Non-confidential version
22 September 2015

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

1 Introduction

1.1 Viterra Operations Pty Limited ("**Viterra**") welcomes the opportunity to make this submission in response to the ACCC's draft decision not to accept the proposed variation to Viterra's capacity allocation system to enable the introduction of long term agreements ("**Draft Decision**").

The Draft Decision

1.2 Viterra understands that the ACCC considers the decision whether or not to approve Viterra's proposal to be "*finely balanced*".[1] However, Viterra considers that, in seeking to balance the various factors set out in section 25(3) of the Code, the Draft Decision both misinterprets key data and significantly overstates any potential concerns arising from the proposal. As a result, it risks denying the substantial benefits that long term agreements will provide for growers, exporters, Viterra and the South Australian grain industry.

1.3 Viterra considers that a final decision not to approve the proposed variation to its capacity allocation system will significantly disadvantage South Australian growers and continue to place the South Australian grain industry at a competitive disadvantage both in Australia and globally. This will outweigh any possible detriment arising from the implementation of the proposal.

1.4 If the ACCC maintains its current view, Viterra's South Australian port terminals will be the **only grain export terminals in Australia** where regulatory intervention prevents the availability of long term agreements for users. This is the case even though Viterra's proposal for long term agreements contains far greater continuing protections for users than any of the unregulated port terminals. In 2014/2015, unregulated port terminals[2] accounted for approximately:

(a) 71.45% of Australian bulk wheat exports;

(b) 75% of Australian wheat exports (bulk and container); and

(c) 99.65% of bulk wheat exports through non-Viterra port terminals.

1.5 This is a very material regulatory distortion and is a clear failure in Australia's wheat export policy, which has resulted in impacts on competition and the existence of an uneven playing field. These impacts have already been experienced in South Australia for the 2015/2016 season.

1.6 Viterra also considers that the Draft Decision contains a number of material errors. In seeking to balance the various factors set out in section 25(3) of the Code, the Draft Decision:

[1] ACCC, *Draft Decision*, 2.
[2] Port terminals that are not subject to Parts 3-6 of the Code or are the subject of a draft decision by the ACCC to exempt that port terminal from the operation of Parts 3-6 of the Code or their status under the Code is unclear.

(a) **(Fails to consider the range of commercial choices and opportunities that are available to wheat marketers).** As a result, the Draft Decision significantly overstates the need for particular exporters to acquire capacity at particular port terminals at particular times and, indeed, 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*".[3]

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.[4] 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.

The Draft Decision also appears to make a number of unarticulated and incorrect assumptions about the impact of access to capacity at Outer Harbor and Port Lincoln during the February to May period on the level of competition in grain acquisition markets.

However, the direct connection that the Draft Decision makes between access to port terminal capacity and competition in grain acquisition markets is clearly inconsistent with, and is plainly undermined by, the conclusion by Primary Industries and Regions SA that "*around 40 traders operate in South Australia, ultimately distributing grain internationally through around 20 exporters*".[5]

Based on this information alone, it is clear that the number of exporters (and, therefore, the number of exporters at particular port terminals and times) provides only limited insight in relation to the way that a wide range of participants compete for the acquisition of grain in South Australia. There are also a large number of matters that have a far greater impact on competition for grain and the prices paid to growers in South Australia than limited physical capacity constraints at a limited number of port terminals in some, but not all, seasons.

This aspect of the Draft Decision clearly requires significant re-consideration.

(b) **(Appears to be based on unsupported and incorrect assumptions about likely port terminal services demand and the level of potential over-subscription)**. In particular:

(i) it is highly problematic that the Draft Decision appears to place undue weight on the level of initial demand for port terminal capacity in the 2010/2011 season. This creates significant distortions in the ACCC's analysis.

As set out in the media releases in **Attachment 1** and the *Post-Harvest Review Working Group Report 2010-2011*, the 2010/2011 season involved the largest crop ever seen in South Australia, with numerous new records for shipping throughput and flow-on impacts for shipping levels in the early parts of the 2011/12 season.

If the ACCC were to:

(A) exclude the 2010/2011 season (or at least take into account in its analysis that 2010/2011 remains a record year both in terms of grain receival and export demand); and

[3] ACCC, *Draft Decision*, 89.
[4] Five exporters have not acquired any capacity at all, and an additional five exporters have acquired 20% or less of their total capacity, at Outer Harbor and Port Lincoln during the February to May period.
[5] ACCC, *Draft Decision*, 36. If there are 40 marketers and approximately 20 bulk exporters, then clearly marketers have a range of commercial choices and opportunities that are not reflected in the Draft Decision (see section 4.2 below).

(B) take into consideration the fact that in the 6 years prior to the 2010/2011 season the average yearly export task out of South Australia was only 3.5 million tonnes,

the extent of any potential over-subscription suggested in Charts 4.7 – 4.8 and A14 – A25 of the Draft Decision would look substantially different.

Any prediction of the level of over-subscription that is, in any **realistic sense**, likely to occur over the next 5 years would also look materially different.

The need to account for the material distortion that arises from the use of a statistical outlier is further highlighted by the additional data provided by the 2015/2016 auctions (see section 5 below).

Data for the 6 years prior to 2010/2011 and for the 4 years following 2011/2012 does not support the ACCC's concerns about potential levels of over-subscription.

(ii) Charts 4.7 – 4.8 and A14 – A25 of the Draft Decision (which underpin the ACCC's analysis of likely future over-subscription 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). This clear data error further distorts the ACCC's analysis of any likely levels of over-subscription in future years. A more accurate representation of capacity utilisation is set out in section 5 of this submission.

(iii) These distortions are further exacerbated by the fact that the Draft Decision does not distinguish in any way between "initial demand for bookings" and "tonnes actually shipped".

The volume of tonnes shipped in a particular month does not bear a clear relationship to either the timing or amount of the initial booking. 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.

As shipments are frequently accommodated at times which are different to the initial booking, there are significant limitations on the analysis set out in the Draft Decision and on the extent to which that analysis provides any accurate indicator of either previous or future demand for initial bookings.

(iv) In assessing likely demand for long term capacity, the Draft Decision does not appear to consider fully the significant risks for exporters in entering into long term take-or-pay agreements. These risks include production risk, drought, global price risk, and marketing and execution risks. These risks apply to all exporters and, based on discussions with clients, it is far from clear the extent to which there may be over-subscription for long term capacity, particularly over future years.

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. This is particularly the case given the recent experience in:

(i) Western Australia, where CBH has already allocated 10 million tonnes of capacity each year (i.e. over 70% of total capacity) through long term agreements, without any resort to an auction mechanism. Notwithstanding the concerns set out in the Draft Decision, Viterra notes that a number of "smaller" exporters were able to secure both long term and short term capacity in Western Australia, and Viterra is not aware of any complaints about the process undertaken by CBH; and

(ii) Viterra's 2015/2016 auctions held on 10-12 August 2015 and 31 August - 1 September 2015, where neither the auction nor first-in-first-served ("**FIFS**") system resulted in full subscription across the "peak period" (see section 5 below).

(c) **(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*").**[6] This concern 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.

(d) **(Appears to interpret the non-discrimination obligation in a way that, in practice, will limit Glencore's ability to use its own infrastructure to meet its reasonable export requirements**). It would involve a fundamental error if the ACCC were not to approve the proposed capacity allocation system because it does not contain restrictions on the allocation of capacity that would prevent Glencore from using its own infrastructure to meet its reasonable requirements.

This is particularly the case given that there is clear evidence of Glencore's actual and reasonable requirements from its participation in the auction and FIFS process previously approved by the ACCC.

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.

(e) **(Does not consider other matters that are critical to any assessment of competition in, and competitiveness of, Australian markets).** The Draft Decision does not appear to involve any real consideration of the need for Viterra to introduce flexible long term arrangements to meet customers' requirements, the need 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.

The level of regulatory intervention – which, with the exemptions for CBH and a range of port terminals in Queensland, New South Wales and Victoria, is focussed primarily on South Australia (see Table 1 below) – has 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.

[6] ACCC, *Draft Decision*, 69.

Table 1 – Exempt and non-exempt wheat export port terminals in Australia

Port terminal	**Operator**	**Current status**
Albany, WA	CBH	Exempt
Esperance, WA	CBH	Exempt
Geraldton, WA	CBH	Exempt
Kwinana, WA	CBH	Exempt
Bunbury, WA	Bunge	Draft determination to exempt
Port of Newcastle, NSW	Newcastle Agri Terminals	Exempt
Port of Newcastle, NSW	Qube Holdings	Exempt
Port of Newcastle, NSW	GrainCorp	Exempt
Port Kembla, NSW	GrainCorp	Draft determination to exempt (when Quattro's port terminal is exempt)
Port Kembla, NSW	Quattro	Draft determination to exempt (once it becomes subject to the Code)
Geelong Port Terminal, VIC	GrainCorp	Exempt
Melbourne Port Terminal, VIC	Emerald	Exempt
Port of Brisbane, QLD	GrainCorp	Draft determination to exempt
Port of Brisbane, QLD	Queensland Bulk Terminals	Draft determination to exempt
Port Adelaide, Berth 29 – SA	Patricks	Status unclear
Port Adelaide, Osborne – SA	JKI	Status unclear
Port Adelaide, Inner Harbour, SA	Viterra	Not exempt
Port Adelaide, Outer Harbor, SA	Viterra	Not exempt
Port Giles, SA	Viterra	Not exempt
Wallaroo, SA	Viterra	Not exempt
Port Lincoln, SA	Viterra	Not exempt

Port terminal	**Operator**	**Current status**
Thevenard, SA	Viterra	Not exempt
Portland, VIC	GrainCorp	Not exempt (but only 33,695 tonnes of wheat (0.25% of Australian bulk wheat exports) in 2014/15[7]
Mackay, QLD	GrainCorp	Not exempt (which exported 0 tonnes of wheat in 2014/15)
Gladstone, QLD	GrainCorp	Not exempt (which exported 0 tonnes of wheat in 2014/15)
Container exports from all port terminals		No regulation

Viterra notes that there are approximately 2 million tonnes of wheat container exports out of Australia each year which are also unregulated.

As set out above, if the ACCC maintains its current view, Viterra's South Australian port terminals will be the **only grain export terminals in Australia** where regulatory intervention prevents the availability of long term agreements for users. These matters should be critical considerations for the ACCC. However, they do not appear to have been taken into consideration in the Draft Decision.

(f) (**Undervalues the significant industry support in favour of Viterra's proposal**). Both exporters (GrainCorp, CBH, Quadra, ADM, Noble, AGG, AvantAgri, Emerald and Bunge) and growers (Ryandra & Co) have expressed support in their submissions for the removal of the auction system and the introduction of long term agreements.

In addition, at the 2015 Australian Grains Industry Conference (which occurred at the same time as the Draft Decision), multiple speakers emphasised disappointment with the continuation of the current auction system.

