcountry storage and transport services with exporters who secure LTC, preventing new entrants in storage and handling access to the potential customers over a longer term.

- Exporters contemplate their own investment upcountry in SA knowing they have long term shipping plans compared to the current auction system.

Conclusion

Viterra currently faces limited competition upstream from other site operators across most parts of SA. The ACCC considers that Viterra is already in a position to leverage market power from its upcountry networks into its port terminals. Viterra currently faces limited competition in the provision of storage and handling with only Cargill providing some constraint at some specific locations.

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[132] GPSA, submission in response to ACCC Issues Paper, p. 4.

[133] "A Modern Transport System for Agriculture – A New Partnership Approach" , SA Government , March 2015.

Given the extent of Viterra's dominance in this market there is already limited prospect of new entrants and/or credible competition for Viterra in the storage and handling market under the current port terminal services arrangements.

The ACCC considers that the introduction of the proposed LTA system is not likely to significantly alter the level of competition in this market.

Additionally, a review into the Code is due to commence no later than September 2017. A key consideration of the review will be to consider in relation to the operation of the Code:

> (d) 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.[134]

4.7.4. Transport and logistics market

Introduction

Viterra can provide customers (growers or exporters) with a bundled storage, logistics and transport service across its network. Export Select is a service provided by Viterra which bundles logistics with transport (road and/or rail services) and also incorporates a rebate. Typically, exporters in SA do not arrange rail transport themselves.

Genesee and Wyoming Australia Pty Ltd (GWA), an Adelaide based business formed in 2006, is the primary provider of grain rail freight in South Australia and provides grain rail services through an arrangement with Viterra.

Submissions and analysis

A range of stakeholders submitted to the Essential Services Commission of South Australia (ESCOSA) review into SA rail access on the difficulty associated with negotiating access to the SA rail network.

In response to the Issues Paper AGG submits in relation to upcountry:

> We also have concerns with the de-linking of Export Select from the proposal.
>
> Viterra is in a dominant if not monopoly position over access to up-country stock and rail freight to port. Conceivably an LTC or STC holder could be hindered by Viterra in getting stock into position to load at port. Thus, potentially forfeiting a slot, which Viterra could take advantage of themselves, or incurring substantial cost delays.[135]

The GPSA also submitted concerns with the operation of the supply chain overall, including rail. The submission queries the operation of Export Select and notes:

> …. proposed efficiency gains were to be passed on to the trade by lower charges, however the pricing regime has seen increases in grain logistics and transport costs.[136]

ESCOSA, in its draft report indicates there is no evidence of misuse of market power by GWA, but has formed the preliminary view that there are some areas where the access regime could be improved to make it more effective. Those are:

- Clarifying the scope of regulated infrastructure services.
- Investigating opportunities for greater integration of transport access regimes.

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[134] Competition and Consumer (Industry Code—Port Terminal Access (Bulk Wheat)) Regulation 2014.

[135] AGG, submission in response to ACCC Issues Paper.

[136] GPSA, submission in response to ACCC Issues Paper, p. 4.

- Ensuring that costs have been allocated appropriately between tis below-rail and above-rail businesses.

The ACCC considers there is scope for competition in above rail transport services and competition between road and rail to emerge across SA. This was recently confirmed in ESCOSA's draft report into the state's rail access regime. [137] In part, this is because the relatively shorter distances to port in SA promotes road transport as a viable alternative to rail. [138]

A range of additional investment and funding issues which undermine the efficiency of rail appear to make road a preferable means for Viterra and exporters to transport grain across SA.[139] This is discounting any externalities, for example road safety, road congestions and road maintenance issues. Substitutability is likely to remain as the challenges for rail are unlikely to be resolved, for example the effect of underutilisation of intrastate railways may further contribute to their decline and undermine its ongoing competitiveness:

> This underinvestment can limit the capacity and performance of railways which may increase the competiveness of road transport, leading to further reductions in demand for rail.[140]

The report notes that the lack of demand has led to the closure of some SA intrastate railways. At the same time, several stakeholders have noted some difficulty associated with seeking access to SA intrastate lines though GWA.

Furthermore, in relation to rail Viterra has recently announced that it has entered a new long term agreement with GWA. Viterra's press release on the arrangement notes:

> Our investment in the rail network, supported by road, will underpin the efficiency of the whole supply chain, providing certainty for our growers, exporters and the state. Rail is critical to providing the capacity to move the SA crop each year.[141]

Viterra also notes in the press release that:

> Viterra is very focused on finding ways to improve the use of rail infrastructure and manage the movement of grain stocks. Those efficiencies are already being realised, with a record amount of grain being moved by rail during March 2015. [142]

Overall, irrespective of the potential for competition in transport services, Viterra has a dominant position across both road and rail markets. For example while there may be many road transport operators, most would rely on providing services to Viterra. Viterra is GWA's only grain related transport customer.

However production in SA continues to rise and rail should retain a competitive advantage of moving high volumes over longer distances. As ESCOSA outlines "railways have significant economies of scale compared to road transport. This provides railway operators with market power."[143]

Conclusion

A range of factors affect the state of competition in the grain transport market. These challenges exist today and are likely to be ongoing. The ACCC notes that the market as

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[137] South Australian Rail Access Regime Review – draft report, ESCOSA, 5 June 2015, p. 16.

[138] ibid.

[139] ibid.

[140] ibid, p.18.

[141] "Viterra makes long term SA rail investment", Viterra press release (1 July 2015).

[142] ibid.

[143] South Australian Rail Access Regime Review – draft report, ESCOSA, 5 June 2015, p. 2.

presently composed does not have a high level of competition and therefore any further entrenchment of this may not be in the best interests of the bulk grain export market, or related markets over the longer term.

The effect of the introduction of proposed LTA system on this market is unclear, but could entrench the existing level of dominance Viterra has in the market. Exporters who secure LTC agreements may enter corresponding long term agreements with Viterra for transport services, limiting any opportunity for competing service providers to enter the market. The ACCC notes that there is little scope currently for exporters to use an alternate service to Viterra's Export Select product.

Alternatively exporters who secure LTC may pursue their own transport services and this could provide new opportunities in the related transport markets. Exporters who do not secure any LTC at all may well develop alternate export supply chains including new transport arrangements. These scenarios are possible but are likely to be on a relatively small scale compared to Viterra's existing operations.

Overall Viterra's position in the transport market is significant. It coordinates the movement of most of the grain exported from SA. The introduction of LTAs is unlikely to affect the state of competition across the sector. The ACCC considers that there appears to be limited prospect of meaningful competition emerging in this market.

4.7.5. ACCC views on matters (e) and (g)

The ACCC's view is that at present there is a reasonably competitive grain acquisition market in South Australia. The market is dominated by several larger exporters, including Viterra's trading arm Glencore. However, there are a range of exporters and other non-exporting grain accumulation organisations that compete for grain from growers and from other traders.

In part, this level of competition may have resulted from the operation of the auction system and the threat of exporters wanting to avoid forgoing rebates. It is also a product of a significant amount of capacity being made available to industry via the FIFS process. Many exporters have had the opportunity to participate in the grain acquisition market due to the relatively low barriers to entry associated with this process. Going forward, there are a number of exporters who want to execute shipping from SA.

As noted throughout this assessment, given the revisions that Viterra has made to its LTA proposal now included under its November protocols, the ACCC considers that there is now less risk that Viterra will allocate LTC to only a few exporters, and that medium and smaller sized exporters will be better able to compete for LTC. This in turn should promote competition for grain in the upstream market and benefit growers.

The ACCC's view is that there is already limited competition across the upstream supply chain in SA. Approving Viterra's LTA proposal could allow Viterra the opportunity to exercise market power upcountry, arising from its vertically integrated operations (although it already has an incentive and ability to do so in its upcountry operations).

The ACCC considers that given the nature of the current environment Viterra's dominant position in the storage, handling and transport markets is likely to be maintained under the proposed LTA system. The ACCC notes that there may be limited likelihood of extensive competition either with or without the LTA system. The ACCC however also notes that general competition law under the *Competition and Consumers Act 2010* applies to the provision of upcountry grain storage and transport services.

4.8. Other matters

Subclause 25(3)(j) relates to any other matters the ACCC considers relevant to its assessment.

The ACCC considers that the operation of the current auction system is a key additional matter relevant to its assessment of Viterra's proposal.

In particular, the ACCC considers that the significant concerns expressed by exporters about auctions for port capacity, and the likelihood that exporters may not participate in any future auctions, is an important matter relevant to its considerations of the LTA proposal.

As outlined in Appendix B, Viterra's auction system has not consistently operated as originally envisaged and it does not appear to readily allocate capacity to those exporters who want it the most. As identified by exporters in the course of the Viterra review, certain changes could be made to the auction system although they have not been implemented and it is not in any case clear that they would resolve all the existing issues. Consequently exporters have expressed ongoing concern with the operation of the auction.

Several exporters have not participated in the auction system because of the identified limitations. They may however have shipped using FIFS residual capacity or via other secondary processes. The ACCC notes that several exporters have indicated they are reluctant to participate in future auctions.

However, the ACCC notes that, under the auction system, on average 15 exporters have completed shipping programs from SA, though not all of these exporters would have acquired capacity via the auction itself. In 2015-16, 14 exporters acquired capacity through the auctions.

Furthermore the experience of Viterra's 2015-16 auction system is evidence that under certain circumstances its auctions can provide a more satisfactory outcome for industry compared to outcomes experienced in other years. For instance, auction premiums were much lower than some other years and a spread of exporters acquired capacity across ports and times of the year. The improved outcomes could have been due to a number of factors, but are likely to be assisted by Viterra running the auction closer to the start of the harvest and shipping year.

Also, an advantage of the current auction system is that exporters have the opportunity to assess their participation in the SA market on an annual basis and only face the prospect of being excluded from the market for at the very worst 12 months.

Despite the limitations of the auction, it does have the advantage placing participants on a relatively equal playing field, and, as seen in 2015-16, has the ability to facilitate access for a broad range of exporters across the shipping year.

