Viterra application seeking capacity allocation system approval

Draft decision

16 July 2015

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Summary

Under the Port Terminal Access (Bulk Wheat) Code of Conduct (the Code), the ACCC has made a draft decision to not approve Viterra Operations Limited's (Viterra) application to introduce long term agreements for the allocation of port capacity at its six South Australian wheat ports.

Process

Viterra submitted its application to vary the capacity allocation system in its port loading protocol to introduce long term agreements on 12 March 2015.

Viterra propose to introduce long term capacity agreements (LTA) to replace its current capacity allocation system that uses an auction as its primary allocation method, and a first-in-first-served (FIFS) allocation method for capacity not allocated in the auction. Following the release of the ACCC's issues paper on Viterra's proposal, and the provision of submissions in response, Viterra provided a revised set of protocols on 12 June 2015. The ACCC notes that stakeholders have not had the opportunity to comment on the revised June protocols and is now seeking comments on the revised proposal.

Legislative Test

In making this draft decision, the ACCC has had regard to the matters listed at subclause 25(3) of the Code. This assessment is set out in Chapter 5 of this document, with an overall conclusion at Chapter 6. These views are based on the ACCC's analysis of the application, discussions with Viterra, submissions from stakeholders, data on past shipping and the potential future use of Viterra's port terminals.

ACCC assessment

The ACCC considers that the decision on whether to approve Viterra's proposal is a finely balanced one. The ACCC has previously recognised the potential benefits of long term agreements to both port terminal service providers and exporters, and that long term capacity arrangements may be appropriate in some cases. Potential benefits of long term agreements can include greater certainty for exporters in planning their long-term grain export programs and assisting the infrastructure owner with supply-chain planning.

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

The ACCC considers that the Viterra protocols have the potential to allocate capacity in a way that balances the interests of all stakeholders and facilitates competition in the grain acquisition and other markets. LTAs also provide greater certainty for investment at the port terminals and along the supply chain, both for the infrastructure owner and potentially from other stakeholders.

The ACCC also acknowledges comments from stakeholders outlining considerable issues with the current auction system. While it is a nominally equal access system whereby grain is allocated according to a competitive process, in practice the auction has proven to be problematic. In particular, the auction has attracted very high premiums and tied up large amounts of exporter capital, has not allocated significant amounts of capacity, and has taken

extremely long periods to close. The ACCC has received feedback from a number of exporters that they would not intend to participate in future auctions. If LTAs were introduced, exporters would not be subject to this cost of premiums, or to associated risks related to rebates.

While the ACCC notes that there is broad support for the concept of a LTA system in principle, and that there are considerable issues with the current auction system and that the proposed LTA offers potential benefits, Viterra's proposed LTA system has potential flaws that raise concerns against the matters in subclause 25(3).

The ACCC's largest concern with the Viterra LTA proposal relates to the discretion that Viterra has in relation to long term capacity allocation in the case of oversubscription. Viterra's proposed capacity allocation system gives priority access to capacity to larger exporters who seek more capacity at more ports or months in their applications. It is also relevant that, as a vertically-integrated port operator, Viterra will have the discretion and incentive to favour its own trading arm, Glencore, in any allocation. The ACCC notes that Glencore has been the largest exporter from South Australia in recent years and that this is likely to continue to be the case.

The ACCC is also concerned that the five year term of the proposed capacity allocation system will run the risk of effectively locking in a market structure dominated by the largest exporters for a significant period of time. This could have implications for the ability of smaller exporters to grow or new exporters to enter the market. Finally, the ACCC has concerns about the ability of all exporters to have adequate access to short term capacity – including exporters who will be unable or unwilling to obtain long term capacity.

On balance, the ACCC considers that, given the matters in subclause 25(3) of the Code, it would not be appropriate to accept Viterra's proposed LTA system.

The ACCC recognises that this draft decision, if affirmed in a final decision, would mean that Viterra will need to revert to auction for at least the first part of the 2015-16 season, and that this may have little support from exporters.

Call for submissions

The ACCC is seeking public submissions from stakeholders on its draft decision to not approve Viterra's revised proposed long term capacity allocation system. Submissions must be received before 5:00pm (AEST), **31 July 2015.**

The ACCC will consider its final decision in light of the feedback it receives from stakeholders to this draft decision, including views on the further amendments put forward by Viterra on 12 June. The ACCC also notes that it may accept an amended proposal from Viterra that adequately addresses the concerns raised by the ACCC in this draft decision.