Tim Henry, Vice President of the Australian Grain Exporters Association and Managing Director of ADM (a non-vertically integrated export customer), stated in his speech that:

> "*With the auction system…exporters…they're the ones with the saddest look on their face this year. Last year there was over half a billion dollars tied up in auction premiums. We consider this as a completely inefficient way, complete inefficient use of capital, adding unnecessary risk in what is already a risky business so we do not support the auction system at all. Quite disappointed we're going to see another year of auctions in South Australia this year…*
>
> *We think … all evidence points that long term agreements and more of a first-in-first-serve model is the way to go. I think the real litmus test for that has been GrainCorp who strongly pushed back on having an auction system implemented, and stuck with a first-in-first-served system, have used a LTA, now in their third year coming, and we've seen as a result of the long term agreements, of the first-in-first-served allocation system was quite smooth,*

[7] Together, the only other regulated wheat port terminals in Australia (Portland, Mackay and Gladstone) accounted for only 33,695 tonnes of wheat exports (or 0.25% of total Australian wheat exports) in 2014/2015. In practice, this process therefore involves the ACCC focusing its regulatory consideration on Viterra only, while port terminals accounting for 71.45% of Australian wheat exports can implement whatever capacity allocation system they choose. In this regard, exports from CBH's Kwinana port terminal exceed the entire exports from Viterra's South Australian port terminals.

> *people had the capacity they wanted over a multi-year agreement and it took the heat out of the whole allocation system.*
>
> *We hope that we can move towards more of a long term agreement with also a residual first-in-first-served for the smaller exporters that may only want one cargo in a specific month at a specific port. But by and large, as an industry, we've got to get the capacity in the hands of the people who are efficiently going to find markets for the grain, and auctions just complicates the system.*"[8]

Angus Wettenhall, the Principal Broker at Allied Grain also stated in his speech that:

> "*In South Australia the market waits for the ACCC final decision on Viterra's long term agreements proposal. At this stage it looks like in the words of the ACCC "Viterra will need to revert to the auction system for at least the first part of the 15-16 season and that this may have little support from the exporters." The first sales of new crop grain were made over 7 months ago from Australia. To be competitive grain merchants need better certainty of long term capacity than they have today in South Australia…"*[9]

Mr Henry further stated in his speech that:

> *"Regulation...it's a key priority for us at AGEA. We strongly feel that less regulation is better and I think we can see some of these effects recently, as Angus mentioned, about the rejection of the LTAs from ACCC for Viterra. We believe that in this instance we'd prefer to be able to have more flexibility and decision making within the industry on how we go about such issues as allocating capacity. They are actually going to an annual auction so that is not a great result from the exporters' point of view."*[10]

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 or will be allocated in South Australia, Viterra disagrees with the ACCC's view that the decision is "*finely balanced*".

Given this strong industry support, 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.

Viterra has only been provided with a high level summary of certain submissions that have been provided to the ACCC on a confidential basis. If these submissions contain any evidence or information to support the high level assertions **[*Confidential*]**, this evidence should be made available so that Viterra has a reasonable opportunity to respond. If, to the contrary, these confidential submissions do not contain any evidence or information, then Viterra submits that the ACCC should attribute very little (if any) weight to the assertions contained in them. The ACCC's final decision must be based on an appropriate consideration of evidence, not unsupported assertions by third parties.

Viterra's specific comments in relation to a number of matters raised by Grain Producers SA ("**GPSA**") are set out in **Attachment 2**.

[8] Tim Henry (Speech delivered at the Australian Grains Industry Conference, Melbourne, 27 – 29 July 2015).
[9] Angus Wettenhall (Speech delivered at the Australian Grains Industry Conference, Melbourne, 27 - 29 July 2015).
[10] Tim Henry (Speech delivered at the Australian Grains Industry Conference, Melbourne, 27 – 29 July 2015).

2 Viterra requests the ACCC to approve its revised proposal

Changes made to the proposal following the Draft Decision

2.1 For the reasons set out in this response, Viterra disagrees strongly with the Draft Decision. However, solely for the purpose of advancing its application and securing the ACCC's approval for the proposed variations to its capacity allocation system, 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.

2.2 Viterra considers that this approach will provide less flexibility for its customers and reduced benefits for Viterra as infrastructure owner. However, it is 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"*.[11]

2.3 With this modification to the proposal, long term certainty remains a key issue for Viterra, particularly in circumstances where unregulated port terminals (which account for approximately 71.45% of Australian bulk wheat exports, and 99.65% of non-Viterra bulk wheat exports) are not subject to any form of ongoing regulation which affects the way that they can offer capacity to their clients.

2.4 Accordingly, Viterra has also amended its proposal so that, unless the ACCC issues an objection notice by 1 February 2017, Viterra will have the ability to run further initial long term capacity nomination processes for each 2 year period (with the nomination processes commencing approximately 33 months before the start of each new 2 year period).

2.5 Viterra considers that this mechanism will provide the ACCC with sufficient opportunity to consider the operation of the initial allocation process for slots occurring in the period 1 October 2016 to 30 September 2019 and to raise any concerns in relation to a "roll-over" of those arrangements via an objection notice process. This objection notice system is similar to that accepted by the ACCC in previous access undertakings.

2.6 Viterra considers that this mechanism expressly addresses the concern expressed in the Draft Decision about the potential for capacity to be allocated for a period of 5 years, and therefore reduce opportunities for new entrants. Under the revised proposal, the allocation of long term capacity will only occur for an initial period of 3 years and then for subsequent 2 year periods. This means that *in addition* to the annual reservation of at least 2.2 million tonnes (including tolerance) of short term shipping capacity, the opportunities for secondary trading, FOB purchases and other options available to exporters, an opportunity will arise each 2 years for exporters to apply for long term capacity.

2.7 The proposed changes also mean that the duration of proposed long term contracts is no longer one of the factors relevant to assessing the allocation of initial long term capacity to over-subscribed slots under section 3.6(g) of the proposed Protocols.

2.8 The mechanism provides the ACCC with significant discretion to issue an objection notice if it considers (acting reasonably) that the initial application process for long term capacity did not operate efficiently, fairly and consistently with the non-discrimination obligation under the Code.

2.9 If the ACCC issues an objection notice, the capacity allocation system will revert to the current auction system. If this occurs, the long term agreement protocols will continue to apply with respect to all slots occurring in the allocation period from 1 October 2016 to 30 September 2019, and clients will not be permitted to move any bookings for this period into any 2019/2020 slot.

2.10 The potential reversion to an auction system provides a further safeguard and discipline in relation to the operation of the initial allocation process.

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[11] ACCC, *Draft Decision*, 53.

2.11 If the ACCC does not issue an objection notice, the ACCC will also continue to have clear powers under the Code and auditor provisions in Attachment 3 of the proposed Protocols to intervene if it considers that Viterra has discriminated in favour of Glencore in contravention of the Code. These powers are further supported by the ACCC's information gathering powers under the *Competition and Consumer Act*.

2.12 Viterra considers that the proposed changes address a number of the key concerns set out in the Draft Decision. Viterra also considers that weighing the matters set out in section 25(3) of the Code supports approval by the ACCC.

2.13 Viterra has set out details of each of the proposed changes to its proposal dated 9 June 2015 in **Attachment 3** of this submission.

2.14 Viterra has also provided its response to the other potential ways of addressing the ACCC's concerns as set out in the Draft Decision in **Attachment 4**.

Timing considerations

2.15 Viterra formally submitted its initial application on 12 March 2015 following at least 8 months of prior engagement with the ACCC and approximately 18 – 24 months of engagement with industry participants.

2.16 As a result of this variation process, there has been substantial uncertainty for a significant period of time which has had an impact on the competitiveness of the South Australia grain industry. Viterra therefore requests the ACCC to approve these proposed changes to its current capacity allocation system as soon as practicable.

3 Benefits of the proposal for growers, exporters and the infrastructure owner

Substantial industry benefits

3.1 Viterra considers that its proposal to vary the Port Loading Protocols to enable the introduction of long term agreements will deliver substantial benefits to growers, exporters, Viterra as infrastructure owner and, as a result, the South Australian grain industry and economy.

3.2 The ACCC has acknowledged that long term agreements may provide a number of benefits to the industry, 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.

3.3 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.

3.4 Viterra considers that the proposal will result in:

(a) Improved access arrangements to port terminal services which will bring South Australia into line with other grain growing regions in Australia and globally. The recent process in Western Australia resulted in the smooth allocation of an estimated 10 million tonnes of long term shipping capacity each year, followed by the allocation of approximately 2.5 million tonnes of short term capacity. This long term allocation is significantly more than what is proposed under Viterra's arrangements (both in absolute terms and as a proportion of total capacity), and provides real benefits to Western Australian growers with exporters making a longer term commitment to Western Australia ahead of other grain producing regions globally.

(b) Enhanced supply chain planning. In particular, the more efficient allocation of capacity through long term agreements will facilitate the movement of grain through the storage and handling system in a way that removes bottlenecks which occur at grower delivery points. This will benefit growers by enabling the continued delivery of grain to their preferred sites.

(c) 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. This, in turn, is likely to provide growers with more marketing options and operational gains by allowing Viterra to adjust its service levels to meet changing grower delivery patterns and needs.

(d) Increased levels of capacity when compared to the auction and FIFS system over the past two years. This reflects some of the operational efficiencies to be gained from long term agreements. Viterra considers that the increase in capacity will facilitate increased sales for South Australian grain.

(e) Increased stability in the price of grain over a longer period. Over the past two seasons, the price of grain under the current auction system has been particularly volatile, which creates significant uncertainty for growers. The introduction of long term agreements will contribute to price stability by both improving exporter confidence in exporting out of South Australia and providing an increased ability to lock in prices for grain over long term agreements between exporters and growers.

3.5 Each of these outcomes involves significant benefits for South Australian growers. The longer term commitment of marketers to exports from South Australia will also provide significant incentives for marketers to develop their grower sourcing and support networks.

The proposal includes a number of key protections

3.6 Viterra's proposal includes a number of key protections which ensure that these benefits arise. In particular:

(a) the allocation of long term capacity and short term capacity is a transparent process, including clear rules and the publication of results;

(b) the proposal has been designed specifically to maximise opportunities for participation by a number of exporters. The minimum capacity requirements are very modest, and there is a deliberate focus on flexibility to suit a range of clients. This in turn fosters opportunities for smaller exporters and new entrants to develop long term relationships with growers;

(c) the duration of the allocation periods is relatively short – an initial 3 year term, followed by successive 2 year periods (if the ACCC does not issue an objection notice following the first allocation). This further addresses any potential concerns in relation to preserving opportunities for future new entrants and smaller exporters;

(d) the proposal sets out maximum caps for initial nominations by each client which limits the ability of larger exporters to acquire long term capacity;

(e) there are clear parameters for the negotiation process between Viterra and exporters. Viterra's clear focus is on facilitating increased exports and on finding acceptable alternatives for clients. Clients are not required to accept alternatives that do not meet their requirements;

(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;

(h) the proposal includes strong processes to support a secondary market for the trading of slots. It also removes the current distortions to tradeability and slot movements – and limitations on operational flexibility which arise from auction premium rebates;

(i) the proposal also provides that there will be no movement of long term capacity for 2 business days after the shipping stem opens. This is intended to further protect the opportunity for new bookings;

(j) the proposal provides flexibility to move slots based on client requirements and available capacity and includes a rebate structure to encourage the early surrender of unwanted slots, facilitating efficient use by other exporters; and

(k) the Code contains clear non-discrimination obligations, which are expressly supported by the proposal containing an independent auditor mechanism.