Overall, however, the ACCC understands that the direct users of Viterra's current auction system, the exporters, are not supportive of continuing the auction system and are generally seeking a longer term allocation system.

5. ACCC's final decision

For the reasons outlined in this decision document, having regard to the matters in subclause 25(3) of the Code, the ACCC's final decision is to approve Viterra's capacity allocation system included in the updated port loading protocols it submitted on 10 November 2015.

The ACCC notes that Viterra has made several changes to its proposed LTA allocation system, both since the March protocols, and since Viterra's original proposal in September 2014 under the previous undertaking regime.

The ACCC noted several concerns in its draft decision about the proposed LTA system under the June protocols and Viterra subsequently made key amendments to its proposal which are now included under the November protocols. The ACCC considers that these amendments substantially address the ACCC's and industry's previous concerns and that a potential outcome under the previous June protocols, where only a few exporters could secure meaningful LTC capacity, is less likely.

Under the November protocols there are a number of features which together strengthen the negotiating position of smaller and medium sized exporters seeking LTC and/or STC to meet their shipping needs. These features include:

- the reduction of the maximum initial term from five to three years
- the inclusion of an ACCC review process, with the ability for the ACCC to revert the allocation system back to the current auction system
- the annual independent audit function
- the removal of the duration of a proposed long term contract as a factor Viterra will consider when assessing LTC for oversubscribed slots
- the LTC initial allocation threshold caps that limit the amount of LTC an exporter can acquire at each port terminal
- the ability for exporters to trade shipping slots and acquire capacity on the secondary market.

Viterra will have incentives to provide LTC to a range of exporters and has committed to publishing the amount of LTC it intends to offer at least 15 business days before the closing date for applications.

Additionally, parties will have equal access to the reserved amount of STC through the FIFS process.

The ACCC also acknowledges comments from stakeholders outlining considerable issues with Viterra's current auction system and feedback from a number of exporters that they would not intend to participate in future auctions.

Overall, the amendments Viterra made to its proposal now included under its November protocols represent a better balance of the interests of the port operator, all exporters, and other stakeholders and should facilitate competition in the grain acquisition market and meet the requirements in the Code.

Appendix A: The Code

The Code replaced the previous regulatory framework under the *Wheat Export Marketing Act 2008* (WEMA) where four port terminal service providers (including Viterra) were subject to ACCC-approved access undertakings.

The purpose of the Code is to regulate the conduct of port terminal service providers (as defined in the Code) to ensure that exporters of bulk wheat have fair and transparent access to port terminal services.[144]

The Code applies to port terminal service providers. A port terminal service provider is defined as:

> the owner or operator of a port terminal facility that is used, or is to be used, to provide a port terminal service.

where:

> **port terminal service** means a service (within the meaning of Part IIIA of the CCA) provided by means of a port terminal facility, and includes the use of a port terminal facility.

and:

> **port terminal facility** means a ship loader that is:
>
> (a) at a port; and
>
> (b) capable of handling bulk wheat;
>
> and includes any of the following facilities, situated at the port and associated with the ship loader, that are capable of handling bulk wheat:
>
> (c) an intake/receival facility;
>
> (d) a grain storage facility;
>
> (e) a weighing facility;
>
> (f) a shipping belt.

The Code has six parts which apply to all port terminal service providers (in the absence of any exemption being granted):

- Part 1 of the Code contains general provisions about the Code and its application.
- Part 2 of the Code requires all port terminal service providers to deal with exporters in good faith, publish a port loading statement and policies and procedures for managing demand for their services, and make current standard terms and reference prices for each port terminal facility publically available on their website.
- Part 3 of the Code places a number of requirements on a port terminal service provider including:
  - not to discriminate in favour of itself or its trading business, or hinder third party exporters' access to port terminal services

[144] Clause 2 of the Port Terminal Access (Bulk Wheat) Code of Conduct (the Code).

    - to enter into an access agreement or negotiate the terms of an access agreement with an exporter to provide services if an exporter has applied to enter into an access agreement and certain criteria are satisfied
    - to deal with disputes during negotiation of an access agreement via specified dispute resolution processes including mediation and arbitration.
- Part 4 of the Code requires a port terminal service provider to have, publish and comply with a port loading protocol which includes an ACCC approved capacity allocation system.
- Part 5 of the Code requires port terminal service providers to regularly publish expected capacity, stock information and key performance indicators.
- Part 6 of the Code sets out requirements relating to retaining records such as access agreements and variations to those agreements.

Appendix B: Current auction system

This appendix provides an overview of the current Viterra auction system, in addition to Viterra's, stakeholders' and the ACCC's views on the auction system in South Australia.

This appendix also considers the results of the most recent auctions for shipping capacity for the 2015-16 season, run by Viterra in August and September 2015.

Overall, the ACCC notes that exporters have expressed general support for long term agreements and the discontinuation of Viterra's auction system. In relation to the auction system, exporters have detailed their key concerns with the operation of the Viterra auction system in particular and with auction systems in general. The ACCC however also recognises that the auction system can provide improved outcomes, as was seen in the results of the 2015-16 auctions.

The ACCC notes that, until recently, an auction system was in operation in Western Australia for allocating capacity at ports operated by CBH.

B.1 Introduction of the auction system

In 2011, during its consideration of Viterra's access undertaking, the ACCC considered that Viterra's FIFS system of capacity allocation was not an appropriate mechanism to allocate all port capacity. This view took into account the expected capacity constraints at South Australian ports, as well as the limited competition to neutralise the incentives for self-preferential treatment by Viterra.[145]

Accordingly, the 2011 Undertaking required Viterra to introduce an auction system to allocate port terminal capacity. The process involved Viterra changing its port loading protocols and/or its standard terms pursuant to which it provides port terminal services to exporters, after the Undertaking was accepted. The process also included an ability for the ACCC to object to all or any of the proposed variations having regard to a range of matters.

On 11 April 2012, in response to Viterra's initial auction system proposal, the ACCC issued an Auction Objection Notice to Viterra. Following extensive consultation Viterra subsequently lodged a Revised Variation Notice addressing the concerns identified by the ACCC in the Objection Notice. These concerns included that the auction would not conclude, that it would conclude at an inefficient outcome and/or that it would be gamed.

On 5 September 2012, following the Revised Variation Notice, the ACCC withdrew the Objection Notice and indicated that:

> … the use of an auction system to allocate capacity is appropriate and should allow for port terminal services to be used efficiently by ensuring that, in periods of constraint, capacity is allocated to those users that value it most.[146]

In withdrawing the notice, the ACCC acknowledged:

> …. that a reduced risk remains, given the auction system is untested in practice, however [the ACCC] considers in all the circumstances that it is appropriate to withdraw the Auction Objection Notice. [147]

[145] ACCC Decision to withdraw Auction Objection Notice 2012, p. 5.

[146] ibid, pp. 5 - 6.

[147] ibid.

In light of this risk, the ACCC noted that:

> Viterra has committed to conducting a review of the operation of the auction system following completion of the Harvest Shipping period ending in 2013. This review mechanism provides an opportunity for Viterra to determine whether any further changes are necessary or desirable. [148]

B.2 Auction system review

As outlined above, the ACCC decision to approve the auction system noted the level of uncertainty surrounding that proposed system. Accordingly, Viterra committed to review the operation of the auction system after the harvest shipping period in 2013. The review was designed to provide an opportunity for Viterra to assess the performance of the auction system it proposed and to determine whether any further changes were necessary or desirable.

After conducting and completing the review, Viterra observed that:

> Nearly all respondents requested that the major allocation of Port Capacity occur via first-in first served or Long Term Agreements rather than auction. This, however, refers to the primary method of allocation of shipping capacity and is outside the scope of the Auction Review.[149]

In the review stakeholders expressed concern with the auction. For example, Pentag Nidera submitted:

> It is clear to all involved the auction scheme has failed to deliver its intended outcome, it appears fundamentally flawed and that further amendments to the auction process would be unlikely to resolve the issues.[150]

Most stakeholders expressed a range of views on possible ways to address concerns with the auction system. As intended, the review process allowed exporters to identify practical concerns with the operation of the auction system.

In response to stakeholder feedback about problems with the auction, Viterra responded by saying that:

> Fundamental changes to the way the auction allocates capacity would require significant consultation and system modifications. The proposed solution was considered prior to implementation of the current system, and was not adopted because it may not result in meeting Viterra's undertaking requirement to allocate capacity to those who value it the most.[151]

In response to concerns surrounding the rebate, Viterra stated that:

> Changes to the rebate structure would also involve very significant modifications to Viterra's current role and obligations (e.g. given likely issues in relation to how auction system proceeds should be invested). Viterra does not propose to move away from a rebate-model auction. [152]

and:

> Viterra's view is that calculating the rebate on a per auction basis is likely to increase the administrative burden and costs for industry without any clear or direct benefit towards the ultimate goal of creating a disincentive to overbooking. That clients may bid different amounts for

[148] ACCC Decision to withdraw Auction Objection Notice 2012, pp. 5 - 6.

[149] Review of the Auction System, Viterra, 7 March 2013, p. 1.

[150] ibid p. 4.

[151] ibid p. 3.

[152] ibid p. 3.

> different slots in different auctions is consistent with the fact that the auction is designed to allocate capacity to clients at the value they attribute to those individual slots. [153]

As a result of the review, Viterra made some adjustments of a more technical/practical nature to the operation of the auction system.

Viterra also notes in its submission:

> Over the past 4 seasons, these shortcomings, risks and challenges have resulted in a number of clients deciding not to acquire capacity, or acquire only small amounts of capacity, through the auction process in South Australia. Those clients have either elected to participate primarily in the secondary first-in-first-served system, or have made a commercial decision not to participate in the acquisition of grain in South Australia.[154]

The ACCC also notes that a number of the problems identified in the review have persisted in subsequent auctions. In Viterra's submission on the ACCC's draft decision, it notes that it could not make a number of the suggested changes to the auction system for several reasons.[155] In summary, Viterra submits that:

- it could not vary the auction system in a way that would make it inconsistent with the requirements set out in the access undertaking accepted by the ACCC
- the review did not raise any new issues had not been previously considered and there was not any industry consensus on the suggested changes.[156]

The ACCC however notes that there were a number of stakeholders suggesting changes to Viterra's auction system and that under the previous access undertaking regime Viterra was able to approach the ACCC at any time to vary its protocols and adjust how the auction operates.

