Port Access Code Exemption: Port Kembla

Discussion paper issued by the ACCC

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NSW Farmers' Association Background
The NSW Farmers' Association (the Association) is Australia's largest State farmer organisation representing the interests of its farmer members – ranging from broad acre, Livestock, wool and grain producers, to more specialised producers in the horticulture, dairy, egg, poultry, pork, oyster and goat industries.

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Introduction

NSW Farmers is Australia's largest state farming organisation representing the interests of the majority of commercial farm operations throughout the farming community in NSW. Through its commercial, policy and apolitical lobbying activities it provides a powerful and positive link between farmers, the Government and the general public.

As the peak representative body of grain farmers in NSW, NSW Farmers welcomes the opportunity to make a submission to the ACCC in response to the issues paper it has released seeking the views of industry on the applications made by GrainCorp and Quattro for relief from the obligations contained within Parts 3-6 of the Port Terminal Access (Bulk Wheat) Industry Code (the 'code') for the Port Kembla zone.

NSW Farmers is concerned that it is too premature to exempt the port facilities from the requirements of Part 3-6 of the code. Specifically, NSW Farmers is concerned at the impact of removing the duty to not discriminate against an access seeker in preference of their own operations. In taking this position, NSW Farmers points to the vertical integration between GrainCorp's marketing arm and the operation of its ports, as well as the likelihood that Quattro's grain exporting shareholders are in positions in which they exercise either control or significant influence on its Port Kembla operations.

If the ACCC forms the view that the regulatory burden associated with the application of Parts 3-6 of the code upon the facilities exceeds the public interest considerations for increased competition; NSW Farmers recommends the ACCC consider whether it would be open for it to make the regulatory decision to a) not exempt the facility, and b) reduce the regulatory burden of the code. This could be done by approving any policy and procedure for managing demand published under cl 8 of the code as a capacity allocation system for the purposes of cl 25.

In addition to the above, NSW Farmers has indicated within the submission that there is a clear public benefit in ensuring that port prices are set in a manner that does not exceed that which would be available to the port terminal operator in a competitive market. Adopting the above suggestion would provide a lower regulatory burden upon a port terminal operator, while at the same time retaining an incentive to set access prices at fair and reasonable levels to avoid the risk of arbitration.

The exemption process

NSW Farmers was part of a group of farming representative organisations who made a joint submission to the Government as part of its consultation on the code's development. This submission supported the development of the code to underpin behaviours port terminal operates in the bulk wheat export market that support a competitive market dynamic for farmers' grain. The submission agreed with the inclusion of a tiered level of regulation that enabled a lessening of the code's requirements dependent on the competitive environment faced by a port terminal operator.

This position was however prefaced by the view that this discretion should be used based upon well defined and measurable thresholds to guide certainty in the ACCC's considerations when making a regulatory decision to exempt, or revoke the exemption of a port terminal facility. To this extent the submission proposed the measure of the

Herfindahl-Hirschman Index (HHI); a tool that is utilised by economic regulators worldwide to measure market concentration. NSW Farmers continues to believe that the explicit use of the HHI would provide greater transparency as to the regulatory decision making process surrounding the granting of an exemption under cl 5 of the code.

NSW Farmers has used shipping stem data to analyse the concentration in the market for bulk wheat exports. The application of the HHI to exports originating from Port Kembla demonstrates the concentration of this market.

Improving Farm Gate Returns is in the Public Interest

NSW Farmers believes that in its examination of the public interest considerations, the ACCC should give weight to ensuring the policy settings embodied within the code are focused on facilitating competition with the aim of improving farm gate returns. The basis behind this belief is not merely an argument about ensuring that the distribution of wealth through the value chain is fair; rather it reflects the economic imperatives to grow agriculture's contribution to Australian economy.

The development of Australia's agricultural capacity is a matter that is firmly in the national interest. To this extent the Federal Government has highlighted that agriculture is one of the 5 pillars of the Australian economy and has outlined the desire to double the contribution of agriculture to the economy. A consultancy undertaken for the NFF has indicated that of the sectors within the Australian economy only agriculture has this potential.

As part of the Government's efforts to develop a white paper to articulate initiatives that will improve Australia's agricultural competitiveness, it has indicated that Government policy that focuses on providing the conditions to improve farm gate is essential to attaining these outcomes. The Agricultural Competitiveness Green Paper outlines that the economic flow-ons from improving farm gate returns includes financial investment in the industry, increased export receipts, stronger regional economies and jobs.[1]

The benefits of growth in the farm sector to rural and regional Australia are evident with agriculture being the backbone of much industry across non-metropolitan Australia. NSW Department of Trade and Investment estimates that NSW's primary industries employ 11.3% of regional NSW's workforce directly, with the employment of 24.5% of this workforce arising as a result economic activity in NSW's primary industries.[2]

In examining the actions required to 're-establish [the] growth engines' of Australian agriculture, the ANZ's Greener Pastures report, highlighted the need for investment to improve on-farm productivity.[3] While the paper made a range of recommendations; key to industry growth was establishing clear market signals for the farm sector to invest in

[1] Australian Government, Department of Prime Minister and Cabinet (2014) *Agricultural Competitiveness Green Paper*, *vii*.
[2] NSW Government, Department of Trade and Investment, 'The Contribution of Primary Industries to the NSW Economy; Key Data 2014' (2014).
[3] Port Jackson Partners 'Greener Pastures: The Global Soft Commodity Opportunity for Australia and New Zealand' (ANZ Insights Report, Issue 3, October 2012) 33-34; 37.

growth.[4] This included ensuring the ability of the supply chain to provide clear market signals to the farm gate that underpins investment in this growth; with one area of risk to this market signal being monopolisation of supply chains and loss of trust in the downstream market.[5]

Further, the importance of providing a market signal to invest in improving farm productivity in the Australian grains sector was highlighted at a grains R&D forum hosted by the GRDC in March this year LMC International. The presentation, an outlook on global agriculture and Australia's role, identified that increasing yield in wheat is essential to maintaining the value created by both Australia's close proximity to Asian markets and by the qualities of Australian grain.