3.7 Viterra is not aware of any grain port terminal in Australia that has this level of protection for users, to ensure the fairness and efficiency of the capacity allocation system.

3.8 Viterra maintains its strongly held view that the initial nomination caps set out above provide appropriate and reasonable protections to prevent smaller exporters from being “locked out” of long term capacity.

3.9 The initial nomination caps represent only a modest proportion of overall capacity – namely, 28% of total capacity at Outer Harbor and Port Lincoln from January to June, and 35% of total capacity at other ports and periods. At Outer Harbor, this equates to only 3 panamax vessels (and at Port Lincoln, it equates to less than 3 panamax vessels) for each of the January to March and April to June quarters. Viterra does not consider that it should be required to reduce the initial allocation cap so that exporters can acquire less than one vessel per month.

A number of the concerns in the Draft Decision are unrealistic and overstated

3.10 Viterra notes the potential concern set out in the Draft Decision that:

> “*At the ports which are not subject to the 40 per cent safeguard, it remains possible under the June protocol that Viterra can allocate Glencore 50 per cent of capacity and then one other exporter the remaining 50 per cent share of total LTC for five years. This may be against the backdrop of 15 exporters competing for LTC*”.[12]

3.11 However, this an extremely unlikely outcome. 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 number of different exporters is clearly demonstrated by the level of open access that it has always provided.

[12] ACCC, *Draft Decision*, 58.

3.12 As set out above, Viterra considers it to be imperative that the ACCC's decision is not based on theoretical worst-case assessments of likely demand which have no basis in commercial reality (past, present or future).

3.13 Viterra also notes that the Draft Decision suggests a potential concern that:

> "*Subject to periods of constraint in later years, larger exporters can then make any capacity surplus to their own shipping needs available to industry through the secondary market. Such an outcome will further frustrate other exporters and new entrants' ability to obtain access to LTC in the initial allocation process, and potentially limit the competition they will face in the grain acquisition market*".[13]

3.14 This is a surprising concern, both in theory and in practice. Rather than "frustrating" other exporters, Viterra considers that the availability of capacity through secondary trading will clearly assist entry by new exporters and/or expansion by other exporters (and is, in fact, one of the considerations specified in section 25(3) of the Code). It is also far from clear why the ACCC may consider that exporters making capacity available through a well-functioning secondary market would have any adverse impact on competition in relation to the acquisition of grain.

3.15 Viterra further disagrees with the assumption - implicit in a number of these statements - that customers who export less grain from South Australia are the least likely to be able to negotiate access to "meaningful" long term capacity. Viterra is not aware of any basis or evidence to support this assumption.[14]

3.16 In Viterra's experience, "smaller" exporters are typically highly sophisticated in their approach. They understand the drivers of their businesses very well and, under the proposal, have many opportunities to acquire their capacity requirements. They do not require special treatment and, as has been affirmed on numerous occasions, it is not the role of the ACCC or competition law or policy to "protect" smaller operators.

3.17 To further highlight the error in this approach, the "smaller" exporters referred to in the Draft Decision are, in any event, typically large and sophisticated multi-national corporations (e.g. Louis Dreyfus, Bunge and ADM), even if in a given season they choose to have limited exports from South Australia. It is not apparent to Viterra why the Draft Decision appears to suggest that some of the largest agricultural enterprises in the world may not be able to negotiate access to meaningful long term capacity if that is what they seek.

3.18 Viterra's proposal has also been specifically designed to facilitate participation from all types of exporters. In particular, smaller exporters who would not ordinarily participate in the auction[15] will have improved access to capacity under the proposal due to the flexible long term arrangements and the reserved minimum of short term capacity – neither of which exist under the current system. This improved access is reflected in the ACCC's statement in the Draft Decision that "*the prospect of LTC and FIFS STC may attract exporters to the SA market … potentially for amounts in excess of their previous shipping commitments*".[16]

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[13] ACCC, *Draft Decision*, 55.

[14] In Viterra's submission dated 12 March 2015, Viterra's statement that the top 5 historical exporters from South Australia are most likely to take up long term capacity agreements was based on the fact that those 5 exporters have typically sought the most capacity in recent seasons. It does not suggest that any other exporter will have difficulties in taking up long term capacity.

[15] The ACCC should consider the level of participation in the 2014/2015 and 2015/2016 auctions as a "baseline" for assessing the validity of its concern that, relative to the counterfactual, the long term proposal may result in fewer opportunities for participation by "smaller" exporters.

[16] ACCC, *Draft Decision*, 36.

4 The proposal will not reduce the opportunities available for wheat marketers and exporters

There are a wide range of commercial choices available to grain industry participants

4.1 Viterra is concerned that the Draft Decision does not appear to give appropriate consideration to the range of commercial choices and opportunities that are available for wheat marketers. As a result, the Draft Decision places far too much emphasis on the ability to acquire capacity at 2 particular port terminals over a 4 month period each year. This over-emphasis is exacerbated by distorted assumptions about likely demand.

4.2 If the ACCC approves Viterra's proposed changes, marketers will be able to participate in relation to the acquisition and supply of grain by:

(a) acquiring long term capacity from Viterra;

(b) acquiring short term capacity from Viterra;

(c) acquiring long or short term capacity from other growers or exporters;

(d) acquiring wheat FOB from other exporters;

(e) exporting via demonstrated alternative port terminal infrastructure at Port Adelaide (see paragraphs 4.6 – 4.9 below);

(f) exporting via containers - there are approximately 2 million tonnes of container wheat exports out of Australia each year;

(g) transporting wheat from eastern SA to Victorian ports. The price for grain in Victoria for the 2015/2016 season is currently approximately $20 per tonne higher than in South Australia.[17] Growers and exporters can profitably transport their grain from eastern South Australia for bulk and container export out of Portland, Geelong or Melbourne or to sell domestically in Victoria;

(h) acquiring capacity (from port terminal operators or from other marketers) or acquiring wheat FOB at other port terminals in Australia or globally;

(i) managing the timing of their sales to end-customers;

(j) entering into a range of wheat swap arrangements to manage physical execution timing and end-customer timing requirements;

(k) supplying wheat to domestic customers (approximately 750,000 tonnes in South Australia). This is not as "limited" as potentially suggested in the Draft Decision; and

(l) requesting, and/or investing in, additional capacity in South Australia and other regions.

4.3 The large number of alternatives available to grain marketers is reflected in the fact that there are approximately 40 acquirers of grain in South Australia and only 15 exporters (on average). This means that there are approximately 25 participants who acquire, and trade in, grain commodities even if they do not individually acquire port terminal capacity from Viterra. In addition, as set out above, many of the participants who do acquire port terminal services capacity directly from Viterra do not (or only infrequently) acquire capacity at Outer Harbor or Port Lincoln during the peak period.

4.4 This suggests strongly that 3 of the key assumptions made in the Draft Decision are incorrect - namely:

(a) it is not correct that capacity at Outer Harbor and Port Lincoln during the February to May period is the only "*meaningful capacity*";

[17] The South Australian price for grain is based on the prevalent forward rate for the 2015/2016 season.

(b) it is not correct to assume that any constraints on access to port terminal services at Outer Harbor and Port Lincoln during the February to May period will have an adverse impact on competition for the acquisition of grain in South Australia; and

(c) it is not correct that all of the 40 participants who acquire grain in South Australia are either actual or potential acquirers of port terminal services capacity from Viterra. Access to port terminal capacity is not all that is required to operate as an international grain marketer. In a number of cases, the Draft Decision therefore appears to be seeking to protect potential new port terminal customers that would not acquire that capacity in any event.

4.5 Regardless of the allocation system in place, the South Australian wheat task has always been spread over the year (with finite capacity during peak periods and some carry into future periods). It is not the case that physical constraints over shorter periods have resulted in fewer participants in South Australia, fewer exports or less competition in the markets in which Viterra's customers operate. The Draft Decision does not contain any evidence to support this theoretical concern.

The availability of alternate export infrastructure in South Australia

4.6 Viterra considers that the characterisation in the Draft Decision of the independent third party storage and ship loading infrastructure at Port Adelaide as "*ad hoc*" and as a "*limited constraint*" is incorrect and contrary to evidence.

4.7 Total wheat exports out of alternative supply chains at Port Adelaide in 2014/2015 have exceeded the amount of wheat exports at a number of other bulk wheat port terminals in Australia. Viterra estimates that alternative supply chains at Port Adelaide are capable of providing an additional 600,000 – 700,000 tonnes of port terminal capacity at Port Adelaide. This equates to approximately 21-24% of existing capacity at Port Adelaide and provides clear evidence of the increasing constraint provided by competing storage and ship loading infrastructure.

4.8 As set out in previous submissions, in the 2014/2015 season, both Cargill and JKI loaded 5 vessels using facilities operated by Patricks near Inner Harbour and JKI near Outer Harbor. Viterra further understands that:

(a) Cargill is currently constructing permanent grain storage facilities that are located adjacent to the Patricks ship loading facilities. This will further enhance Cargill's existing ability to by-pass Viterra's infrastructure completely at Port Adelaide; and

(b) **[*Confidential*]**. In fact, in the harvest auction and the non-harvest auctions for the 2015/2016 season, only 41% of the capacity made available for Port Adelaide, Inner Harbour was booked.

4.9 As the possibility of over-subscription at Port Adelaide during the February to May period is one of the key concerns raised in the Draft Decision, Viterra would strongly encourage the ACCC to seek further information from other service providers at port about their discussions with Cargill, JKI and other exporters.

5 Likely levels of demand for Viterra's port terminal services

5.1 Viterra acknowledges that there are a number of challenges in accurately forecasting the likely level of demand for long term capacity at each of its port terminals over a multiple year period. However, Viterra considers that the Draft Decision makes a number of unsupported assumptions about likely levels of demand, and also makes a number of incorrect comparisons that distort any accurate analysis. In particular, the Draft Decision:

(a) compares historical shipping volumes to outdated and incorrect data about the amount of long term capacity that will be made available to exporters[18];

(b) uses actual shipping data as a proxy for "initial bookings", without taking into account the large number of reasons why actual shipping dates may diverge from initial booking dates (and Viterra's operational ability to accommodate shipments across different periods);

(c) does not adjust its analysis of potential over-subscription to take account of the additional 10% tolerance that exporters have in executing shipments. This further distorts any comparison of actual shipments with capacity available for initial booking; and

(d) appears to place undue weight on the level of demand for capacity in the 2010/2011 season, and insufficient weight on data from:

(i) the past 4 seasons;

(ii) the upcoming 2015/2016 season; and

(iii) seasons prior to 2010/2011 - the average annual shipping task for the 6 years prior to 2010/2011 was less than 3.5 million tonnes.