B.3 Viterra submission and results of the auction system

In its submission in support of its LTA proposal, Viterra has provided a detailed examination of the operation of the auction system and submits that:

> … both Viterra and a number of clients have identified significant shortcomings with, and challenges inherent in the operation of, any revenue neutral auction for the supply of port terminal services capacity.[157]

Viterra submits that the key shortcomings of the auction are:

- the increased cost and risk for exporters
- the arbitrage opportunities in "chasing the rebate"
- the impact on operational efficiency
- that the disincentive for commercial engagement leads to a "one-size-fits-all" system.[158]

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[153] ibid, p. 3.

[154] Viterra, Submission, 12 March 2015, p. 4.

[155] Viterra, submission on the ACCC's draft decision, p. 19

[156] ibid, p. 19

[157] Viterra, Submission, 12 March 2015, p. 2.

[158] ibid, pp. 2 - 4.

Viterra notes the amount of auction premiums paid by exporters and when rebates were paid (see table B.1). Table B.1 also shows the results for the two auctions held for the 2015-16 season.

Table B.1: Viterra auction results, 2012-13 to 2015-16

Season	Aggregate Premiums	Tonnage acquired at auction	When premiums paid	When rebate paid
2012-13 – Non-Harvest Period Auction (1)	$32,739,000	814,000	26 November 2012	10 December 2013
2012-13 – Non-Harvest Period Auction (2)	$3,304,500	358,000	2 January 2013	10 December 2013
2013-14 – Harvest Period Auction	$3,529,500	1,479,000	16 April 2013	29 October 2014
2013-14 – Non-Harvest Period Auction (1)	$8,910,500	877,000	8 May 2013	29 October 2014
2013-14 – Non-Harvest Period Auction (2)	$499,500	492,000	31 May 2013	29 October 2014
2014-15 – Harvest Period Auction	$19,352,500	1,275,000	16 April 2014	TBD
2014-15 – Non-Harvest Period Auction (1)	$39,427,500	1,165,000	14 May 2014	TBD
2014-15 – Non-Harvest Period Auction (2)	$66,582,500	1,270,000	23 June 2014	TBD
2015-16 – Harvest and Non-Harvest Period Auction	$10,121,000	3,639,000	n/a	TBD
2015-16 – Non-harvest Period Auction (2)	$1,218,000	675,000	n/a	TBD

Sources: Viterra, Submission, 12 March 2015, pp. 2 - 3, and published auction results as available on the Viterra website.

Table B.2 shows aggregated results of the auctions with estimated average auction premiums and details around the number of rounds for the auctions each season.

Table B.2: Aggregated Viterra auction results, 2012-13 to 2015-16

	2012-13 [a]	2013-14	2014-15	2015-16
Total capacity offered (tonnes)	4,625,000	6,535,000	7,000,000	7,200,000
Total capacity awarded (tonnes)	1,172,000	2,848,000	3,710,000	4,314,000
Average premium per tonne [b]	$ 30.75	$ 4.54	$ 33.79	$ 2.63
Total number of auction rounds	216	173	379	54
Proportion of offered capacity awarded	25 %	44 %	53 %	60 %

[a] Viterra's 2012-13 auction results relate only to auctions for the non-harvest period from 1 February to 30 September 2013.
[b] Average premiums are based on total capacity awarded and total auction premiums paid across auctions each season.

Sources: Compilation of Viterra auction results, as available on the Viterra website.

The ACCC notes a degree of variability in the auction results over the four years. The amount of capacity offered and awarded has increased in each year and average auction premiums have fluctuated from over $30 per tonne in 2012-13 and 2014-15 to a low of $2.63 per tonne in 2015-16.

The proportion of offered capacity awarded via the auction system has also increased each year. In the 2012-13 and 2013-14 seasons the auctions allocated less than 50 per cent of offered capacity. However, in 2015-16, around 60 per cent of offered capacity was allocated by the auction.

Over the four years however, a significant amount of capacity was made available and taken up via the subsequent FIFS process.

B.4 Industry views on the auction system

As expressed in submissions, exporters' key concerns with the auction system include that:

- the auction system does not allocate a significant proportion of overall capacity.
- the auction process is resource intensive, both leading up and during the actual auction
- exporters drop out of the auctions due to risk exposure, and capacity is awarded to exporters with biggest risk appetite, rather than to those who necessarily value it the most
- auction premiums tie up capital, which potentially could be invested in SA, for up to 18 months
- auctions distort the underlying commodity market and other related markets, and that it is difficult to trade in the grain acquisition market as exporters who have shipping slots need to execute their auction acquired slots to avoid losing rebate premiums.

ADM submits that it does:

> … not support the current auction system as the primary allocator of shipping capacity. We believe there is substantial evidence that auctions distort the underlying commodity market. The high auction premiums we have seen since the inception of the auction system have inhibited

> ADM's growth in the Australian market. The inflation of auction premiums causes an imbalance in the risk reward scenario in the Australian Grain export market.[159]

ADM also outlines several reasons that it believes the auction should not be the primary allocation method. These include that the auction has allocated on average only 43 per cent of capacity, results in an inefficient use of potential working capital and that capacity is awarded to parties with the biggest risk appetite and not those who value it most.

On auctions generally, Quadra submits that:

> these systems are the single major contributor to the current structural issues seen in the Australian Wheat market over recent seasons. They are an artificial mechanism that have prevented the track & FOB markets behaving in a rational & responsive manner.[160]

Furthermore Quadra notes:

> Participants in the supply chain who do not own assets have suffered large financial losses on the back of this irrational export market, and the long term health of a competitive export industry need to be considered when evaluating the fairness of such allocation mechanisms.[161]

Noble in its submission references the "the inefficient auction mechanism" and notes that it has been demonstrated to be:

> … a cost prohibitive platform in allocation of shipping capacity. A total of upwards of AUD 480 million in capital between Western Australia and South Australian Ports has been tied up in auction premiums at an average of AUD 28.70 underpinning 80% of total available elevation capacity. This significant industry capital tie up restricts the trades ability to react to dynamic market forces, distorts inherent trade flows and the unsustainable high cost burden acts as a barrier to entry for a large proportion of the trade which in turn restricts interior competition for grain at the farm gate.[162]

Bunge submits:

> … that the current Auction system used in South Australia has not provided a net benefit to the Industry participants, and created extreme risks and market distortions as a direct consequence of Auction Systems and its outcome. Therefore Bunge's view is that the current status quo is not in the industry's benefit, nor is it sustainable. Over the longer term it is quite probable it may result in reduced competition by increasing the likelihood of participants withdrawing from the market due to the price distortions and excessive risks.[163]

CBH agrees with "the shortcomings of the current auction system which Viterra identifies at para 3.2 of its Submission."[164]

SA farmer Geoff Ryan submits:

> I believe it would be a detrimental move for SA to be the only state confined to the auction system, now WA has moved away from it, as it could make us less attractive for marketers.[165]

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[159] ADM, submission in response to ACCC Issues Paper, p. 1.

[160] Quadra, submission in response to ACCC Issues Paper, p. 1.

[161] ibid.

[162] Noble, submission in response to ACCC Issues Paper, pp. 1 - 2.

[163] Bunge, submission in response to ACCC Issues Paper, p. 1.

[164] CBH, submission in response to ACCC Issues Paper, p. 2.

[165] Geoff Ryan, submission in response to ACCC Issues Paper.

AGG in its submission believes:

> Replacing the “Auction system” will reduce exporter execution risk and may provide more reasonable access to capacity for small exporters. However, we contend there needs to be more transparency and definition to Viterra’s proposal.[166]

In contrast to the views of exporters, the farmer representative group Grain Producers SA (GPSA) supports the retention of the auction system. GPSA submits that:

> The Auctioning of capacity is on currently available information the most transparent and fair mechanism for allocating port capacity. [167]

Given the concern surrounding Viterra’s vertical integration, GPSA notes:

> The current auction system requires the rebating of the auction premium to all executors of grain onto the shipping stem. This ensures that the vertically integrated marketer Glencore is incentivised equally with competing exporters to execute their Viterra shipping stem. How will the LTA system ensure that the same level of incentivisation continues?[168]

GPSA also submits that:

> There is no benefit to the consumer (farmers) in changing from the auction system to the Glencore/Viterra Application indeed there are a number of negatives that we identified below.
>
> The Glencore/Viterra Application shifts more production risk to the farmers. The farmer already carries the bulk of the production risk. A shift away from the auction system increases that risk without reduction in logistics or supply chain risk. This shifting of risk is identified in the Glencore/Viterra Application.[169]

In response to a question in the Issues Paper about appropriate safeguards, the GPSA submits that the:

> Glencore/Viterra application has excessive discretion for Glencore/Viterra and the current Auction system should be continued to avoid the risks to exporters and consumers alike.[170]

Both Avant Agri and Profarmer comment broadly on the needs for consistency in relation to capacity allocation system across the ports across Australia.[171]

B.5 Auction results for the 2015-16 season

Viterra held auctions for shipping capacity at its port terminals for the 2015-16 season on 10 to 12 August and on 31 August to 1 September 2015. High level results of the 2015-16 auctions are presented above in tables B.1 and B.2.

Overall, the high level results of Viterra’s 2015-16 auctions also showed more positive outcomes compared to auction results across the previous three seasons. The key differences in the outcomes of the 2015-16 auctions are:

- average auction premiums were significantly lower at around $2.63 per tonne
- the 2015-16 auctions ran for a much shorter time period, totalling 54 rounds. Previously, the shortest auction period for a season was in 2013-14 when the auctions ran for a total of 173 rounds.