With respect to the question of the applications being considered by the ACCC to exempt GrainCorp and Quattro's Port Kembla facilities, potential risks to farm gate revenue are posed through:

- Use of market power to require access to port terminal facilities at costs that would not be available in a competitive market; and
- Impeding competition in upstream markets for farmers' grain through conditions of access to competitors to port terminal facilities, and to the upcountry networks that are essential for the operation of the bulk grain export market.

Market for port terminal services

In the ACCC's Draft Determinations on Emerald's Melbourne Port Terminal and GrainCorp's Geelong and Portland port facilities the ACCC articulated the following should be answered in respect to the public interest criteria and that of the requirement to promote competition in dependent markets.

> *Whether there is a sufficient competition in the market for bulk wheat export port terminal services, such that the full application of the Code may not be required to promote competition for those services or in upstream and downstream markets.*[6]

The following section seeks to provide the views of NSW Farmers in response to this question.

Market definition for competition analysis

In considering whether the level of competitive constraint is sufficient to protect these interests, NSW Farmers supports the approach proposed by the Victorian Farmers Federation Grains Group to define the market to be subject to the required competition analysis. That is the use of the well established and utilised concept of Natural Terminal

[4] Ibid.
[5] Ibid 48-49.
[6] Australian Competition and Consumer Commission, 'ACCC Draft Determinations: Exemptions in respect of Emerald's Melbourne Port Terminal Facility, GrainCorp's Geelong Port Terminal Facility, GrainCorp's Portland Port Terminal Facility' (10 April 2015). Here after the 'Victorian Ports Draft Determination'.

Port (NTP) or port catchment area.[7] These catchment areas are attached to the relevant port by virtue of the freight cost associated with delivery compared to an alternate export location. Traditionally these have been created as a result of the alignment of grain rail lines to a port terminal; which continues to provide freight efficiencies particularly in NSW where the median freight distance is over 400 km;[8] however maintain general application even when cargoes are executed to port by road.

As a rule it does not make commercial sense to arbitrage grain away from the NTP on the basis that the additional cost of moving the grain further away is not matched by a corresponding premium; either in the form of a reduced port costs or access to a premium export market. NSW Farmers however accepts that opportunities enabling the development of a lowest cost freight and handling outside of the NTP catchment and unlocking greater competition between port terminals could arise as a result of the proposed Inland Rail; however at the present this infrastructure does not exist.

On this basis, NSW Farmers believes that the correct market in which to undertake a competition analysis in is the market for the provision of bulk grains export services in the catchment for the Port Kembla terminals (herein after Port Kembla Zone or PKZ).

Impact of market for port terminal services on competition for farmers' grain

<u>The market for bulk grain exports establishes a floor in the market for farmers' grain</u>

As noted above, one of the key criterion upon which the question of whether public benefit arises as a result of maintaining the full application of the code is whether it promotes increased farm gate returns. Internationally Australia is an important grain producer due to the high volumes of grain exported. The converse impact of this is that with approximately 80 percent of all grain produced in Australia exported the FOB price of Australian grain offered to producers is largely established as a result of global supply and demand.[9] Farm gate pricing is therefore primarily determined by the global price less the sum of storage and logistics costs and margins taken (including risk premiums) by grain marketers.[10] This section of the submission will primarily focus on factors of farm gate pricing related to the costs associated with offering services at bulk grain port terminal facilities.

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[7] VFF Grains Group, Submission to the ACCC Issues Paper 'Applications seeking exemption from certain provisions of the Port Terminal Access (Bulk Wheat) Code of Conduct' (6 February 2015) 3; further articulated at VFF Grains Group, Submission to the ACCC 'Draft Determinations: Exemptions in respect of Emerald's Melbourne Port Terminal Facility, GrainCorp's Geelong Port Terminal Facility, GrainCorp's Portland Port Terminal Facility' (24 April 2015)

[8] See Deloitte, 'Operational costs for transporting grain from silos on the NSW Country Rail Network to ports at Newcastle or Port Kembla by rail and road: sensitivity testing of assumptions' (Final Report for the NSW Independent Pricing and Regulatory Tribunal, 3 April 2012).

[9] Free on Board meaning grain loaded on a bulk vessel free of costs to the buyer.- Incoterms 2010.

[10] Tamara Stretch, Chris Carter and Ross Kingwell 'The cost of Australia's bulk grain export supply chains' (Information Paper, Australian Export Grains Innovation Centre, January 2014) 8; see also Productivity Commission, *Wheat Export Marketing Arrangements*, (1 July 2010, Report no. 51) 92-95. Canberra.

Unlike in other dependent markets, the market for farmers' grain is an upstream market in which the producer operates as a price taker. The implication of this is that costs incurred downstream by grain purchasers are passed back to the grain producer. The impact of this in the Australian grain market is very evident through the process of selling grain using a port price and then deducting supply chain costs; but is also reflected in the less discrete practice of reduced FOB prices.[11] As outlined by the joint submission submitted to Government on the development of the code, this situation is further exacerbated by the stranding of growers, as the ultimate bearer of these costs, from the negotiation over the cost of access.