If the ACCC were to exclude 2010/2011 (and the flow on impacts in 2011/2012) from its analysis – on the basis that this season involved by far the largest crop on record in South Australia – and take proper account of previous and subsequent seasons, this would materially change any assessment of likely over-subscription.

5.2 For the reasons set out above, there are significant limitations in comparing available capacity with actual shipments.[19] However, to enable an "apples to apples" comparison, Viterra has set out in Tables 4 to 10 in **Attachment 5**, a comparison of actual shipping data for each port terminal since 2004/2005 with both the amount of capacity that was made available at that time (for all seasons since Q1 2013), and the amount of capacity that will be made available under the long term proposal.

5.3 As set out above, this comparison of data provides substantially different information on which the ACCC should base any predictions of the likely and realistic level of supply and demand at each of these port terminals in future years. It suggests that the concerns set out in the Draft Decision are significantly overstated. This is an important issue for the ACCC to re-consider, given its stated view that Viterra's proposal is "*finely balanced*".

The upcoming 2015/2016 season

5.4 As the ACCC is aware, Viterra held auctions for the 2015/2016 season on 10-12 August and 31 August to 1 September 2015.

5.5 The auctions and FIFS processes gave rise to the results in Table 2 below:[20]

[18] The Draft Decision also states that the shutdowns are likely to occur during the Q2 period where, in the ACCC's view, port terminal capacity is likely to be higher demanded. Viterra acknowledges that its long term capacity notice dated 12 June 2015 contained an error that misrepresented the timing of available capacity. However, this error was corrected in its further notice sent to clients and the ACCC on 9 July 2015. The further notice makes clear that the majority of shutdowns will occur in Q3 each year.
[19] Viterra notes that there are also certain challenges in comparing initial booking nominations with available capacity. First, Viterra does not have the relevant data. However, second (and more importantly), initial nominations may not reflect an exporter's actual requirements for shipments. There is often significant flexibility in relation to the timing of bookings and it is frequently the case (as demonstrated repeatedly in the auctions) that exporters are prepared to move their requests for the timing of bookings in response to particular alternatives and opportunities. Accordingly, initial high demand for a particular slot does not in any way suggest that exporters' requirements will not be able to be satisfied through commercial negotiations and discussion of the range of other available opportunities. The certainty afforded by long term agreements will further facilitate this process.
[20] This reflects bookings as at 10 September 2015, being 16 business days after FIFS bookings opened for the harvest period.

Table 2 – Bookings as at 10 September 2015

Port Terminal	**Capacity offered (tonnes)**	**Capacity booked (tonnes)**	**Capacity booked (%)**
Outer Harbor	2,115,000	1,705,000	80.6
Inner Harbour	785,000	299,000	38.1
Port Giles	920,000	440,000	47.8
Port Lincoln	2,080,000	1,775,000	85.3
Thevenard	610,000	6,000	1.0
Wallaroo	690,000	223,000	32.3
Total	**7,200,000**	**4,448,000**	**61.8**

5.6 Table 2 demonstrates that, of the capacity booked during the 3 auctions and during the FIFS process for the harvest period:

(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.

5.7 The first 2 business days of FIFS bookings for the non-harvest period also resulted in only the following bookings:

(a) Glencore acquired 5,000 tonnes in three separate bookings at Outer Harbor in Q2;

(b) **[*Confidential*]** acquired 40,000 tonnes at Port Giles in Q1; and

(c) **[*Confidential*]** acquired 5,000 tonnes at Port Lincoln in Q2.

5.8 Even after completion of the auction process and the opening of FIFS bookings, clients had booked only 4,448,000 tonnes of capacity. This equates to 61.8% of available capacity and 81% of the volume of long term capacity set out in Viterra's notice dated 9 July 2015.

5.9 Table 3 below breaks this information down further, and compares the amount of auction capacity that Glencore acquired at Outer Harbor and Port Lincoln during Q1 and Q2 2016 with the maximum amount of capacity that Glencore could acquire under the long term proposal (if approved by the ACCC).

Table 3 – Glencore's capacity acquired in 2015/2016 season compared with capacity available under the proposal

Period	Capacity acquired by Glencore at auction and FIFS (2015/2016) (tonnes)	Maximum LTC permitted under proposal (tonnes)	% of reserved STC that Glencore would need to book to equal its 2015/2016 bookings
OHB			
Q1 2016	307,000	164,800	96%
Q2 2016	240,000	162,000	50.32%
LIN			
Q1 2016	256,000	160,800	64%
Q2 2016	258,000	160,800	66%

5.10 Even if Glencore were to obtain the maximum amount of long term capacity (which is not clear would occur), the operation of the "15 minute rule" makes it highly unlikely that Glencore would be able to acquire this level of short term capacity, unless there was no demand for that capacity by other exporters.

5.11 Viterra considers that this data from the 2015/2016 allocation process further supports 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.

6 Other comments on Draft Decision

Viterra's decision not to run the initial nomination process in parallel with the ACCC's decision

6.1 Viterra understands from the Draft Decision that it would have assisted the ACCC to observe the long term capacity allocation process prior to forming a definitive view.

6.2 While this may be the case, it is important to recognise that a number of customers advised Viterra that they were not willing to incur the time and costs involved with participating in the initial nomination process until there was greater regulatory certainty. Rather than exclude these customers from the process, Viterra decided that initial nominations should be deferred until after the ACCC issued its draft decision.

6.3 If the ACCC had issued a draft decision to accept rather than reject Viterra's long term agreement proposal, Viterra considers that this would have provided sufficient regulatory certainty for it and its customers to proceed with the initial nomination process. This was not forthcoming, and the appropriateness of Viterra's decision to defer the initial nomination process is now clear given the outcome of the ACCC's Draft Decision.

6.4 Viterra considers that it is imperative that the ACCC provides the necessary regulatory certainty to enable the initial nomination process to proceed. The converse is not feasible. The ACCC should not await the outcome of the initial nomination process and any commercial negotiations between Viterra and its clients in order to determine whether the capacity allocation system satisfies the requirements set out in section 25(3) of the Code.

Transport and up-country storage

6.5 Viterra does not agree with many of the assertions contained in the Draft Decision in relation to its market position in up-country storage and transport markets. Given that the Draft Decision contains limited evidence or analysis in relation to these issues, Viterra does not propose to address them in detail in this response. However, Viterra considers that:

(a) any assessment of storage and handling markets is incomplete and is likely to be highly distorted without any consideration of on-farm storage and recent and planned entry by a range of other operators (including other exporters);

(b) it is difficult to see how the statement in the Draft Decision that "*Viterra has a dominant position across … road [transport] … markets*",[21] would withstand any level of scrutiny. First, it is unclear on what basis the ACCC considers that there might be a separate market for the road transportation of grain, and second, it is unclear how there could be a suggestion that there are any barriers to entry for any participant in acquiring these highly scalable services;

(c) it is very important that the ACCC distinguishes between the existence or use of market power in acquiring rail transportation services, and the benefits that Viterra delivers to the entire grain industry by investing heavily in underwriting rail transport services and making those services and efficiencies available on a non-discriminatory basis to all industry participants. The logistics services provided by Viterra are also entirely optional. If dissatisfied with the price or service, exporters can clearly pursue other options. The fact that they do not, provides a clear indication that they perceive value in the services offered. Investment in underwriting services for the benefit of the entire industry should not be equated simplistically with market power or the existence of barriers to entry; and

(d) the conclusion that Viterra has market power in relation to up-country transport also seems to be inconsistent with the ACCC's acknowledgement that "*exporters who secure large long term agreements with Viterra may enter agreements relating to upcountry services and/or transport*".[22] This clearly reflects that, with the certainty of

[21] ACCC, *Draft Decision*, 86.
[22] ACCC, *Draft Decision*, 46.

long term port access (and even without), exporters may enter into their own longer term logistics / freight and storage arrangements and that barriers to entering these arrangements are likely to be low.

6.6 While Viterra notes Cargill's statements to the recent ESCOSA review in relation to rail access arrangements in South Australia, those statements do not reflect Viterra's experience. Viterra also notes that:

(a) the GWA access arrangements operate under a legislative scheme that has been certified as an effective access regime under the *Competition and Consumer Act*. Viterra questions whether there may be genuine difficulties in negotiating access;

(b) Cargill has chosen to execute grain from Pinnaroo by road through Berth 29 at Port Adelaide, rather than use the rail capacity available; and

(c) access to Mallee rail lines is not comparable to access to the ARTC main lines. Grain is the only freight on the Mallee lines, while a wide range of freight types and volumes are transported on ARTC lines. This prevents any simplistic comparison of freight charges.

6.7 Given these issues, Viterra also questions why these matters were raised with ESCOSA, rather than through commercial negotiations as contemplated by the certified access regime.

The auction review process

6.8 Viterra is disappointed that the Draft Decision appears to suggest that Viterra did not respond to certain issues raised by exporters in the 2012 Post Auction Review which, had it done so, may have ameliorated many of the concerns identified with the auction in the Draft Decision. This does not reflect Viterra's view of the review process. In particular:

(a) Viterra could not make a number of the suggested changes. Notwithstanding feedback from certain exporters on various aspects of the auction system, Viterra could not vary the auction system in a way that would make it inconsistent with the prescriptive requirements set out in the Access Undertaking accepted by the ACCC;

(b) the Post Auction Review occurred only 6 or so months after a very intensive period of discussions between Viterra, industry participants and the ACCC. None of the issues raised by exporters during the Post Auction Review were different from the issues (and proposed solutions) raised during the extensive discussions occurring during the previous 6-12 months. Viterra had previously responded in detail on each of these issues to both the relevant exporters and the ACCC. Both Viterra and the ACCC had also decided (only 6 or so months earlier) that the suggested change was not appropriate or that, even if the change addressed one issue, it would be likely to have other impacts on the operation of the auction system; and

(c) a number of the changes suggested by exporters were mutually inconsistent. During the entire period of discussing, implementing and operating the auction system, there has not been any industry consensus on the appropriate approach. However, there now appears to be universal agreement that the auction system is not delivering the benefits that its initial promoters sought.

6.9 Viterra requests the ACCC to change materially this aspect of its Draft Decision. Viterra would be pleased to provide the ACCC with further information in relation to the Post Harvest Review if required.

7 Confidentiality

7.1 **[Not included in non-confidential version]**.