[166] AGG, submission in response to ACCC Issues Paper.
[167] GPSA, submission in response to ACCC Issues Paper, p. 3.
[168] ibid, p. 4.
[169] ibid, p. 7.
[170] ibid, p. 11.
[171] Profarmer submission in response to ACCC Issues Paper. Avant Agri submission in response to ACCC Issues Paper.

- the amount of capacity allocated through the 2015-16 auctions was greater than in the previous three seasons.

These outcomes represent a better functioning auction system compared to previous Viterra auctions, with less capital being tied up in auction premiums (relative to the total amount of capacity allocated by the auctions), a more timely allocation exercise meaning lower overall operational costs, and more capacity being allocated by the auction process rather than the subsequent FIFS process.

The ACCC also notes that capacity allocated during the 2015-16 represent a large proportion of available capacity at the premium port terminals (Port Lincoln and Outer Harbor) during the peak shipping period. For instance, following the auctions there was very little available capacity remaining at Port Lincoln from January to July 2016 that could be taken up by FIFS. There was only slightly more available capacity remaining under FIFS at Outer Harbor in the same period.[172]

The ACCC considers that a further positive outcome of the 2015-16 auctions is the spread of exporters who secured access to capacity at the relatively low auction premiums compared to other seasons. Data provided by Viterra shows that:

- a total of 14 exporters acquired capacity at Viterra's port terminals via the auctions
- nine different exporters acquired capacity at each of Viterra's Port Lincoln and Outer Harbor terminals during the peak six months from January to June 2016.

The ACCC considers that the improved outcomes experienced in the 2015-16 auctions are due to a variety of factors. However the ACCC believes the following key factors were of particular importance:

- The 2015-16 auctions were held at a later time of the year relative to auctions in previous years, providing more certainty for exporters about when and how much capacity to book. Typically Viterra's auctions were held around April to June where exporters may book slots around 12 months or more in advance of shipping, and at a time where the season's crop is still maturing and the final harvest may be uncertain. In 2015-16 Viterra's auctions were ran much closer both to the time of harvest and when shipments are due to be executed.
- The timing of the 2015-16 auctions may have also meant that particular exporters who operate across various parts of the country may have had other export arrangements outside of South Australia already in place, providing them with the ability to weigh up their overall level of demand for shipping slots at Viterra's ports.

B.5.1 2015-16 allocation results compared to the proposed LTA system

In Viterra's response to the ACCC's draft decision, it described the results of the 2015-16 auctions (in conjunction with the results of the subsequent FIFS process), and compared them to what could have been achieved through its proposed LTA system under the previously proposed June protocols.

Viterra submits that, overall, across the both the auction and FIFS processes, 61.8 per cent of capacity on offer was booked. This varied across individual ports with Outer Harbour and Port Lincoln showing over 80 per cent of capacity on offer being booked while less capacity

[172] Viterra, Available Shipping Capacity / Practical Port Terminal Capacity, First In First Served Non Harvest 2015-2016, http://www.viterra.com.au/uploads/PDFs/Ports%20And%20Shipping/Shipping%20Stem/Available%20Non%20Harvest%20Capacity%20FIFS%20September%202015.pdf

on offer was booked at Port Giles (47.8 per cent), Inner Harbour (38.1 per cent), Wallaroo (32.3 per cent) and Thevenard (1 per cent).[173]

Regarding its LTA proposal, Viterra noted the following outcomes of the 2015-16 auction and FIFS allocations:

> (a) the largest customer booked 2.191 million tonnes (49.25% of booked capacity, and equivalent to 39.9% of the volume of long term capacity set out in Viterra's notice dated 9 July 2015);
>
> (b) the second largest customer booked 696,000 tonnes (15.65% of booked capacity, and equivalent to 12.7% of the volume of long term capacity set out in Viterra's notice dated 9 July 2015);
>
> (c) the third and fourth largest customers each booked 240,000 tonnes (5.4% of booked capacity, and equivalent to 4.4% of the volume of long term capacity set out in Viterra's notice dated 9 July 2015);
>
> (d) the fifth largest customer booked 210,000 tonnes (4.7% of booked capacity, and equivalent to 3.8% of the volume of long term capacity set out in Viterra's notice dated 9 July 2015); and
>
> (e) the remaining exporters booked 891,000 tonnes (20% of booked capacity, and equivalent to 16.2% of the volume of long term capacity set out in Viterra's notice dated 9 July 2015). Six of Viterra's usual clients did not participate in the auctions at all.[174]

Viterra submits that under the 2015-16 auction and FIFS processes, it was able to acquire more capacity during the peak times at the more attractive ports (i.e. in the first half of 2016 at Outer Harbour and Port Lincoln) than it could have acquired under its LTA proposal.[175]

Viterra considers that the results of the 2015-16 allocation processes further support its view that:

> (a) there is limited support for the ongoing operation of the auction system. The auction system (and regulatory distortions in enabling long term agreements in all other states and delaying their introduction in South Australia) is having a far greater impact on ongoing participation by exporters in South Australia than any potential risks raised by the long term agreement proposal.
>
> The reluctance of exporters to commit to exporting out of South Australia, particularly during the harvest period, also has the potential to impact significantly on the services that Viterra and other bulk handlers are able to provide to growers for the timely delivery of their harvest. As a result of the reduced demand for export capacity, there are likely to be storage blockages at grain receival sites which creates bottlenecks that limit growers' ability to deliver grain into their preferred storage sites;
>
> (b) the long term agreement proposal contains far greater protections in relation to the amount of capacity that can be allocated to individual exporters – and to facilitate participation by a range of exporters – than the current auction system; and
>
> (c) the initial nomination caps have been set at a reasonable and, in fact, low level having regard to Glencore's existing and demonstrated requirements. It is not reasonable or appropriate that they be reduced further.[176]

B.6 Potential effects of continuing the auction system

In light of concerns with Viterra's auction system, some exporters in discussions with the ACCC have indicated they may not participate in any future auctions. Most stated that they

[173] Viterra, submission on the ACCC's draft decision, p. 16

[174] Viterra, submission on the ACCC's draft decision, p. 16

[175] ibid, p. 17

[176] ibid, p. 17

would however consider accessing FIFS capacity and/or participate in the secondary trading market. Viterra also makes this observation in its submission.[177]

ADM submits that:

> If the auction system is retained in South Australia, ADM would genuinely consider withdrawing from South Australia altogether or, only participate in the South Australian market on a short term / spot basis.[178]

Given these views, the ACCC notes that the continuation of the auction system may not be a popular outcome among exporters, especially if the identified concerns about the auction continue to go unaddressed. ADM made a further submission on the ACCC's draft decision noting its disappointment that South Australian export capacity has reverted to auctions for the 2015-16 season.[179]

The ACCC notes that a potential risk of continuing the Viterra auction is that only a few large exporters may participate, which may lead to a further increase in the market concentration in South Australia. As the auctions are held annually the effect would be confined to a 12 month window, although it may well be replicated in subsequent seasons if the auction continued.

The ACCC notes it is difficult to be certain as to the precise response of industry if and when auctions are run.

The ACCC considers that the likely outcomes of auctions are also difficult to predict, and are subject to a numerous factors. For instance, while auctions in some years lasted for a significant period of time before concluding and resulted in high auction premiums, auctions for other years, and particularly the 2015-16 auctions, resulted in lower premiums and only lasted a relatively short period of time.

The 2015-16 auctions also allocated more capacity than auctions for each of the previous three seasons, including allocating most of the capacity for the two premium ports at peak times of the year.

Additionally, the ACCC notes that while some exporters may have decided to not participate in the 2015-16 auctions, at least 14 exporters participated and acquired capacity through the auctions. Furthermore, nine different exporters acquired capacity at each of the premium ports during the peak times of the shipping year.

Accordingly, while exporters are generally not supportive of continuing the auction system, the 2015-16 experience indicates that under certain circumstances the auction system can result in improved outcomes to those experienced in other seasons.

B.7 ACCC observations on Viterra's auction system

The ACCC notes that a number of submissions were received by the ACCC which expressed concerns with Viterra's current auction system.

The auction has a number of limitations, most of which were highlighted by industry at the time of Viterra's initial review. Furthermore, the ACCC notes that there is now a general level of distrust among exporters towards auction mechanisms for allocating capacity, and reluctance to continue to participate in future auctions.

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[177] Viterra, Submission, 12 March 2015, p. 4. Viterra, submission on the ACCC's draft decision, p. 16

[178] ADM, submission in response to ACCC Issues Paper, p. 1.

[179] ADM, submission on the ACCC's draft decision, p. 1

The ACCC is of the opinion that in South Australia the auction system has not consistently achieved the desired objectives that it was introduced to achieve. However the ACCC considers that the outcomes of auctions for some years, and particularly for 2015-16, suggest that the auction can achieve improved results under certain circumstances.

Consistency between capacity allocation methods

The ACCC notes the submissions by Profarmer and Avant Agri that it is desirable to have the same allocation system operating in all states in Australia. The ACCC notes that there may be administrative benefits to having the same system in all states. For example, participating exporters would only have to learn one system for the allocation of capacity.

However, the ACCC notes that there is no mechanism in the Code to require all PTSPs to introduce the same capacity allocation system, and that there may be reasons why the same system would not be appropriate in all locations. Historically, the ACCC notes that, under the previous undertaking regime, GrainCorp has operated a long term capacity and first-come-first-served capacity allocation system, whereas Viterra and CBH have used auction systems. Also, even if Viterra does bring in an LTC system, it is unlikely to be identical in all aspects to GrainCorp or CBH's systems. Some smaller port operators may wish to operate on a more ad hoc booking system.

In any case, the ACCC considers that its main question should be about the appropriateness of Viterra's proposed capacity allocation system as presented to the ACCC for consideration. It does not consider it necessary to seek to introduce consistent capacity allocation mechanisms across the country, or to rule out auction mechanisms on the basis that GrainCorp and CBH no longer use them.

Issues with auction design

The ACCC concurs with industry that the following aspects of the auction currently used by Viterra have undermined its ability to effectively allocate capacity.