As a result farmers require strong competition in the market for storage and logistics, and specifically in the market for port terminal services for bulk grain, to ensure the upwards pressure on service delivery to reduce the cost of risk and maintenance of downward pressure on service delivery costs. Both of these factors contribute to lifting the floor price in the market for farmers' grain.

The relationship of the cost taken by the bulk export supply chain to the floor in the market for farmers' grain is one of the reasons NSW Farmers supports the position put to the ACCC by the VFF Grains Group that its Victorian Ports Draft Determination placed undue weight upon the presence of the markets for container packing and domestic end use.

The cost of port terminal services in Australia

Recent reports by the Australian Export Grains Innovation Centre (AEGIC) and Rabobank have indicated that Australia's export grain supply chains are not only expensive; but also as a result of low global shipping freight rates have reduced the freight advantage that Australian grain has traditionally held into southern Asia.[12] The AEGIC analysis has identified port costs are growing at a rate that is faster than other supply chain costs.[13]

Table 1 (below) outlines that the port costs associated with the export of wheat from GrainCorp's Port Kembla terminal start at $21.35 per tonne. This compares unfavourably to costs incurred at Canadian ports, which have been identified as being around **$14 per tonne**.[14]

[11] See Tamara Stretch, Chris Carter and Ross Kingwell 'The cost of Australia's bulk grain export supply chains' (Information Paper, Australian Export Grains Innovation Centre, January 2014) 23. This outlines that unreliability of the supply chain exposes exporters to risks of demurrage and other costs with these risks passed onto grain farmers through reducing quoted Free On Board prices.

[12] Tamara Stretch, Chris Carter and Ross Kingwell 'The cost of Australia's bulk grain export supply chains' (Information Paper, Australian Export Grains Innovation Centre, January 2014). Graydon Chong 'Australian Grains – Competitive Strains' (Rabobank Agriculture in Focus Report, November 2013).

[13] Tamara Stretch, Chris Carter and Ross Kingwell 'The cost of Australia's bulk grain export supply chains' (Information Paper, Australian Export Grains Innovation Centre, January 2014) 2, 5.

[14] Peter White, Chris Carter and Ross Kingswell 'The puck stops here! Canada challenges Australia's grain supply chains' (Information Paper, Australian Export Grains Innovation Centre, May 2015) 44.

NSW Farmers is aware of a number of market analysts who are of the belief that the port costs charged in Australia are excessively high.

Table 1: Port Kembla charges 2014-15 for wheat deliveries[15]

Basic service	Port Kembla ex GNC ($/t)	Port Kembla ex 3rd party ($/t)
Basic intake receival fee - rail	5.45	7.40
Basic intake receival fee - road	7.40	9.30
Vessel nomination	8.00	8.00
Vessel loading	3.60	3.60
Storage for the first week (for loading)	1.17	1.17
Inspection charges	0.26	0.26
Miscellaneous port/wharf fees	2.07	2.07
Dust	0.25%	0.25%
Base cost at $320 FOB/t (Rail)	**21.35**	**23.30**

Maintaining fair and reasonable port costs

The stated purpose of the code is to ensure 'fair and transparent access to port terminal services' by exporters of bulk wheat. This includes ensuring fair and reasonable prices are charged for access. In making this statement NSW Farmers is aware, and foreshadowed in its submission in response to the draft code, that where adequate competition exists it will protect the interests of farmers by placing downwards pressure on the costs sought by port terminal operators. However, NSW Farmers is concerned that any action to lower the regulation at Port Kembla may pre-empt the establishment of demonstrable competition that will ensure these interests are protected.

Part 4 of the code provides for a mechanism through which an exporter is able to enter into a dispute resolution process to resolve differences on the proposed terms of access, including price. It would be NSW Farmers' preference that the availability of this action remained available to exporters to act as a deterrent against unreasonable pricing at port. NSW Farmers understands that during the operation of the *Wheat Export Marketing Act 2008* (Cth) none of the port terminal operators required to hold a port access undertaking

[15] GrainCorp, 'Bulk Wheat Port Terminal Services Fee Schedule (including Durum) 2014/15'; and Tamara Stretch, Chris Carter and Ross Kingwell 'The cost of Australia's bulk grain export supply chains' (Information Paper, Australian Export Grains Innovation Centre, January 2014) 24.

with the ACCC was brought to arbitration.[16] As such if the exemptions sought were not provided to GrainCorp and Quattro, this obligation is unlikely to constitute an over bearing regulatory requirement.

Lastly as a statement of position, while NSW Farmers is not opposed to the duplication of grain storage and handling infrastructure, through investments such as Quattro's Port Kembla facility, concerns exist over the cost to industry arising from the requirement to cover the construction and maintenance costs of this facility. Specifically the concern is that in the absence of a properly functioning competitive market for port terminal services. the cost of duplication will be borne by farmers regardless of whether the excess capacity is required to take advantage of Australia's bulk grain export opportunities. These fears arise as a result of observing revenue models, such as the former arrangements for determining electricity network charges that encouraged the gold plating of infrastructure, passing the costs back to the consumer while reducing community welfare. In the view of NSW Farmers further monitoring of the fees charged for bulk grain port terminal services benchmarked against other competitive markets for these services worldwide should be undertaken.

Will Quattro bring competitive tension?