Viterra Operations Pty Ltd
22 September 2015

Attachment 1 – Media releases for the 2010/2011 season

For Immediate Release
April 14, 2011
Adelaide, Australia
Listed: TSX:VT: ASX:VTA

RECORD GRAIN EXPORTS FOR SOUTH AUSTRALIA

Grain exports through Viterra's ports in January, February and March topped 2.26 million tonnes, the most shipped in three consecutive months in the history of bulk grain exports from South Australia.

This continues the record shipping program, which has seen 3.8 million tonnes exported from October 2010 to March 2011.

Dean McQueen, Viterra's Executive Manager Grain said there is a highly competitive market for South Australian grain with a number of active grain exporters.

"Of the 3.8 million tonnes of grain shipped since October, 2.60 million tonnes was owned by grain marketers other than Viterra," Mr McQueen said.

"This year, twelve companies have exported wheat from South Australian ports. Just three years ago, there was only one single-desk exporter of bulk wheat."

Since entering the Australian grains industry in 2009, Viterra has made significant infrastructure investment designed to improve the efficient operation of South Australia's export supply chain for the benefit of growers, exporters and destination customers.

"Viterra has invested more than AUD35 million during the past eighteen months in storage, transport, logistics and port terminal infrastructure, enhancing export supply chain efficiency and facilitating greater throughput and increased grain exports from South Australia," he said.

"These volume records have been achieved while managing a diverse client base as well as a number of different types and grades of grain. For example, in February we exported the highest number of grain grades in our history."

Following the record harvest, grain is continuing to move through the Viterra storage and handling network at record levels.

"We expect shipments to be very strong over the next few months given the amount of grain in storage, the favourable commodity pricing environment and production issues in other grain growing regions of the world.

"Our current initiative to recruit 200 permanent regional employees will further underpin our operations to execute the shipping program and prepare for next harvest," he said.

About Viterra
Viterra provides premium quality ingredients to leading global food manufacturers. Headquartered in Canada, the global agribusiness has extensive operations in Western Canada, North America, Australia and New Zealand. Our growing international presence also extends to offices in Japan, Singapore, China, Switzerland, Italy, Ukraine, Germany and India. Driven by an entrepreneurial spirit, we operate in three distinct businesses: grain handling and marketing, agri-products, and processing. Viterra's expertise, close relationships with producers, and superior logistical assets allow Viterra to consistently meet the needs of the most discerning end-use customers, helping to fulfill the nutritional needs of people around the world.

Forward Looking Statements
Certain statements in this news release are forward-looking statements that reflect Viterra's expectations regarding future results of operations, financial condition and achievements. All statements included or incorporated by reference in this news release that address activities, events or developments that Viterra or its management expects or anticipates will or may occur in the future, including such things as growth of its business and operations, competitive strengths, strategic initiatives, planned capital expenditures, plans and references to future operations and results, critical accounting estimates and

expectations regarding future capital resources and liquidity of Viterra and other such matters, are forward-looking statements. Such forward-looking statements involve known and unknown risks, uncertainties and other factors that may cause the actual results, performance and achievements of Viterra to be materially different from any future results, performance and achievements expressed or implied by those forward-looking statements. The risks include, but are not limited to, those factors discussed in Viterra's Management's Discussion and Analysis ("MD&A") for the year ended October 31, 2010 under the heading "Risks and Risk Management". This MD&A can be found on SEDAR at www.sedar.com under Viterra's name.

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FOR IMMEDIATE RELEASE
June 24, 2011
Adelaide, Australia
Listed: TSX:VT: ASX:VTA

Grain shipments from SA ports continue at record pace

A record shipping program has seen more grain exported from South Australian ports in the past six months than is normally exported in a year, with more than 4.3 million tonnes of grain shipped between December 2010 and May 2011. The average annual grain export task from South Australia, during the past 10 years, is 4.3 million tonnes.

There is a highly competitive market for South Australian grain with a number of active grain exporters. Fourteen exporters have accounted for the record shipments during this six month period, and more than two thirds of this grain was shipped by exporters other than Viterra. Just three years ago, there was only one single-desk exporter of bulk wheat.

Rob Gordon, Viterra's President South East Asia, said the result highlighted the strength of the South Australian grains industry.

"Since harvest began last year, the shipping program has been very strong with records continuing to be broken," he said.

"Even during harvest we were shipping large amounts of grain, which is noteworthy considering the sheer size of the crop coupled with the unseasonal wet weather late last year."

According to the Australian Bureau of Statistics (ABS) wheat export summary in May 2011, wheat exports out of South Australia were up by more than 100% for December 2010, January and February 2011. Strong grain exports continued from South Australian ports during March, April and May.

"This is indicative of an efficient shipping program and effective shipping stem management which benefits both exporters and growers.

"In May, 32 vessels shipped grain from our ports, and Outer Harbor, our newest port terminal, achieved a new record. Meanwhile, exports from Port Lincoln were the second highest on record in May.

"We have also been working to facilitate movement of the expected crop for next season.

"We look forward to gaining greater certainty for the coming season once our access undertaking is approved by the ACCC, providing clarity for growers and exporters alike," Mr Gordon said.

Viterra expects shipments from South Australia to remain strong given the significant crop in storage, the favourable commodity pricing environment and strong demand.

Since entering the Australian grains industry in 2009, Viterra has invested more than $35 million in infrastructure designed to improve the efficient operation of South Australia's export supply chain for the benefit of growers, exporters and destination customers.

As a port terminal operator, Viterra's strongest incentive is to maximise throughput. This is how the company obtains a return on its significant investment in South Australian infrastructure, and its commitment to doing so is demonstrated by both the level of its continuing investment and the record tonnages that it has moved through its system.

About Viterra

Viterra provides premium quality ingredients to leading global food manufacturers. Headquartered in Canada, the global agribusiness has extensive operations in Western Canada, North America, Australia and New Zealand. Our growing international presence also extends to offices in Japan, Singapore, China, Switzerland, Italy, Ukraine, Germany and India. Driven by an entrepreneurial spirit, we operate in three distinct businesses: grain handling and marketing, agri-products, and processing. Viterra's expertise, close relationships with producers, and superior logistical assets allow Viterra to consistently meet the needs of the most discerning end-use customers, helping to fulfill the nutritional needs of people around the world.

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For Immediate Release
23 August, 2011
Adelaide, Australia
Listed: TSX:VT: ASX:VTA

Viterra ports have broken all time record

The record for annual grain exports shipped through South Australia's ports has been broken, with almost 7 million tonnes of grain exported from the State on behalf of 14 exporters since 1 October 2010.

From 1 October last year to 31 July 2011, 6.84 million tonnes have been exported. The previous highest amount for the 1 October to 30 September period was 6.69 million tonnes in 2001/02.

Mayo Schmidt, Viterra's Chief Executive Officer, said the Company's strong leadership team in Australia had strengthened operational performance in the region.

"The record shipping result is a positive reflection on Viterra's local management expertise. The efficient operation of Viterra's ports has ensured a highly competitive marketplace for South Australian grain and Viterra is committed to opening up new markets for Australian growers.

"We're expanding our international presence into South East Asia and recently opened a new marketing office in Ho Chi Minh City, Vietnam, to further support the development of new markets and complement our existing international network," he said.

Rob Gordon, Viterra's President South East Asia, said the record shipments had enabled Viterra to clear stocks from sites so the Company was ready to receive another large harvest.

"We are consolidating our carry-in grain into fewer sites to maximise the capacity of the bigger sites and create as many delivery options for growers as possible," he said.

Mr Gordon said the Company expected solid shipping to continue through August and September in the lead up to the 2011/12 harvest.

"With the strong shipping to continue, we estimate the carry-in stocks across the State will be less than two million tonnes, which, considering last year's record harvest, is a great situation for growers," he said.

"Our harvest preparations are well underway and we look forward to working together with growers to ensure they can deliver their grain in a timely and efficient way."

"Since entering Australia, Viterra has invested more than AU$40 million in storage, transport, logistics, people and port terminal infrastructure for the benefit of Australian growers, marketers and international customers."

About Viterra
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Forward Looking Information
This publication contains forward-looking information relating to Viterra's and its subsidiaries' future operational plans and outlook (such statements are usually accompanied by words such as "anticipate", "expect" or similar words).
All forward-looking statements reflect Viterra's beliefs and assumptions based on information available at the time the statements were made, are given as of the date of this publication, and are subject to important risks and uncertainties. Readers are cautioned not to place undue reliance on this forward-looking information except as required by law. For additional information on the risk and uncertainties which could cause actual results to differ from anticipated results, please refer to Viterra's Management Discussion and Analysis dated 19 January 2011, which can be found under Viterra's profile on SEDAR at www.sedar.com and other reports filed by Viterra with Canadian and Australian securities regulators.

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Record shipping as Viterra prepares for harvest

Viterra is entering the 2011/12 harvest having set new records for the amount of grain exported from its South Australian ports.

Almost 8 million tonnes of grain was shipped from South Australia between October 1, 2010 and September 30, 2011.

Dean McQueen, Executive Manager Grain, said Viterra was one of 15 grain marketers to export during this period, with shipping remaining consistently strong throughout the year.

"This is a great result and shows the competitiveness and strong demand for South Australian grain," he said.

"Viterra's Adelaide ports – Port Adelaide and Outer Harbor – have shipped nearly 3 million tonnes combined.

"Port Lincoln on the Eyre Peninsula has been the single busiest port, with 2.65 million tonnes of grain shipped. The previous highest amount of grain shipped from Port Lincoln in this same period was in 2001/02, when 2.06 million tonnes was exported."

Shipping at Thevenard, Port Giles and Wallaroo has also been strong, with 479,000 tonnes, 972,000 tonnes and 982,000 tonnes exported respectively.

Mr McQueen said the record shipping highlighted Viterra's commitment to clearing as much grain from its storage and handling network as possible in preparation for harvest.

"We expect widespread harvesting to begin shortly, with above average yields expected," he said.

"There is about 1.7 million tonnes of carry-over grain in the system, which is a great result and ensures we will be able to effectively service growers this harvest."

In preparation for harvest, Viterra has invested more than $12 million in infrastructure, road works, new equipment and amenities, as part of its commitment to implement the recommendations from the Post Harvest Review.

About Viterra
Viterra provides premium quality ingredients to leading global food manufacturers. Headquartered in Canada, the global agribusiness has extensive operations across Canada, the United States, Australia and New Zealand. The company's growing international presence also extends to offices in Japan, Singapore, China, Vietnam, Switzerland, Italy, Spain, Ukraine, Germany and India. Driven by an entrepreneurial spirit, Viterra operates three distinct businesses: grain handling and marketing, agri-products, and processing. Viterra's expertise, close relationships with producers, and superior logistical assets allow the company to consistently meet the needs of the most discerning end-use customers, helping to fulfill the nutritional needs of people around the world.TSX: VT ASX: VTA

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FOR IMMEDIATE RELEASE

Viterra Breaks All-Time Monthly Shipping Record

ADELAIDE, South Australia – April 10, 2012 – Viterra (TSX:VT) (ASX:VTA) has broken another all-time shipping record, with more than 900,000 tonnes of grain exported from its South Australian ports in March, 2012.