Where relevant, the ACCC notes similarities or differences to the auction system used by CBH until recently to allocate capacity at its ports in Western Australia.

Table B.3: Issues with Viterra's auction system

Issue	ACCC comments
Length of the auction and auction closure	The auction can only close when all available shipping slots are at, or under capacity. There is no scope for Viterra to bring the auction to a close when a conclusion is evident and an allocation possible (as was used by CBH in WA). Consequently the auction process requires exporters to dedicate staff over an extensive period of time. Not all exporters have access to recourses to prepare and participate in the auction process. A mechanism to close the auction early would have also decreased the risk of an auction being 'gamed'.
Number and timing of auctions	Three auctions are held each year, with the option of a further auction/s. In 2013-14 and 2014-15, all auctions were held in April, May and June prior to the relevant season starting in October. This compares to the five to six auctions held for the CBH auctions. As a result, Viterra's auction system attempts to allocate capacity up to 15 or 16 months in advance of the shipping year and before the outcomes of the relevant harvest are clear. The improved results of the 2015-16 auctions indicate that holding the auction later in the calendar year is one factor that may yield better outcomes.
Rebate pool and calculation	Annual pool for each port and the rebate calculation is formula based, accounting for high and low demand slots over all auctions in each year Due to the annualised nature of the rebate, it is not possible to calculate the size of the rebate payable to any of the slots until after the final auction has been completed. For most exporters, but especially smaller exporters, the uncertainty surrounding the rebate process has affected their ability to participate in the auctions. There is evidence that exporters have 'chased the rebate' in making applications for capacity in the auction, potentially extending its length of time and causing problems with overall allocations. CBH used an auction rebate pool on a per auction basis.

Certain elements of these issues could be addressed by amendments to the auction design. For example, it would be possible to introduce an ability to close the auction even when certain slots remain oversubscribed, if the port operator considers that it can fulfil the capacity profile sought. This may help to end the auction early and reduce the level of auction premiums.

However, the ACCC notes that making amendments to the auction design may not resolve all of the issues with the auction, and premiums may still be high even if significant changes were made.

Negative aspects of the auction

The major concern raised by exporters is the significant level of auction premiums incurred. Also noted above in table B.2, the average premiums in the 2012-13 and 2014-15 auctions were above $30 per tonne, although the average premiums in 2013-14 and 2015-16 were significantly lower at less than $5. The total premium pool in 2014-15 was above $125m. Many exporters do not have a risk appetite and/or sufficient working capital to have capital tied up for such long periods, especially in the years where premiums have been relatively high, which occurred in two of the four years of Viterra's auctions. There is little benefit in exporter capital being tied up for long periods, especially during the peak shipping period, when it might be of most benefit to growers and the industry overall. Also of concern for exporters has been the delay in finalising and processing rebates.

The overriding objective of the auction system was to ensure capacity would be allocated to the exporters who valued it most. The auction premium was designed to achieve this. The particular calculation method for the auction rebate was devised to encourage exporters to ship from slots where there was the least level of demand, encouraging the rapid closure of the auction and the use of the port terminal facilities across the whole of the year. However, in practice this does not appear to have been consistently achieved. Many exporters may have found the system too difficult to understand and/or effectively participate in.

The ACCC also concurs that the value of the rebate for the exporter who initially acquired the capacity has affected how capacity and grain is acquired and traded in SA. Typically grain can be traded multiple times prior to shipping, and capacity can also be traded between exporters. However, most exporters have been reluctant to engage in these trading activities given the associated risk of missing out on their rebates if they do not execute auction capacity successfully. This was especially the case in the 2014-15 auctions where premiums were high and there was a very significant cost associated with a failure to execute.

A further less desirable feature of the auctions is that they have not consistently allocated a large proportion of offered capacity. However, this has improved over time and in 2015-16 around 60 per cent of capacity offered in the auctions was allocated and most of the capacity offered during the peak times at peak ports was acquired through the auctions.

The ACCC notes however that, over the four year period, there has been a significant uptake of capacity in the subsequent FIFS processes, rather than through the auctions.

Positive aspects of the auction

The ACCC notes however that the auction has several desirable features and has the ability to provide improved (albeit not perfect) outcomes as experienced in the 2015-16 auctions.

In particular, the ACCC considers a key feature of auctions is that they allow for a level playing field. All auction participants have a nominally equal starting position in the auction. This means that (subject to prudential requirements) both traditionally larger and smaller exporters are able to participate on an annual basis in the SA allocation process. The procedure also allows for new entrants to obtain capacity in any given year.

Over the last four years, perhaps reflecting this nominally level playing field, a number of exporters have been able to access SA shipping slots, including at peak times and at the most premium ports. However, the ability to participate is of course limited in practice by exporters' ability to provide the necessary capital for auction premiums. As is noted in Appendix C below, in practice the SA market has been dominated by a small number of exporters that have significant market share.

Another benefit of the auction is that not all shipping slots garnered high auction premiums, and in some years, many shipping slots have not demanded high premiums. This has meant that exporters have been able to participate in the auction to obtain select premium and/or less premium shipping slots as required. Any residual capacity was also made available in the FIFS process where many exporters had the ability to secure it, subject to significantly less risk than under the auction process.

The ACCC also notes the GPSA argument relating to the rebating of the auction premium to all executors of grain, and that this system means that the auction system keeps Glencore incentivised to execute capacity it holds.[180] The ACCC recognises that the rebate system provides an incentive on Glencore to not obtain excess capacity than it actually desires, as any rebate not received will go to Glencore's competitors. In the context of the vertical

[180] GPSA, submission in response to the ACCC Issues Paper, p. 4.

integration present between Viterra and Glencore, the ACCC considers that this is a desirable mechanism. This is in contrast to the LTA proposal where Glencore, if it does not execute capacity, will only pay a penalty to Viterra, essentially constituting a transfer of funds between two arms of the same business.

However, the ACCC also notes that there are other incentives affecting Viterra's allocation and Glencore's use of export capacity. The non-discrimination obligation under Part 3 of the Code may partly address the GPSA's concerns that Viterra will be able to favour Glencore ahead of any other exporter using its facilities. Additionally, Viterra has a commercial incentive for its export capacity to be fully utilized.

Finally, one of the key benefits of the auction relates to transparency. All exporters have had access to clear documentation setting out what capacity is available, and the procedures for participating are defined. Likewise, at the end of the auction Viterra publishes information outlining its operation and allocation outcomes.

The relevance of the auction system is discussed in the ACCC's analysis of subclause 25(3)(j) of the Code in Chapter 4.

Appendix C: South Australian bulk wheat port terminal services

The ACCC's decision on whether to approve Viterra's proposed capacity allocation system is informed by the nature of the current bulk grain export and related markets.

This appendix summarises information on South Australian grain production, exports, and the supply chain.

C.1 Viterra's port terminal facilities

Viterra operates six bulk wheat port terminals across South Australia, located at Port Adelaide (Inner Harbour and Outer Harbour), Thevenard, Port Lincoln, Wallaroo and Port Giles. Relevantly, Viterra is a subsidiary of Glencore International Plc. Glencore trades in grain and other commodities across Australia, and internationally. Glencore is currently the largest bulk wheat exporter operating in South Australia.

Viterra also operates an extensive upcountry grain storage and handling network across South Australia. Viterra provides transport services using rail and road for their customers.

C.2 Grain production in South Australia

Grain production in South Australia is widely distributed and reliant on well-coordinated storage, handling and transportation links at harvest. Viterra divides grain production and storage in South Australia into five key areas:

- Eyre Peninsula – stretching from Pitumba in the west to the Spencer Gulf in the east. This area represents around 28 per cent of total state production;
- Northern Area – stretching from Quorn in the north to Roseworthy and Stockwell in the south. This area represents around 30 per cent of total state production;
- Yorke Peninsula – this area represents around 19 per cent of total state production;
- Murray Mallee – which includes parts of Victoria. This area represents around 14 per cent of total state production; and
- South East – stretching from Tailem Bend in the north to Millicent in the south. This area represents around 7 per cent of total state production.[181]

GPSA noted in its submission to the ESCOSA review of rail access arrangements that:

> Total grain production in South Australia from an estimated 3,000 grain producing businesses for the 2014-15 season was 7.63 million tonnes from 4.04 million hectares.[182]

Total grain production in South Australia has varied over the last ten years. According to data from the Australian Bureau of Agricultural and Resource Economics and Sciences (ABARES), winter grain production in South Australia has ranged significantly from a low of 2,793 million tonnes in 2006-07 to 9,317 million tonnes in 2010-11.[183] According to ABARE

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[181] ABB Grain Ltd, Submission to the ACCC, 16 April 2009, p. 13. Viterra Operations Ltd, "Storage and handling", < http://viterra.com.au/grain/australia/storagehandling.> (viewed on 30 March 2011).