With regard to the likely nature of the competition between GrainCorp and Quattro, NSW Farmers notes that the market for the provision of port terminal services for bulk grain will be concentrated between the two providers. Experience has seen a small level of pricing differentiation by an incumbent port terminal operator in response to emerging competition. For example in 2013 in response to the commissioning of the Newcastle AgriTerminal, GrainCorp removed the premium charge it requires to receive grain from a third party upcountry storage into its Carrington terminal; however this was done as part of changes to its fee structure across its network where it unilaterally lifted the cargo nomination fee across its entire port terminal network by 60 percent ($5 up to $8). In the first year of its operation this increased cost was applied to 8 million tonnes.

Noting the concentration in the market for port terminal services and the small level of response to competitive tension from competing terminals historically, NSW Farmers remained concerned as to whether the behaviour that will be seen by the two operators will be characterised by true competition on price and service, or rather non-competitive duopoly.

Market for upcountry storage and handling

The ACCC's Draft Determinations on Emerald's Melbourne Port Terminal and GrainCorp's Geelong and Portland port facilities the ACCC also posed the reverse proposition to that referred to above; asking whether competition in the upstream markets will constrain the market power of port terminal operators. This was articulated by the ACCC as follows:

[16] ACCC and Department of Agriculture briefing with the NFF Grains Policy Council 2014.

- 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 in the absence of parts 3 to 6 of the Code applying. [17]

The market for upcountry storage and handling

GrainCorp is the dominant participant in the market for storage and handling across the grain belt of NSW and in PKZ with 48 upcountry grain receival sites after the implementation of its "Project Regeneration". Of these 48 sites, 36 are classified as Primary or Major sites with a focus on bulk export markets, with the remainder as custom/flex sites which are focused on the domestic market and providing additional capacity during larger harvests. In addition to those sites with Port Kembla as their NTP, grain may be diverted into Port Kembla from a further 15 GrainCorp sites located in the south west of the Newcastle Port Zone and the north of the Melbourne Port Zone; however are are adjacent to PKZ.

The major competition to GrainCorp's network within PKZ comes from Cargill's network which includes 4 multi-buyer GrainFlow sites Bogan Gate, Grong Grong, Stockinbingle and West Wyalong and the single buyer BFB receival facility at Temora. In addition, grain may be diverted into PKZ from GrainFlow sites located at Narromine, Gilgandra, Nyngan.

Emerald also operates three storage and receival sites in PKZ at Goolgowi, Coolomon and Ardlethan, and a further site at The Rock in the Melbourne Port Zone.

Figure 1 is a map of PKZ showing grain receival sites by local government areas. The map has been colour coded by grain production using a production map developed by Australian Crop Forecasters for the NSW Grain Freight Review in 2009.

<u>Grain receival site catchment</u>

The behaviour of farmers in the planning of harvest logistics should be considered as that of rational economic actors; that is all things being equal, they will coordinate where they will deliver grain based on what will deliver the highest return. Factors included in this are:

- price received;
- cost of delivery to silo/domestic user;
- FOB costs, such as the location differential to port; and
- other transaction costs such as the speed of turnaround at receival point and the impact this has on the progression of harvest.

These factors will often result in a farmer selecting the nearest silo as the preferred destination for their grain. On this basis NSW Farmers concludes that in considering grain storage and handling within the port zone, a sole focus on volume capacity is not an adequate measure of the ability of alternative storage and handling providers to directly compete with each others networks. Rather based on the factors above, grain producer will naturally be drawn to the most efficient receival site; most often this will be the site located closest to the grain being harvested or the intermediate storage on farm.

[17] Australian Competition and Consumer Commission, 'Victorian Ports Draft Determination'.