The 912,029 tonnes of grain shipped during March has exceeded the previous monthly record of 839,658 tonnes shipped in February 2004.

Dean McQueen, Executive Manager Grain, said the outstanding March shipping results reflected the efficiency of not only the ports, but the entire storage and handling network in South Australia.

"It is thanks to our employees that exports are being facilitated in such an effective way enabling us to consistently break record after record," he said.

"Last year, we broke the calendar year record by shipping 8.41 million tonnes of grain on behalf of 15 exporters, and now, only three months into 2012, we've shipped 2.39 million tonnes from the State."

Viterra's newest port, Outer Harbor, also reached a new record for grain exported during one month, shipping 244,000 tonnes in March.

"The through-put we're seeing, despite high world grain stocks, demonstrates the global demand for South Australian grain and is a positive result for the State, marketers and growers alike," he said.

About Viterra
Viterra provides premium quality ingredients to leading global food manufacturers. Headquartered in Canada, the global agri-business has operations across Canada, the United States, Australia, New Zealand and China, as well as a growing international presence that extends to offices in Japan, Singapore, Vietnam, Switzerland, Italy, Ukraine, Germany, Spain and India. Driven by an entrepreneurial spirit, Viterra operates three distinct business segments: Grain Handling and Marketing, Agri-Products and Processing. Viterra's expertise, close relationships with producers and superior logistical assets allow the Company to consistently meet the needs of discerning end-use customers, helping to fulfill nutritional needs around the world.

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Attachment 2 – Response to GPSA's submission

1 The GPSA submissions

1.1 Viterra wishes to respond to a number of the matters raised by GPSA in its submissions to the ACCC dated 24 April 2015 ("**First Submission**") and 21 August 2015 ("**Second Submission**").

1.2 Viterra notes that, in providing the Second Submission, GPSA appears to have changed its view of the proposal from "*fundamentally anti-competitive*" and providing "*no benefit to the consumers (farmers)*",[23] to some level of support for the proposal. This change, and Viterra's subsequent discussions with GPSA and growers, suggest that the GPSA submissions may not have been:

(a) based on a full understanding of the benefits of the proposal for the South Australian grain industry (or indeed any robust evidence to support the concerns raised); and

(b) specifically focussed on the proposal under consideration by the ACCC (as distinct from assertions that GPSA may wish to be considered as part of separate political or State-based review processes).

1.3 In this regard, Viterra notes that a number of the concerns raised in the GPSA submissions are not relevant to the ACCC's current approval process under the Code. The Code sets out a framework for regulating access for bulk wheat exporters to port terminal services in Australia, and provides the ACCC with an ability to approve (or reject) proposed variations to capacity allocation systems by port terminal service providers that are not "exempt service providers" under the Code. Neither the Code nor the ACCC's role under section 25 of the Code relate to the operation of up-country storage or logistics arrangements.

1.4 It is therefore not clear to Viterra whether GPSA's intended audience for these comments was growers, ESCOSA or some other forum.

1.5 Viterra has not sought to respond to these issues directly in the submission. However, Viterra would like to highlight a number of clear inaccuracies that strongly suggest that both submissions were not based on a correct understanding of the proposal and its benefits.

First Submission

1.6 Viterra does not agree that there "*is no benefit to the consumer (farmers) in changing from the auction system to the [proposal] indeed there are a number of negatives*".[24] Viterra has set out the key benefits to growers in section 3 of this submission.

1.7 Viterra also considers that there are a number of significant detriments for growers in continuing with the auction system. In particular:

(a) there has been a clear lack of interest by exporters in exporting out of South Australia in 2015/2016, as demonstrated by the results of the auction set out in paragraph 5.6 above. This lack of interest reflects industry feedback that "*there is a general level of distrust among exporters towards auction mechanisms for allocating capacity and reluctance to continue to participate in future auctions*";[25]

(b) the lack of export activity in 2015/2016 will have a direct impact on the ability of Viterra and other bulk handlers to accept grower's harvest in a timely way due to the existence of likely blockages in up-country storage receival sites;

(c) there has been a reduction of exporters participating in South Australia on a year-on-year basis, as total exporter numbers have fallen from 19 to 14 between the 2014/2015

[23] GPSA, *Submission to the ACCC Issues Paper* (24 April 2015), 3 and 7.
[24] GSPA, *Submission to the ACCC Issues Paper*, 7 quoted in ACCC, *Draft Decision*, 25.
[25] ACCC, *Draft Decision*, 26.

and 2015/2016 seasons. Viterra considers that this is a direct result of its allocation system being the last regulated auction system in Australia;

(d) the current prices for grain in South Australia are lower than the price in both Western Australia and Victoria – in the case of Victoria, the price of grain is approximately $20 per tonne higher. This is likely to have a significant impact on growers in the central and western growing regions in South Australia; and

(e) the absence of long term agreements will continue to contribute to volatility in the price of grain.

1.8 Viterra also disagrees with GPSA's statement that the proposal "*shifts more production risk to the farmers*".[26] The introduction of long term take-or-pay agreements requires exporters to take on significantly more production risk by committing to execute capacity in future seasons. Under the current auction system and single year agreements, exporters take on little risk as contracts are frequently entered into after the size of the crop is effectively known. The likely effect of the proposal on growers' production risks is that long term certainty will allow the grower to access acceptable forward prices from multiple exporters.

1.9 Viterra further disagrees with the claim that "*cost of grain freight continues to increase rapidly*".[27] The export select rates at all major up-country sites are lower for the 2015/2016 season than they were in the 2012/2013 season. It is therefore unclear on what basis GPSA makes this assertion.

1.10 Finally, Viterra considers that GPSA's suggestion that ESCOSA "*undertake a review of the entire grain supply chain … [to] provide a substantive platform for the entire grain supply chain to move forward on rather than the current piece meal approach*"[28] is not appropriate in the context of the current proposal. It misunderstands the legal framework that underpins the ACCC's decision under the Code and does not assist in the practical way forward for consideration of Viterra's proposal.

Second Submission

1.11 Viterra does not agree with a number of the statements made in the Second Submission. In particular, Viterra notes that:

(a) The "LTA allocation charges" (which Viterra takes to mean the long term capacity booking fee) are the charges payable by exporters for the use of Viterra's infrastructure. Viterra would not accept an amendment that curtailed its legitimate ability to charge exporters for the use of its infrastructure. Viterra also notes that under the current system, it is the premium paid, and not the auction fee, that accrues in the rebate pool.

In relation to the cost to exporters of failing to execute, Viterra notes the following comment from GPSA:

> "*The large incumbent organisations will take significant positions knowing the worst case is forfeiting capacity at cost of 25% of the fee or more likely trading it on the secondary market*".[29]

This statement is incorrect. The cost of not fully utilising capacity under the proposal includes both the $5 booking fee per tonne and the lost capacity fee of $5 per tonne. Accordingly, there is a significant deterrent from failing to execute total capacity. Further, Viterra considers that more capacity becoming available via the secondary market is likely to assist, rather than restrict, new entrants.

Further, it is not correct to assert that because Viterra is vertically integrated, a failure to execute capacity by its trading arm will only constitute "*a transfer of funds between two*

[26] GPSA, *Submission to the ACCC Issues Paper* (24 April 2015), 7 quoted in ACCC, *Draft Decision*, 25.
[27] GPSA, *Submission to ESCOSA SA Rail Access Regime Review* quoted in ACCC, *Draft Decision*, 43.
[28] GPSA, *Submission to the ACCC Issues Paper* (24 April 2015), 5 quoted in the ACCC, *Draft Decision*, 84.
[29] GPSA, *Submission to the ACCC Issues Paper* (24 April 2015), 9.

arms of the same business". Viterra incurs significant loss for any under-utilisation of its infrastructure.

(b) It is not correct that there is a lack of transparency in the long term capacity volumes. Viterra has a clear rationale for the level of long term capacity. Viterra has set aside at least 2.2 million tonnes (including tolerance) of short term shipping capacity per year and has set out clearly how that short term capacity will be spread across the port terminals and periods. Viterra also set out clearly the available long term capacity on a slot-by-slot basis over a five year period in its notice to clients on 9 July 2015. Accordingly, 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. Viterra also notes support for the transparency of this process in the Draft Decision:

> "*Viterra's decision to publish [the amount of available LTC] on the Viterra website and communicate this information to clients should result in the same outcome of improved transparency surrounding the LTC allocation process*".[30]

Viterra does not consider that Table 1 in the Second Submission provides any meaningful information or comparison. Table 1 purports to compare long term capacity available under the proposal against the 3 year average for tonnes exported. This is highly distortive because it does not incorporate either the level of capacity that was made available each year or any under-utilisation of port terminals over that 3 year period. This leads to irrational results. For example, the 156% figure for Thevenard merely shows that Thevenard is an under-utilised port. It provides no information at all about the appropriateness of the long term capacity caps under Viterra's proposal.

A clearly more appropriate comparison would be the level of long term capacity made available under the proposal against the total amount of capacity made available.

(c) The proposed term of 2 years, with annual consultation, and half the level of long term capacity in the subsequent 3 years, would bring a considerable degree of regulatory uncertainty for the industry. An initial term of 2 years, and limiting the level of long term capacity in subsequent seasons, is entirely at odds with industry feedback and antithetical to the key drivers for introducing a long term agreement proposal. GSPA's proposed structure would fail to deliver any meaningful long term certainty to exporters, South Australia growers or Viterra and would therefore substantially remove the benefits of the proposal.

Other matters

1.12 Viterra will respond separately to GPSA in relation a number of other significant inaccuracies contained in the Second Submission about Viterra's up-country and logistics services.

[30] ACCC, *Draft Decision*, 73.