[182] GPSA Issues Paper Submission to the ESCOSA SA Rail Access Regime Review, <http://www.escosa.sa.gov.au/library/20150407-SARailAccessRegimeReviewIssuesPaperSubmission-GrainProducersSA.pdf>

[183] ABARES, Agricultural commodity statistics 2014, December 2014, p. 25.

data over the last four years to 2013-14, South Australian grain production averaged 7,939 million tonnes.[184]

The Department of Primary Industries and Regions SA's (PIRSA) 'Grains in SA' document notes that:

> South Australia produces 20% of Australia's grain produce and averages seven million tonnes of production per year.[185]

C.3 Grain export market

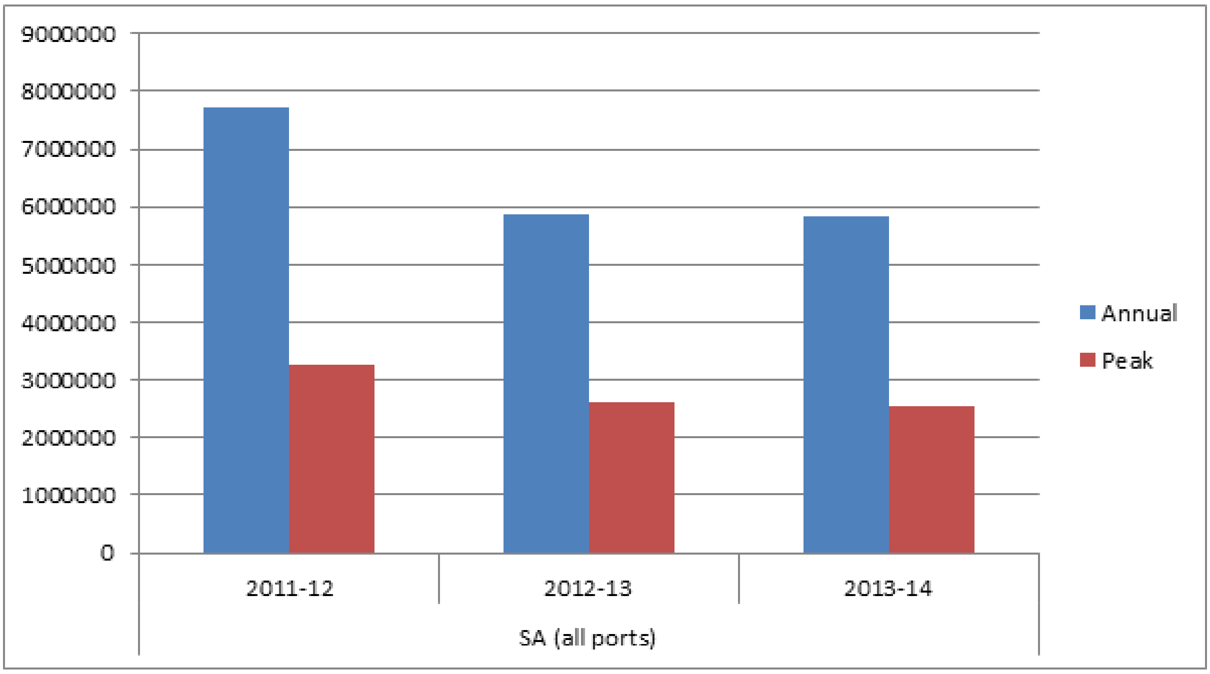
PIRSA has noted that:

> About 80% of South Australia's grain is exported to key markets across the world, with approximately 5.26 million tonnes exported each year. [186]

Similarly, AEGIC has observed that the SA supply chain is structured to "deliver grain one way to port" and notes that about 85 per cent of the grain produced in SA is exported.[187]

Chart C.1 shows the annual and peak period exports for SA over the last three completed seasons.

Chart C.1: Total overall annual and peak month (Feb- May) exports from SA (tonnes)



Source: Australian Crop Forecasters (data from 2011-12 to 2014-15).

Chart C.2 below illustrates the varying overall levels of demand across the Viterra port terminals. As evident there is significantly greater level of demand for capacity from ports like Port Adelaide Outer Harbour and Port Lincoln compared with Thevenard and Wallaroo.

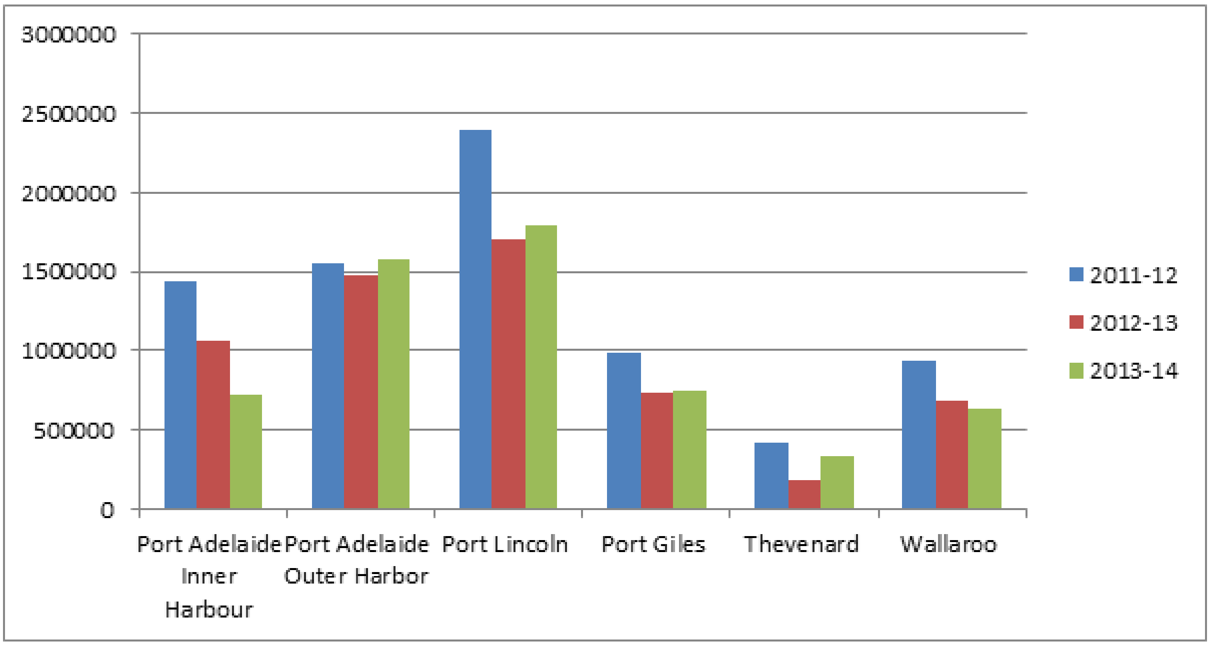
[184] ibid.

[185] "Grains in South Australia", Primary Industries and Regions SA, May 2015, p. 2.

[186] ibid, p. 5.

[187] Tamara Stretch, Chris Carter and Ross Kingwell (Australian Exports Grains Innovation Centre), "The cost of Australia's bulk grain export supply chains An information paper", January 2014, p. 5.

Chart C.2: Total tonnage exported by SA port terminal, 2011-12 to 2013-14



Source: Shipping stem data provided by Viterra.

C.3.1 Market Share in SA

Over the past three years there have been on average 20 exporters shipping grain out of the six Viterra ports, including Glencore.

In its initial submission, Viterra submitted that the top 5 historical exporters from SA were most likely to take up LTC agreements. As outlined in the table below, after the top 5, on average an additional eight to fourteen exporters have executed shipping from SA.

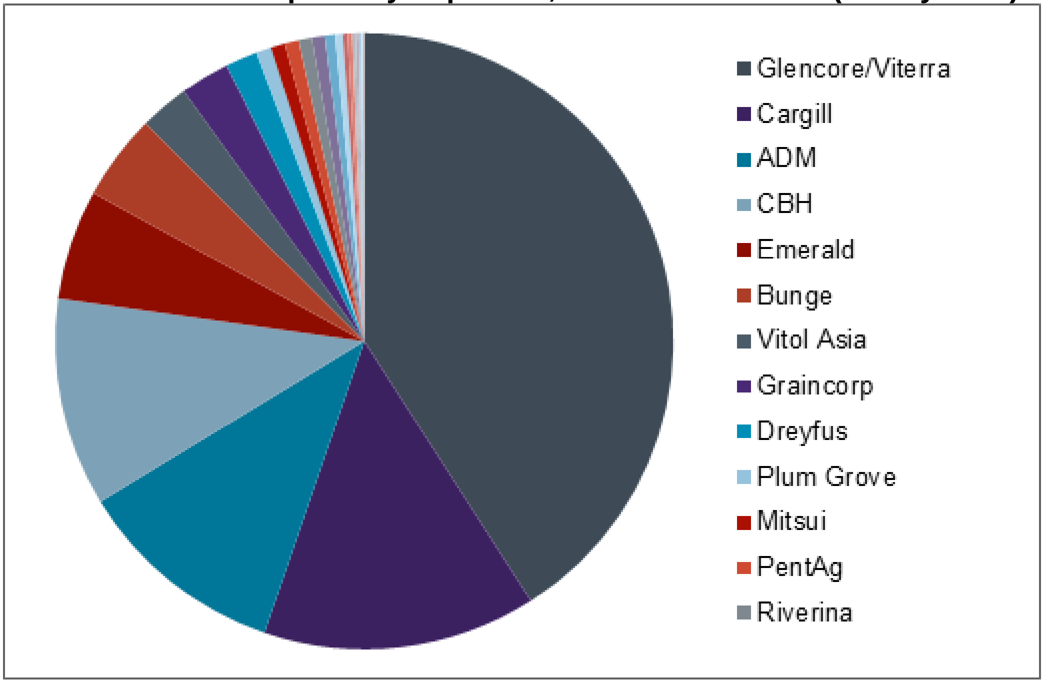
Table C.1: Total tonnage exported by SA port terminal, 2011-12 to 2014-15

Top 5 aquired/All other exporters aquired				
Season	Exporter	Tonnes acquired	Average per quarter	% of total tonnes aquired
2011/2012	Top 5 exporters	6,498,940.04	1,624,735.01	90.34%
	All other exporters (9)	694,847.73	173,711.93	9.66%
2012/2013	Top 5 exporters	5,005,760.00	1,251,440.00	88.06%
	All other exporters (8)	678,573.30	169,643.33	11.94%
2013/2014	Top 5 exporters	4,894,532.99	1,223,633.25	76.45%
	All other exporters (12)	1,507,400.00	376,850.00	23.55%
2014/2015	Top 5 exporters	4,633,866.00	1,158,466.50	76.02%
(as at 4 March 2015)	All other exporters (14)	1,461,666.00	365,416.50	23.98%

Source: Viterra submission 12 March 2015

Note: The table has been annotated to include additional data column - percentage of total tonnes acquired.

Chart C.3: Total Exports by Exporters, 2011-12 to 2014-15 (to July 2015)



Source: Australian Crop Forecasters

C.3.2 Shipping and exporter shares in peak periods

Capacity constraints during peak periods are experienced at the majority of bulk wheat ports in Australia. These periods occur when new season grain is available to be shipped and may differ depending on harvest times in the production zones. Demand for shipping slots during these peak periods exceeds capacity to some extent even in poor harvest years.[188] Exporters will also typically achieve the highest prices for grain in international markets during the peak period, due to low exports from northern hemisphere grain producing nations.