Figure 1: Upcountry receival sites in the Port Kembla Zone

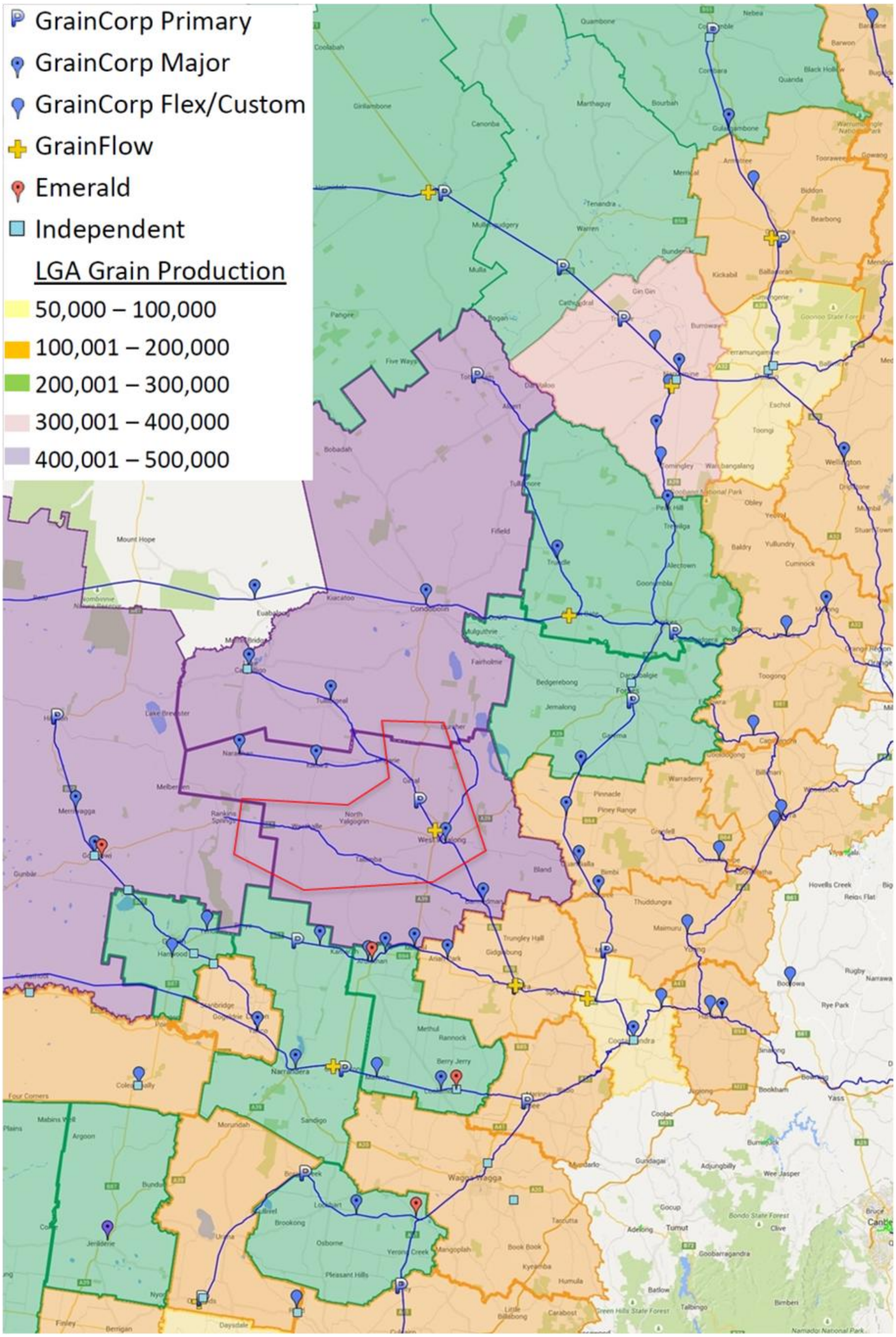

Figure 1 uses the catchment for West Wyalong to demonstrate this concept. While there will be duopolistic competition within the direct catchment zone between GrainCorp's new primary site at Callen and the GrainFlow site at West Wyalong, the cost of road transport restricts the commercial viability of sending grain from farms outside of this area to the GrainFlow site. To the north west of this catchment, a farmer's options for delivering grain at harvest is limited to the nearest of GrainCorp's Naradhan, Kikoira, Tullibigeal and Lake Cargelligo sites. To the south east, the lower location differential to port means that grain will be delivered along the Goldfields Way to GrainCorp's Barmedman site and to the direct south along the Newell Highway to GrainCorp's Mirrool site or along the Tallimba-Ardlethan road to either the GrainCorp or Emerald receival facility. To the east of West Wyalong the commercially available options for a farmer to deliver grain is limited to GrainCorp's Wirrinya, Caragabal, Quandialla and Bribbaree receival facilities.

Alternative markets to the use of bulk handling

As foreshadowed above, NSW Farmers is supportive of the position put by the Victorian Farmers Federation that the ACCC paid undue consideration to the presence of the domestic consumption market, the market for container exports and on-farm storage in the Victorian Ports Draft Determination.

Domestic market

NSW Farmers re-emphasises the limited impact of the domestic market on the policy settings arises from the context of the inter-related nature of the domestic and international markets which sets the floor price at export parity. That is, domestic users are required to match bids that a grower would alternatively receive for grain acquired for export based on supply and demand within global markets.[18] The requirement of the domestic market to match the floor price set by the export market has been acknowledged by GrainCorp in the representations it has made regarding the impact of reduced rail freight facilitated by its project regeneration on farm gate returns.

Fair and non-discriminatory access to port terminal services is required to maintain the market efficiency and competitive tension in the bulk wheat export sector which determines the floor in the price for farmers' grain regardless of its end market.

Container market

NSW Farmers' notes the limited ability of the container trade to bring downwards pressure upon the costs associated with the bulk export of wheat on the basis that it has a higher export supply chain cost.

Farm storage

NSW Farmers further rejects that on-farm storage is a true competitor to the bulk export supply chain on the basis of the following reasons.

[18] See for example Profarmer, 'Sorghum' *Weekly Grain Newsletter* (11 June 2014) 9 in which the price of sorghum during drought conditions in Northern NSW and Queensland is linked to the price of bulk wheat exports originating in South Australia.

Firstly, access to the export market and domestic processing generally occurs through receival into the bulk handling system. As such, even in instances in which a farmer may utilise on farm storage to take advantage of counter seasonal price spikes or the capacity to blend grain to increase a premium, delivery will often occur through the bulk handling system.[19]

Secondly, often the purpose for the establishment of on-farm storage is a strategic decision related to production, not marketing. That is to ensure fewer delays at harvest caused by backlogs at local receival sites, keeping harvesters (particularly contract harvesters) operational and managing quality risks caused by in-harvest rainfall events. Silos used for this purpose do not need to be manufactured to handle the issues of preserving grain quality that are accompanied with longer term storage of grain.[20]

Lastly, for most farmers the market signal to invest in the establishment and ongoing management of the type of on farm storage required for longer storage periods does not exist.[21]

Vertical Integration

The policy rationale behind the imposition of access arrangements and the parliamentary mandate for the development of the code is to ensure that the high levels of concentration in the export grain supply chain does not impede on competition for farmers grain. This is through ensuring fair and transparent terms of access to third party exporters.[22]

In particular this is necessary due to the vertical integration of these bulk handling networks with marketing business segments which results in an economic incentive to self preference its own marketing arm in the allocation of shipping slots and in the terms and cost at which they allocate capacity to other exporters. This places competitor exporters at a disadvantage in executing the accumulation and export of grain cargoes which will be reflected in the risk premiums that they allocate in determining the bid price for grain. This is reflected in lower farm gate prices for grain farmers, with the marketing segments of the dominant bulk handler only needing to match or slightly better competing bids to accumulate its export and domestic consignments.