Attachment 3 – Revised Port Loading Protocols

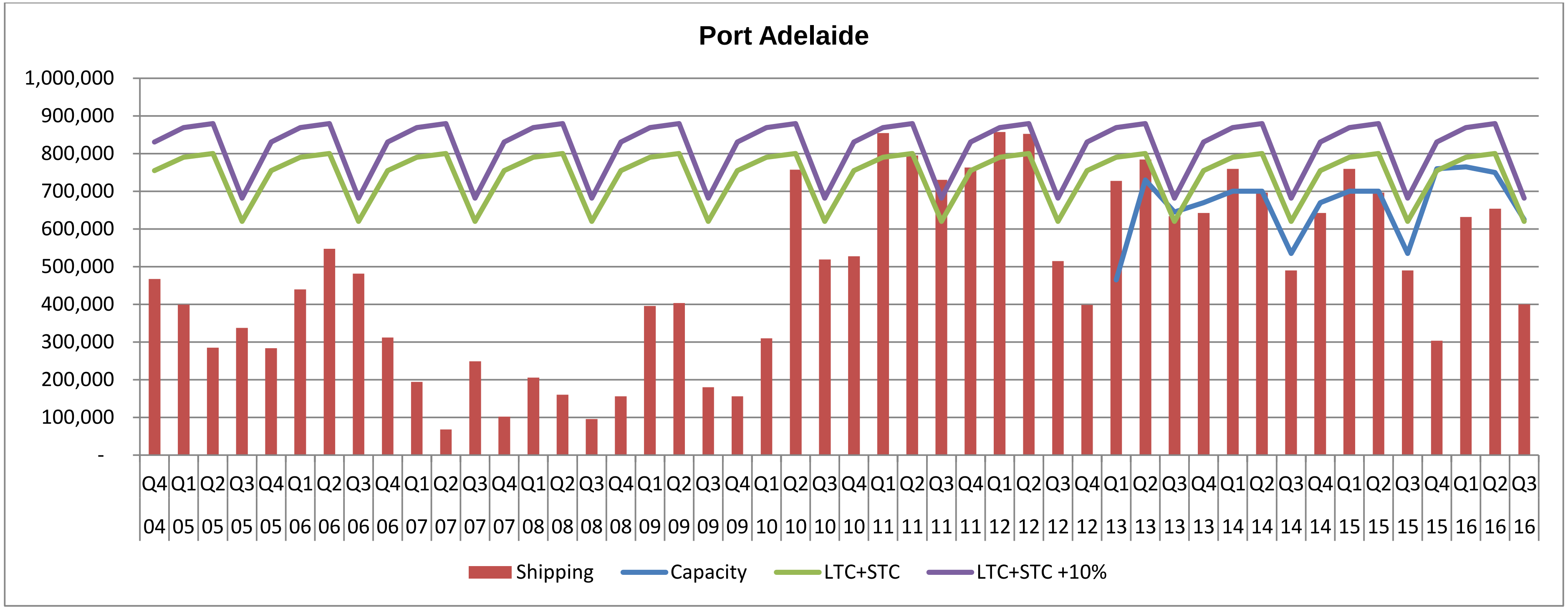
Attachment 4 – Response to ACCC's other proposed solutions

	ACCC proposed solution	Viterra response
1	**A decrease in the LTC nomination cap thresholds**	The current caps are already a modest proportion of overall capacity: • ~28% at OHB and LIN (Jan to June) • ~35% at other ports and periods. This represents, on average for each of Q1 and Q2, approximately: • three panamax vessels at OHB • less than three panamax vessels at LIN. Viterra considers that reducing the initial nomination caps further would be likely to dilute the value of LTAs for both Viterra and exporters, and create disincentives for uptake.
2	**Increase in short term capacity**	This cannot occur in isolation from Solution 1 (see above) or without an increase in total available capacity. One of Viterra's purposes in offering LTAs is to obtain realistic information about required infrastructure investment over the medium term. ***2.2 million tonnes is substantial capacity*** Viterra notes that 2.2 million tonnes (including tolerance) represents approximately 30-35% of the South Australian export task in an average year. Reserving, rather than selling upfront, is a significant concession by an infrastructure owner that is not undertaken by other unregulated port terminal operators in Australia. ***Alternative infrastructure at Port Adelaide*** Viterra estimates that there is an additional 600,000 – 700,000 tonnes of port terminal capacity that is made available at Port Adelaide each year under alternative infrastructure. This equates to approximately 21-24% of existing capacity at Port Adelaide. This represents an additional avenue for exporters to obtain short term capacity.

	ACCC proposed solution	Viterra response
3	**Application of LTC nomination cap thresholds to include STC allocation process**	This would have the effect of capping allocations to clients. Viterra does not consider that it is appropriate or in the interests of the South Australian grain industry for either Viterra or the ACCC to introduce rules that potentially cap exports or growth by its clients. It is not in Viterra's interests to artificially cap (or indeed reduce) Glencore's access to port terminal services. Over the two shipping years prior to 2015/2016, Glencore has exceeded the proposed LTC cap both annually and during peak periods at all port terminals other than Thevenard and Wallaroo. Information about Glencore's requirements in the 2015/2016 season are set out in section 5 above.
4	**Limitations on the amount of STC available to exporters who secure peak LTC shipping slots or a large proportion of total LTC**	Even if Glencore were to be allocated the maximum amount of initial LTC, this would be less than its existing use of port terminal services in South Australia. The LTA proposal only make sense for Glencore (and potentially other exporters) if they can also acquire STC. This proposed solution would: • actively discriminate against the owner of the infrastructure and other participants in the LTA process • potentially result in the owner of the infrastructure obtaining less access than under the current system • potentially operate as a significant disincentive for clients to enter into LTAs • grant privileged access to exporters who have not contributed a longer term investment in the South Australian industry (at the expense of those who do)

Attachment 5 – Available capacity table Port Giles, Wallaroo, Thevenard

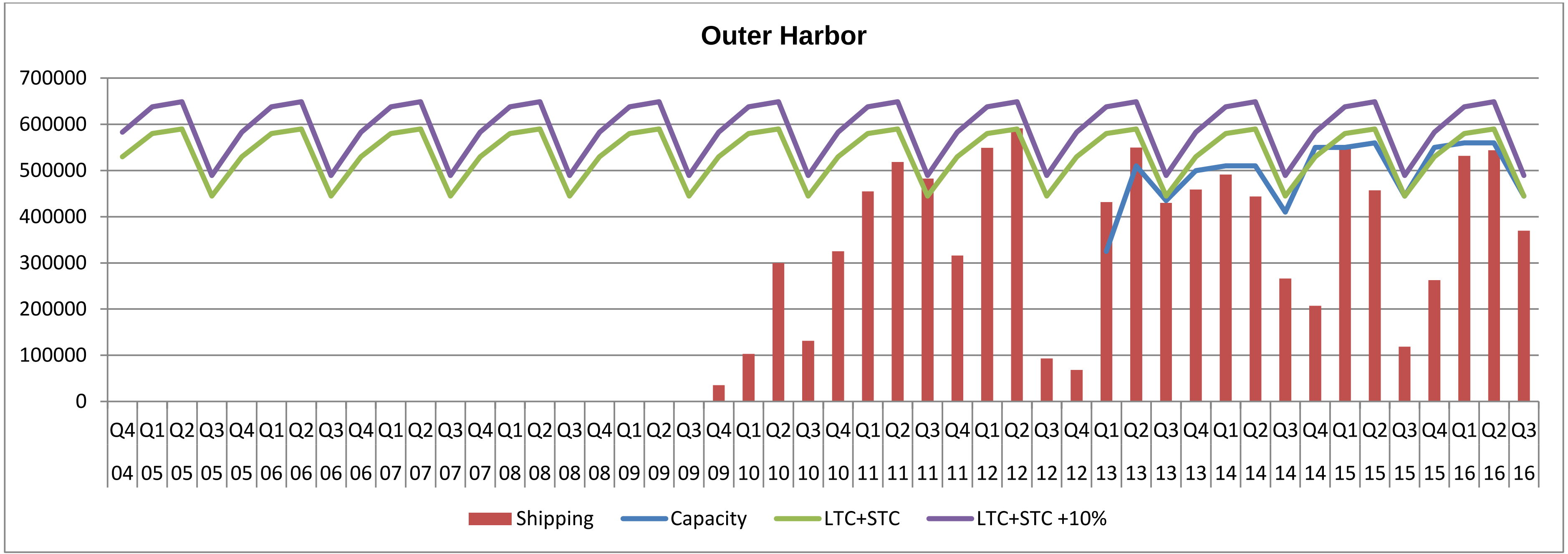
Table 4 – Available capacity at Port Adelaide (Inner Harbour and Outer Harbor combined) compared to historical shipping activity



Notes:

- Alternative supply chains that operate at Port Adelaide are capable of providing an additional 600,000 – 700,000 tonnes of port terminal capacity

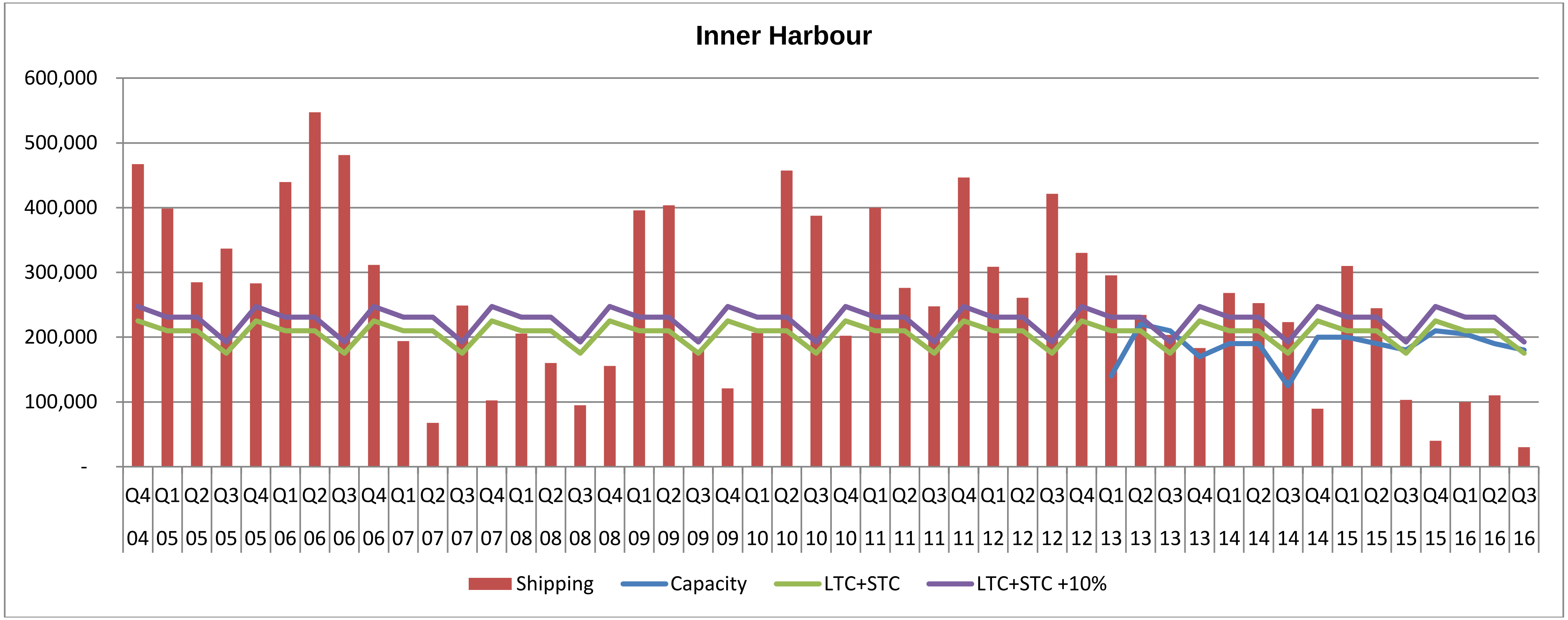
Table 5 – Available capacity at Outer Harbor compared to historical shipping activity



Notes:

- Outer Harbor was opened for export activity in Q4 2009

Table 6 – Available capacity at Inner Harbor compared to historical shipping activity



Notes:

- Inner Harbour was Viterra's only port terminal at Port Adelaide until Q4 2009. Accordingly, all logistics and resources were directed to Inner Harbour and it had greater capacity during this period. As a result, higher shipping levels occurred at Inner Harbour prior to the commencement of exports through Outer Harbor.