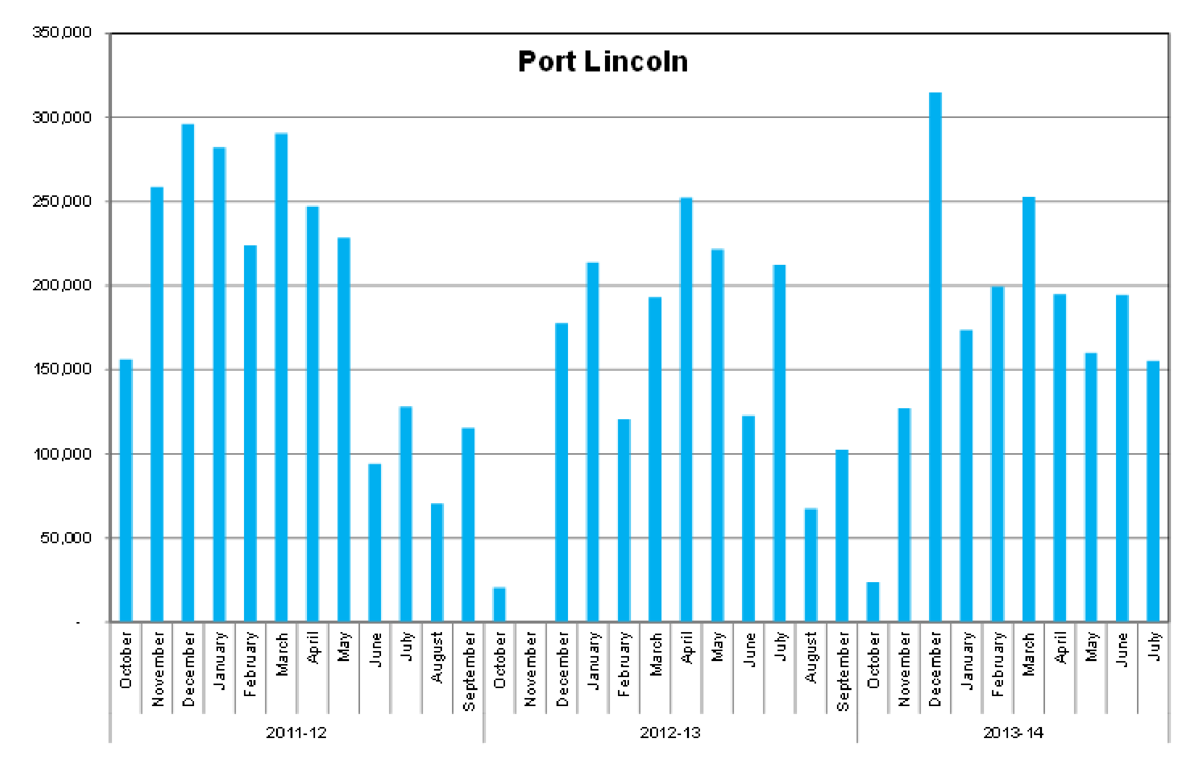
The ACCC has previously taken the view that the mere likelihood of excess demand at some points during the wheat export year is not sufficient to warrant requiring a specific approach to capacity allocation.[189] However, it is a relevant consideration when examining the effect of a particular capacity allocation approach. Accordingly, it is useful to establish the relevant peak periods in SA. The ACCC's key concern is the extent to which a vertically integrated port terminal service provider can discriminate in favour of its own trading business by allocating itself the majority of peak period capacity.

The peak period in SA generally appears to fall between February and May each year, as illustrated with respect to Port Lincoln at chart C.4 below. However, export patterns may have been influenced by the auction system, which rewards exporters who ship in periods where there would be typically less demand.

[188] Viterra Operations Limited Port Terminal Services Access Undertaking Decision to Accept, 29 September 2011, ACCC, p. 49.

[189] ibid.

Chart C.4: Port Lincoln total monthly exports, 2011-12 to 2013-14

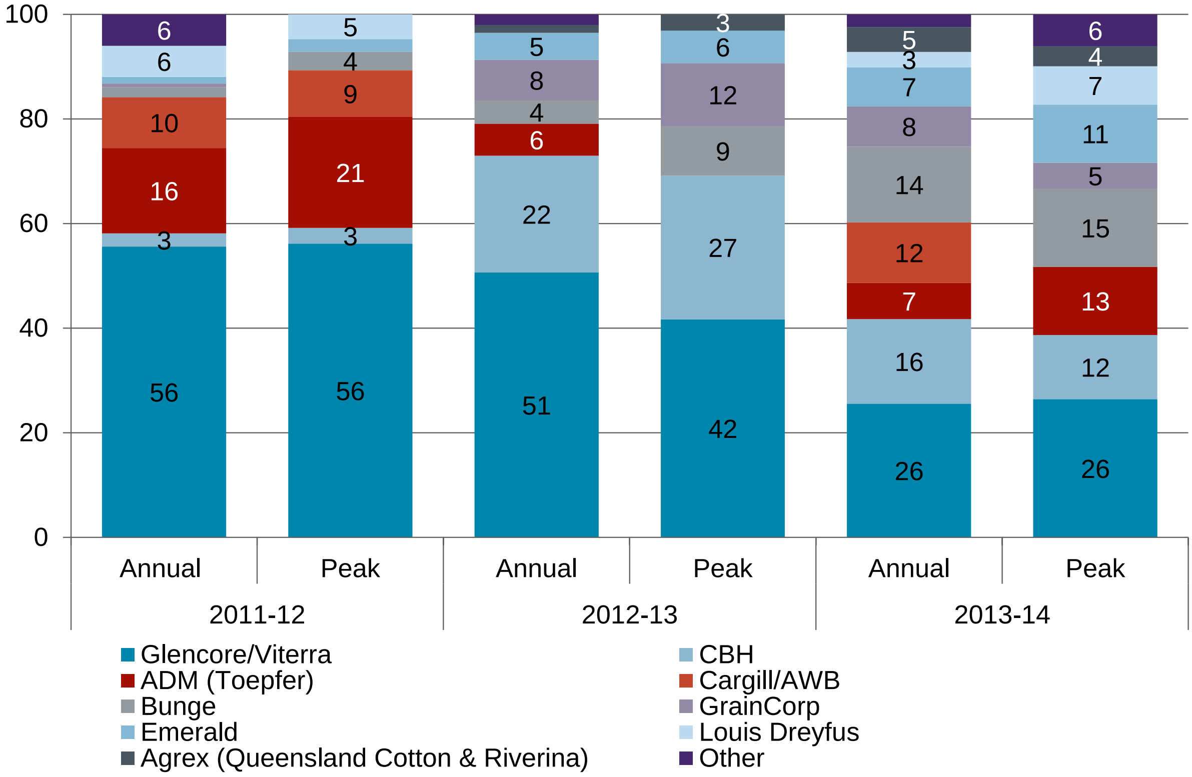


Source: Shipping stem data provided by Viterra

Port Lincoln and Outer Harbour are two key ports of interest for exporters, as they are the largest facilities and best able to fill larger ships for export. Capacity at these two ports will likely be constrained across peak shipping. Charts C.5 and C.6 highlight the relative exporter share of exports between exporters during peak periods (February to May) compared with non-peak periods. This capacity allocation has occurred under the current capacity allocation system, of auction and FIFS.

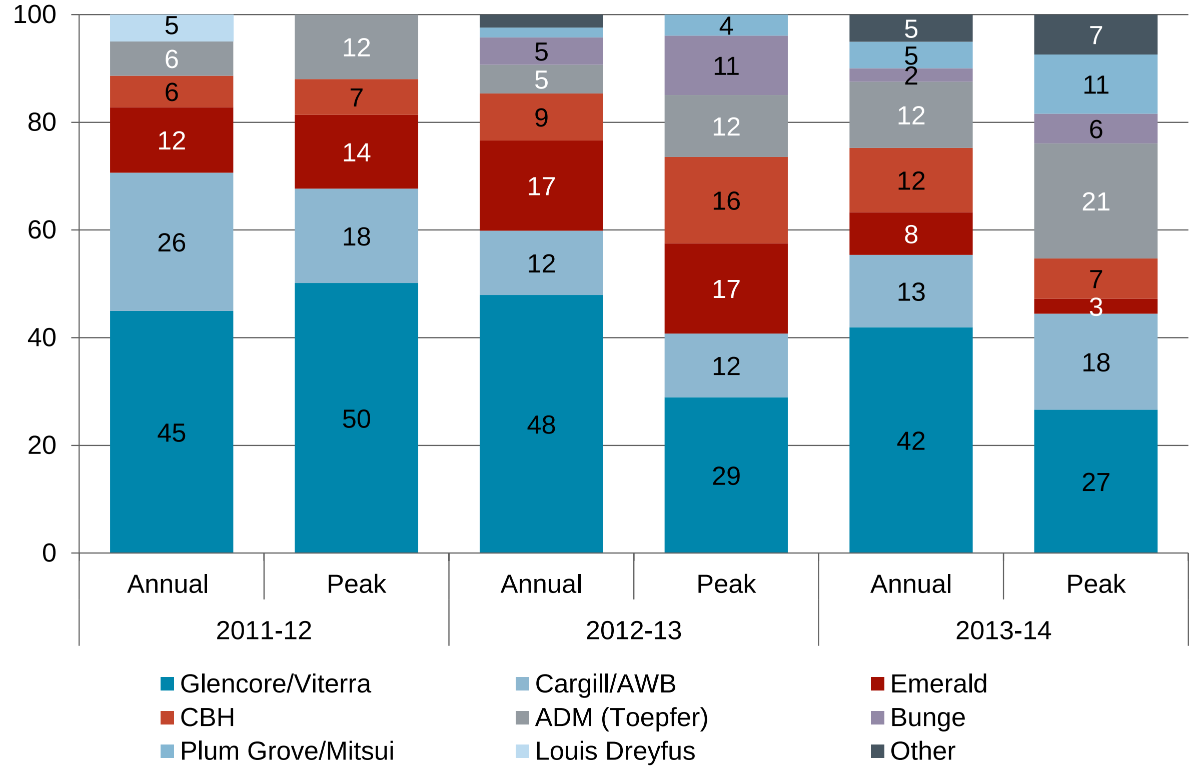
Chart C.5 and C.6 below illustrate relatively little difference in the share by exporter between annual and peak figures. The increase in exporters between 2012-13 and 2013-14 is also likely to be a consequence of the large amount of residual auction capacity that was allocated via FIFS.