As a result of the vertical integration of the grain marketing business segments of GrainCorp and Emerald and Cargill, as shareholders in Quattro, the economic incentive to preference their own grain marketing divisions through either direct control, or alternatively through the exercise of significant influence on operations exists. While it is

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19 Malcolm Bartholomaeus, Submission No. 21 to Senate Rural and Regional Affairs and Transport References Committee, Parliament of Australia, *Inquiry into operational issues in export grain networks*, (30 August 2011), 2.

20 See Chris Warrick, 'On-farm storage – do the sums first', *Ground Cover* (Issue 104: May – June 2013) < http://www.grdc.com.au/Media-Centre/Ground-Cover/Ground-Cover-Issue-104-May-June-2013/On-farm-storage-do-the-sums-first>.

21 Ibid. See also Peter White, Chris Carter and Ross Kingswell 'The puck stops here! Canada challenges Australia's grain supply chains' (Information Paper, Australian Export Grains Innovation Centre, May 2015) 37-38.

22 Port Jackson Partners 'Greener Pastures: The Global Soft Commodity Opportunity for Australia and New Zealand' (ANZ Insights Report, Issue 3, October 2012) 48-49.

acknowledged that port terminal service providers have an incentive to optimise throughput of grain through its storage and logistics assets;[23] this incentive is not mutually exclusive to behaviour that can impede competition for farmers' grain by increasing the costs and the risks faced by third party competitors.

In particular, NSW Farmers is concerned that these incentives risk the creation of exclusive closed loop operational practices. As a result of the natural drawing zones of grain receival sites as referred to above, the potential to allow self preferential behaviour from port terminal operators poses potential risks to competition for farmers' grain. The operation of BFB in Temora as a single buyer site has already seen the commencement of these practices.

As such the requirement for a vertically integrated port terminal operator to not discriminate in favour of itself is a key element in ensuring competition in the upstream market for farmers' grain.

Legitimate business interests

NSW Farmers draws attention to the statement made by the ACCC with regard to the flexibility that port terminal operators are able to exercise, even under the full application of the code.[24] This includes the ability to vary the terms and prices of a service offering to a particular exporter, provided that in doing so the non-discrimination obligations are not breached.

In noting the concerns outlined above, NSW Farmers does not believe that at this point in time the ACCC should provide an exemption to either GrainCorp or Quattro due to the role Parts 3-6 play in protecting the public interest by facilitating competition for farmers' grain.

If the ACCC forms the view that the regulatory burden associated with the application of Parts 3-6 of the code upon the facilities exceeds the public interest considerations; NSW Farmers recommends the ACCC consider whether it would be open for it to make the regulatory decision to a) not exempt the facility, and b) that it will reduce the regulatory burden of the code by approving any policy and procedure for managing demand published under cl 8 of the code as a capacity allocation system for the purposes of cl 25.

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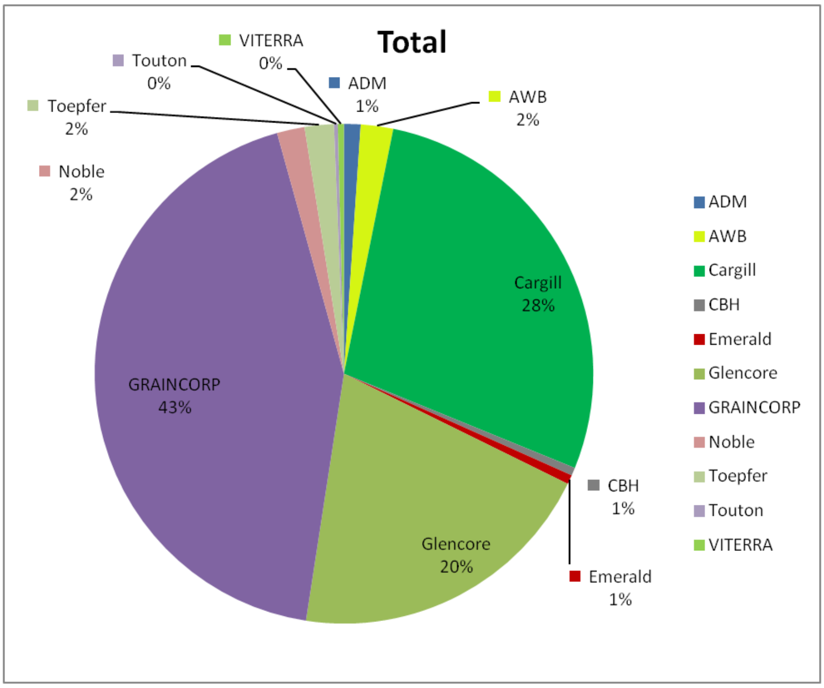
[23] Productivity Commission, *Wheat Export Marketing Arrangements*, (1 July 2010, Report no. 51) 181; 200-203.
[24] Australian Competition and Consumer Commission, 'Victorian Ports Draft Determination', 47.