Table 7 – Available capacity at Port Lincoln compared to historical shipping activity

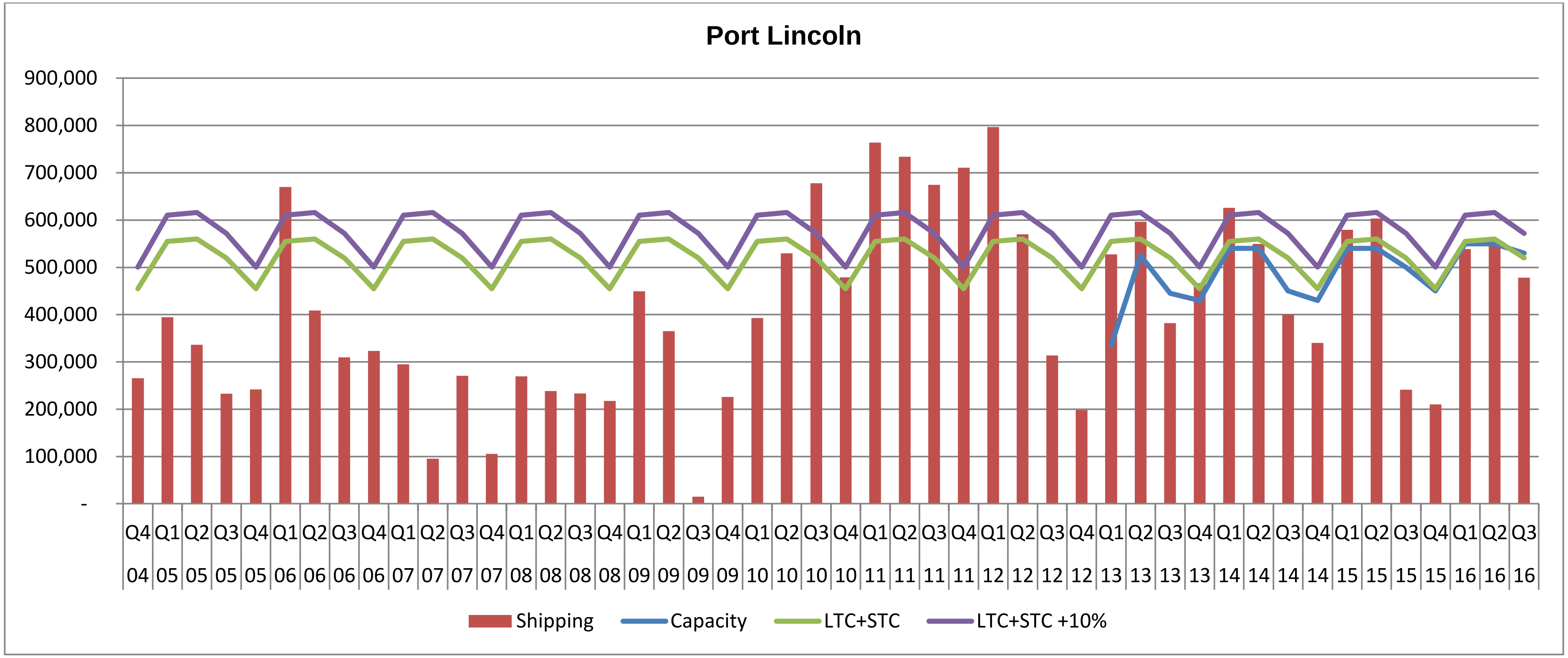


Table 8 – Available capacity at Port Giles compared to historical shipping activity

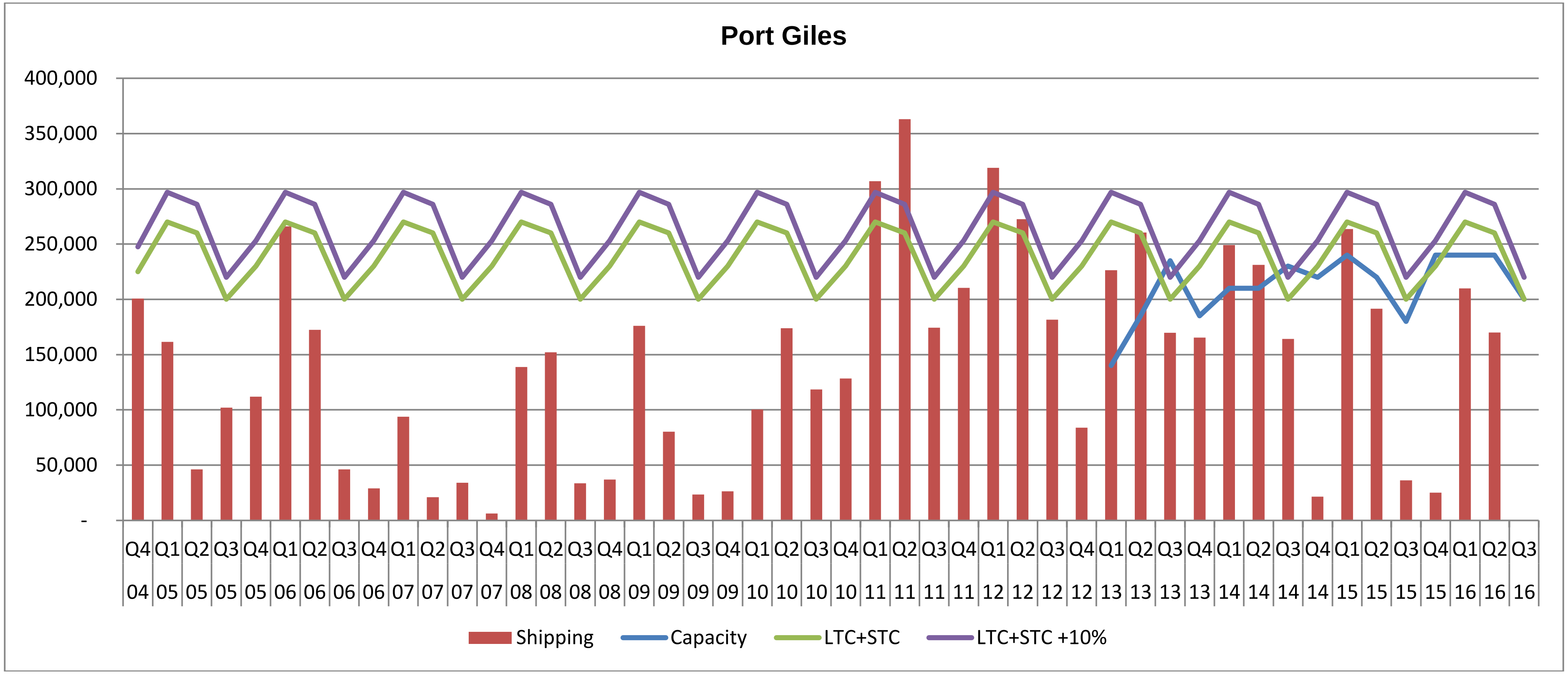


Table 9 – Available capacity at Wallaroo compared to historical shipping activity

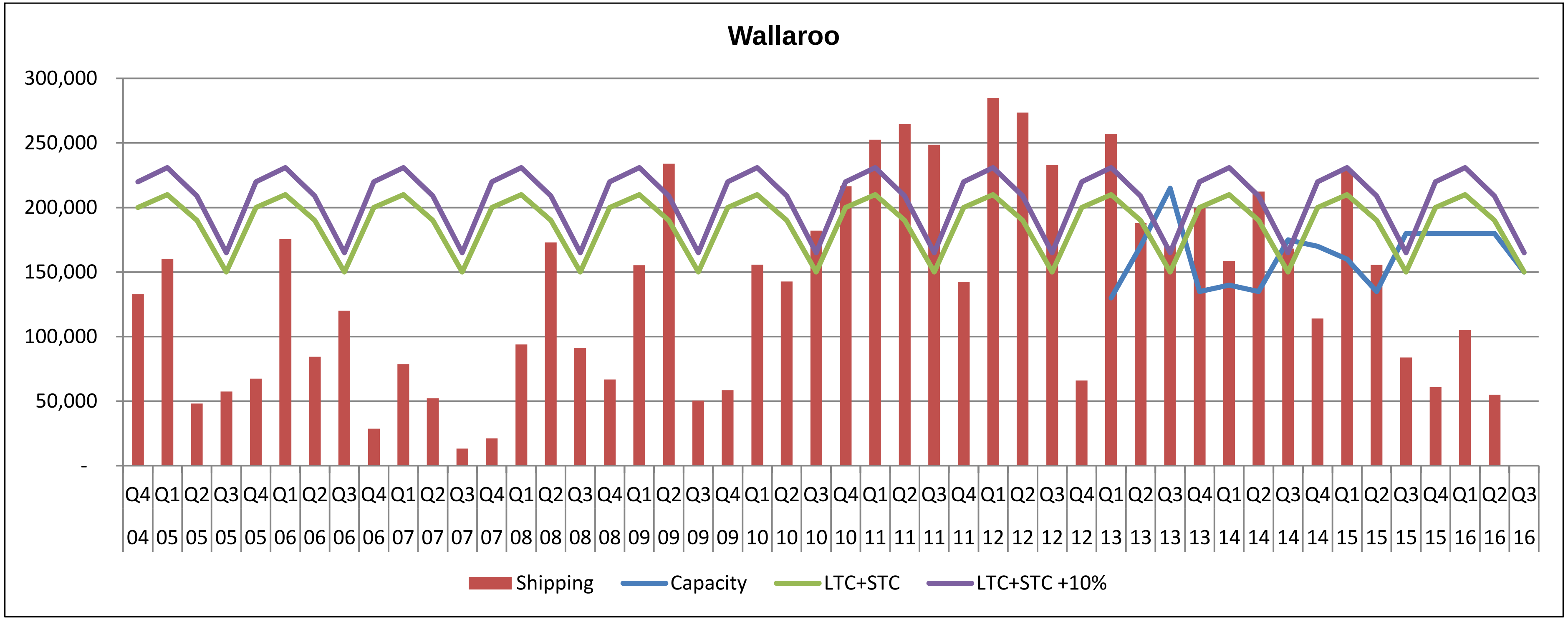


Table 10 – Available capacity at Thevenard compared to historical shipping activity