Chart C.5: Port Adelaide Outer Harbour annual and peak (Feb-May) exports by exporter



Source: Shipping stem data provided by Viterra

Chart C.6: Port Lincoln annual and peak (Feb-May) exports by exporter



Source: Shipping stem data provided by Viterra

The ACCC notes however that it is unlikely to be economically efficient to have sufficient port terminal infrastructure to accommodate the entire export task within a three to six month window that goes un-utilised for the remainder of the year. Therefore, while exporters' preference may be to export the majority of grain within a peak period, spreading of the export task into the non-peak period is an efficient infrastructure use outcome.

C.3.3 Long term capacity proposal and historic shipping data

To understand what capacity exporters might secure in accordance with Viterra's proposal, the ACCC's draft decision considered historical SA shipping data against the framework of the Viterra's proposed LTC allocation process.

Key observations from that analysis include:

- Considering the baseline (or minimum) STC and LTC that was proposed to be available for exporters, the data indicates that, over the past four years, there would be many occasions where capacity constraints would exist across a number of ports. This occurs even in years where there is a smaller than average harvest.
- Exporters have demonstrated an ongoing interest in shipping from the premium shipping ports of Port Lincoln and Outer Harbour. Looking at those ports specifically, there would be excess demand for shipping slots during the peak season, in particular at Port Lincoln.
- Capacity constraints can be observed at all six ports during the peak shipping period.

The ACCC's full analysis is set out in chapter 4 and Appendix A of its draft decision document.

C.3.4 Additional demand, including new entrants

In addition to known historical levels of demand for port capacity in SA, as demonstrated by the above charts, the ACCC notes that there may be additional demand from new entrants and also some existing exporters who previously have only shipped on an ad hoc basis from SA port terminals. For example, as shown in chart C.3, GrainCorp has not shipped large quantities from SA under the auction system. The prospect of LTC and FIFS STC may attract such exporters to the SA market.

Many smaller exporters have not participated heavily in the auction due to concerns around the auction rebate and high premiums. Some have secured capacity through the FIFS arrangements. Smaller exporters may also be interested in applying for both LTC and STC, potentially for amounts in excess of their previous shipping commitments from SA.

In addition to the current exporters who have shipped from SA there are also a range of companies and organisations that acquire and accumulate grain directly from growers, for example Australian Grain Growers cooperative. PIRSA concludes that "around 40 traders operate in South Australia, ultimately distributing grain internationally through around 20 exporters".[190] The ACCC notes that these organisations may also be potential new entrants into the bulk wheat export market, subject to their ability to access shipping capacity. Equally, their ability to participate in the grain acquisition market may be indirectly affected by the introduction of long term agreements, subject to its effect on related markets.

[190] "Grains in South Australia", Primary Industries and Regions SA, May 2015, p. 4.

C.3.5 Alternative port developments in South Australia

As outlined in Viterra's submission, Cargill has recently trialled an export program from SA. The trial relies on using Cargill's upcountry Grain Flow storage network, trucking the grain to port and the use of a mobile ship loader at Inner Harbour.[191]

Viterra also provided information about a second trial also at Port Adelaide, and submitted an article with its initial March submission that suggested EP Grain was contemplating alternative export pathways.[192]

C.4 Containerised exports

In contrast to bulk grain export, containerised exports are not subject to the regulations under the Code. Evidently, container exports use different port infrastructure, and are shipped in smaller quantities. However, containerised grain may also use much of the same infrastructure, such as upcountry storage or transport infrastructure.

Containerised grain exports provide limited competitive constraint on bulk exports in South Australia. This may increase over time. In South Australia, the use of containers as a means of exporting wheat has fluctuated but not significantly increased overall since 2010 -11from 85,180 tonnes to 92,699 tonnes in 2013-2014.[193] In SA containers are not exported through Viterra's port terminals.

C.5 Storage and handling services in South Australia

Viterra operates an extensive upcountry network of storage facilities across SA. It is vertically integrated, with a total storage capacity of more than 10 million tonnes.[194][195]

Cargill is the second largest operator of upcountry storage and handling services in SA through its GrainFlow network.[196] It has sites at Crystal Brook, Mallala and Pinnaroo. These sites have rail access. A fourth site at Maitland has no rail access. However Cargill has stated in the ESCOSA rail review that it has had considerable difficulty seeking rail access under the present SA rail access regime.

There are a small number of additional small to medium storage providers.

As noted be AEGIC, the storage network in SA has been designed to "accept large volumes of grain in a very short time during the harvest period."[197] Consequently:

> [growers] have capacity to store only about 30 per cent of an average harvest and will often store much less than this on-farm with warehouse storage being the major storage used at harvest time.[198]

A further challenge for new entrants in the upcountry market is that:

> "80 per cent of the grain is received into just 20 per cent of sites with the least-used 20 per cent of sites receiving less than one per cent of the grain. [199]

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[191] Viterra, Submission, 12 March 2015, p. 4 and Attachment 4.

[192] ibid, Attachment 4.

[193] Australian Crop Forecasters data.

[194] Viterra Operations Ltd, "Storage and handling", < http://viterra.com.au/grain/australia/storagehandling.> (viewed on 30 March 2011).

[195] "Grains in South Australia", Primary Industries and Regions SA, May 2015, p. 4.

[196] GrainFlow is a wholly owned subsidiary of Cargill Australia Ltd. GrainFlow operates a network of 22 storage centres along the east coast and into South Australia, See: "GrainFlow", Cargill website, <http://www.cargill.com.au/en/products/GrainFlow/index.jsp.>

[197] Dr Peter White, Dr Chris Carter, Prof Ross Kingwell, "The puck stops here! Canada challenges Australia's grain supply chains", May 2015, p. 29.

[198] ibid.

C.6 Transportation in South Australia

South Australia's grain producing regions are generally located near the South Australian coastline, which means that the distance between upcountry storage and port is relatively short. Consequently it is increasingly common for grain to be moved to export facilities via road transport. While it may have other externalities, road transport in these circumstances can be less expensive and more efficient.

C.6.2 Road transportation

Road transport is typically used by growers to deliver their crop into the Viterra network upcountry. Some growers can deliver direct to their local port.[200] Viterra also contracts with road transport operators to move grain through their system, including from upcountry storage to port.

Delivery by road to port is also an option for exporters. They can deliver from third party storage sites to the ports and/or arrange to outturn from Viterra's storage network and move grain to port directly. However given that most growers deliver into the Viterra upcountry network and Viterra provide a bundled storage, handling and logistics product there is limited incentive and/or opportunity for exporters to make their own transport arrangements.

C.6.3 Rail transportation

Genesee and Wyoming Australia Pty Ltd (GWA), an Adelaide based business formed in 2006, is the primary provider of grain rail freight in South Australia. GWA is a wholly owned subsidiary of Genesee and Wyoming Inc (GWI), a business based in the United States. GWI purchased the rail network in South Australia in 1997 from the South Australian Government, which had made the decision to privatise the network.

There are a number of rail lines which can carry grain under GWA arrangements. These are located on the Eyre Peninsula, north of Adelaide, and in the Murray - Mallee region. Most recently Viterra has announced it will no longer use rail in the Mallee and instead will trucks to move grain from this region to other upcountry sites and/or port.[201]

An Australian Rail Track Corporation (ARTC) controlled interstate line also runs through SA. Access is governed by an ACCC approved access undertaking.

C.6.4 Export Select

Viterra currently makes available port terminal services as either a stand-alone service - Export Standard, or bundled with Viterra's freight services.

On its website, Viterra notes how it:

> … utilises the strength of its supply chain and long-term agreements with road and rail service providers to optimise the movement of grain through our storage and handling network and transport grain to port cost-effectively.[202]

Furthermore it notes how Export Select:

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[199] Dr Peter White, Dr Chris Carter, Prof Ross Kingwell, "The puck stops here! Canada challenges Australia's grain supply chains", May 2015, p. 29

[200] "Grain Delivery", Viterra, http://www.viterra.com.au/storage-handling/harvest-2014-15/grain-delivery-2014-15, (viewed 30 June 2015).

[201] Alisha Fogden, "Mallee rail future in doubt", Stock Journal, 21 May 2015, <http://www.stockjournal.com.au/news/agriculture/cropping/general-news/mallee-rail-future-in-doubt/2732626.aspx> (viewed 26 June 2015).

[202] "Storage and handling", Viterra Operations Ltd, < http://viterra.com.au/grain/australia/storagehandling.> (viewed on 30 March 2011).

> … ensures timely and efficient movement of grain from up-country sites to port for shipping and is a significant contributor to managing an efficient accumulation and logistics operation in a deregulated environment.[203]

Viterra provides a rebate to exporters that use Export Select. While not guaranteed, use of the Export Select product is more likely to ensure an exporter's grain is received at port on time as per the specifications required. Customers who use Export Select are "are also protected from adverse freight rate movements, as these rates are fixed at the time of transfer".[204] Historically, utilisation of direct to port access in conjunction with using Export Standard (the stand alone storage and logistics option) has been limited.[205]

[203] "Export Select Freight Rates", Viterra Operations Ltd, <http://www.viterra.com.au/storage-handling/export-select-rates-2>.

[204] ibid

[205] Viterra Operations Limited Port Terminal Services Access Undertaking Decision to Accept, 29 September 2011, ACCC, p. 77.