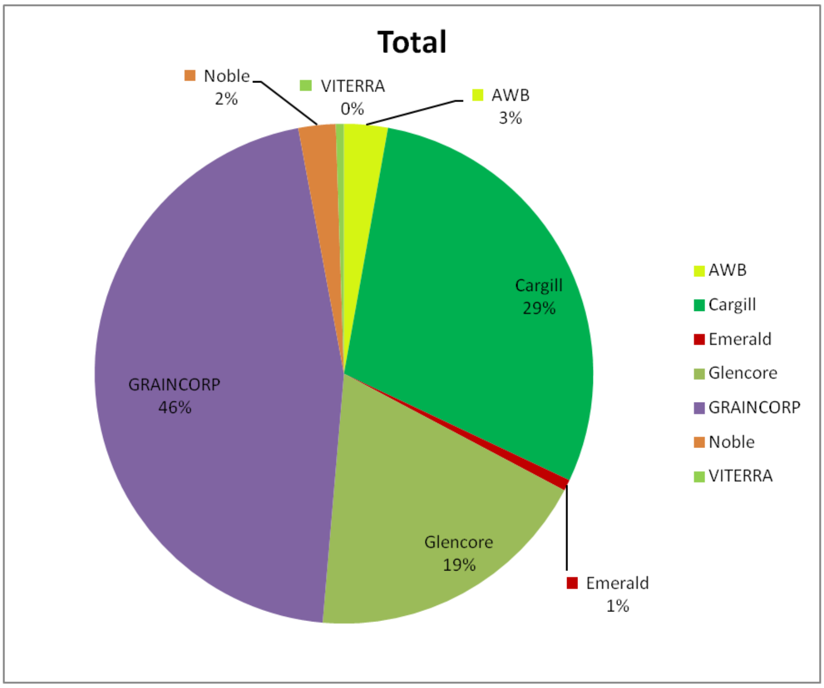
Market concentration in bulk exports (PKZ)

Figure 2 2010/11 - 2014/15 All Grains[25]



Volume (mt): 8,409,870 Market Concentration (HHI): 3072

Figure 3 2010/11 - 2014/15 Bulk Wheat[26]



Volume (mt): 6,249,147 Market Concentration (HHI): 3300

[25] Estimation GrainCorp Shipping Stem
[26] Estimation GrainCorp Shipping Stem

Table 2 Estimated market concentration[27]

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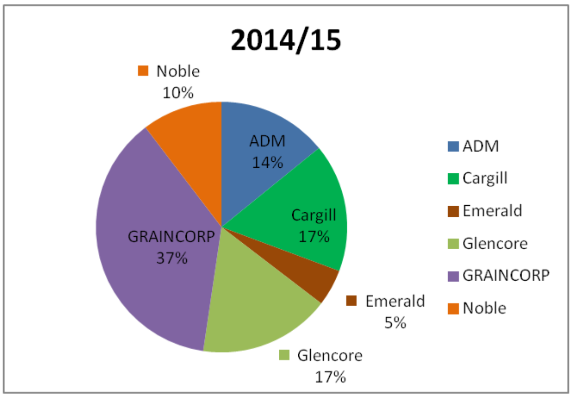

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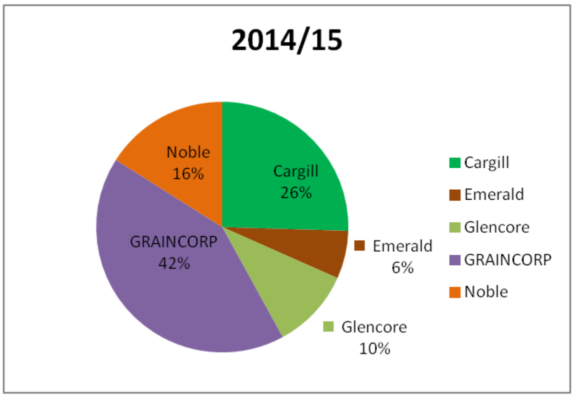

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<tr><td>Tonnes: 635,777 Market Concentration (HHI) = 2280</td><td>Tonnes: 412,227 Market concentration (HHI) = 2812</td></tr>
<tr><td colspan="2">2013/14 Marketing Year</td></tr>
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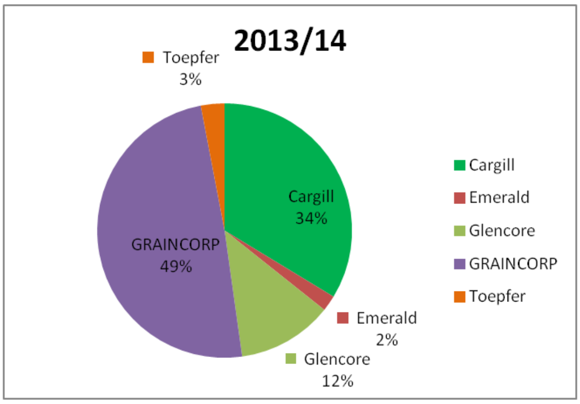

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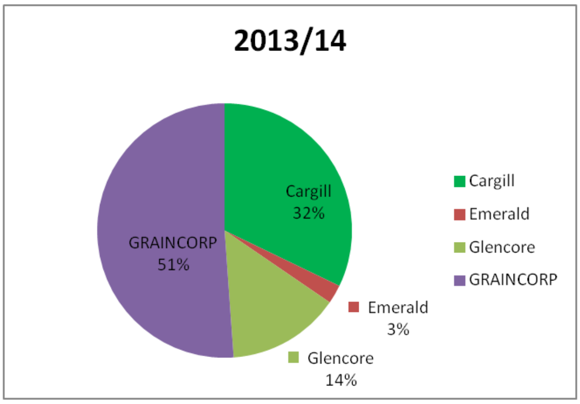
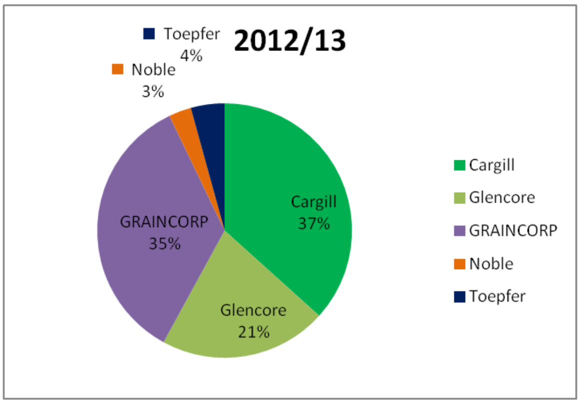


</td></tr>
<tr><td>Tonnes: 995,000 Market Concentration (HHI) = 3714</td><td>Tonnes: 840,000 Market Concentration: 3859</td></tr>
</table>

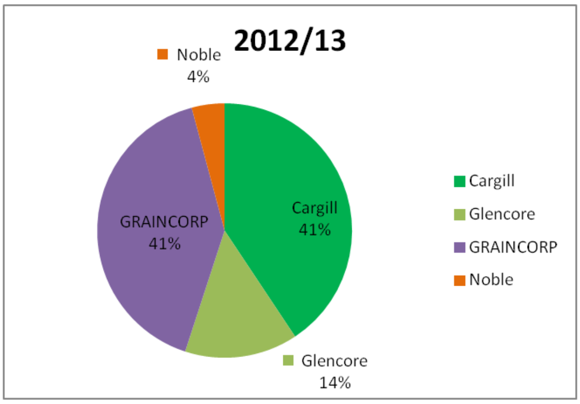
[27] Estimation GrainCorp Shipping Stem

All Grains	Bulk Wheat

2012/13 Marketing Year

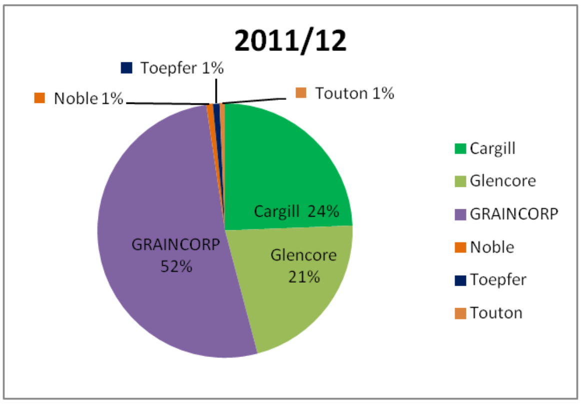


Tonnage: 2,089,686 Market Concentration (HHI): 3041

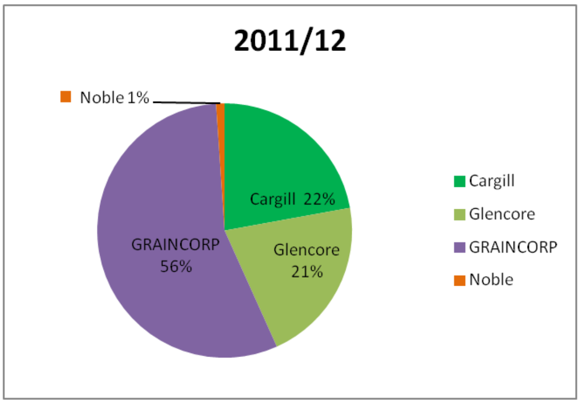


Tonnage: 1,428,082 Market Concentration (HHI): 3540

2011/12 Marketing Year

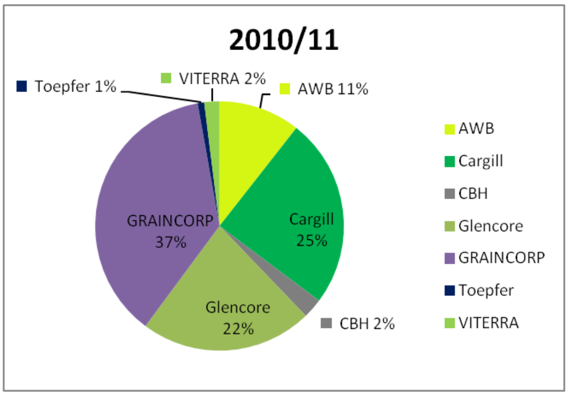


Tonnes: 3,019,473 Market Concentration (HHI): 3737

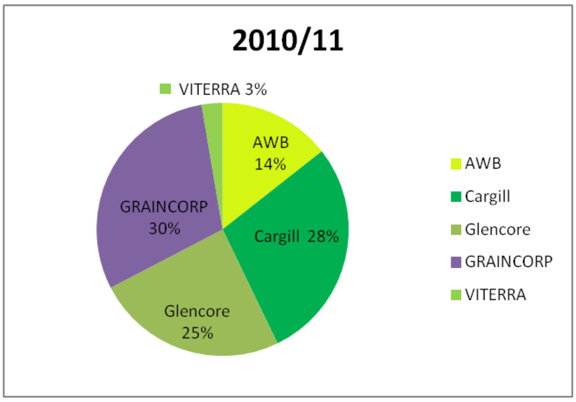


Tonnes: 2,339,474 Market Concentration: 4036

2010/11 Marketing Year



Tonnes: 1,669,934 Market Concentration: 2599



Tonnes: 1,229,364 Market Concentration: 2522