1. Introduction

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

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

The purpose of the Code is to regulate the conduct of port terminal service providers (as defined in the Code) to ensure that exporters of bulk wheat have fair and transparent access to port terminal services.[1]

1.1 The Code

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

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

where:

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

and:

> **port terminal facility** means a ship loader that is:
>
> (a) at a port; and
>
> (b) capable of handling bulk wheat;

and includes any of the following facilities, situated at the port and associated with the ship loader, that are capable of handling bulk wheat:

> (c) an intake/receival facility;
>
> (d) a grain storage facility;
>
> (e) a weighing facility;
>
> (f) a shipping belt.

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

- Part 1 of the Code contains general provisions about the Code and its application.
- Part 2 of the Code requires all port terminal service providers to deal with exporters in good faith, publish a port loading statement and policies and procedures for managing demand for their services, and make current standard terms and reference prices for each port terminal facility publically available on their website.

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

- Part 3 of the Code places a number of requirements on a port terminal service provider including:
    - not to discriminate in favour of itself or its trading business, or hinder third party exporters' access to port terminal services
    - to enter into an access agreement or negotiate the terms of an access agreement with an exporter to provide services if an exporter has applied to enter into an access agreement and certain criteria are satisfied
    - to deal with disputes during negotiation of an access agreement via specified dispute resolution processes including mediation and arbitration.
- Part 4 of the Code requires a port terminal service provider to have, publish and comply with a port loading protocol which includes an ACCC approved capacity allocation system.
- Part 5 of the Code requires port terminal service providers to regularly publish expected capacity, stock information and key performance indicators.
- Part 6 of the Code sets out requirements relating to retaining records such as access agreements and variations to those agreements.

1.2 Capacity Allocation under the Code

The Code provides for processes whereby the ACCC can approve the capacity allocation system for allocating a port terminal service provider's port capacity.

1.2.1 Varying a capacity allocation system

The Code provides for the ACCC to have a role approving the capacity allocation system used by a port terminal service provider.

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

If a port terminal service provider's capacity allocation system has not been approved by the ACCC in accordance with subclause 25(3), and is not taken to be approved by the ACCC under subclause 25(5), subclause 25(2) provides that the port terminal service provider may only allocate capacity up to 6 months in advance.

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

These matters are:

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

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

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

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

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

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

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

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

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

j) any other matters that the ACCC considers relevant.

1.3 Viterra's application

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

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

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

On 12 March 2015 Viterra submitted an application to the ACCC seeking approval of its proposed capacity allocation system in relation to services provided at port terminal facilities (the March protocols). On 12 June 2015, following the release of the ACCC's issues paper (discussed below),[2] Viterra provided a revised capacity allocation system for the ACCC's approval (the June protocols).

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

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

1.4 ACCC capacity allocation review process

1.4.1 Indicative timeline for assessment

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

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

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

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

Table 1: ACCC assessment to date

Date	Action
12 March 2015	Viterra lodged an application to introduce long term agreements
2 April 2015	ACCC release Issues Paper and invited public submissions by 24 April 2015.
30 April -5 May 2015	ACCC published 12 public submissions received from interested parties.
12 June 2015	Viterra lodged a revised long term agreement proposal
16 July 2015	ACCC published draft decision on the capacity allocation system and invited public submissions on its preliminary views by 31 July 2015.

The ACCC is seeking to finalise its assessment of the application as soon as possible. The actual timeframe may depend on the nature of comments received from industry in response to the draft decision outlined in this document.

1.4.2 Public consultation undertaken to date

The ACCC released an Issues Paper on 2 April 2015 seeking public submissions on Viterra's applications and related key issues.

The ACCC received the following twelve public submissions from the following parties in response to its Issues Paper:

- GrainCorp (exporter and vertically integrated port terminal service operator, transport and storage operator)
- CBH (exporter and vertically integrated port terminal service operator, transport and storage operator)
- Quadra (exporter)
- AvantAgri (Agribusiness consultants and grain marketers)
- Profarmer Australia (agricultural data and information services provider)
- Noble (exporter and vertically integrated port terminal service operator, transport and storage operator)
- Emerald (exporter and vertically integrated port terminal service operator, transport and storage operator)
- Grain Producers SA (grower representative group)
- Australian Grain Growers Co-operative (grain trader and pool manager)
- ADM (exporter)
- Bunge (exporter and vertically integrated port terminal service operator, transport and storage operator)
- Geoff Ryan (SA grower).

Public submissions are available on the ACCC's website at https://www.accc.gov.au/regulated-infrastructure/wheat-export/viterra-2015/issues-paper

1.5 Consultation on the draft decision

The ACCC invites public submissions on the draft decision set out in this document. Please include detailed reasons to support the views put forward in submissions.

Please address submissions to:

General Manager
Infrastructure & Transport - Access & Pricing Branch
ACCC
GPO Box 520
MELBOURNE VIC 3001
Email: transport@accc.gov.au

The ACCC prefers that submissions be sent via email in Microsoft Word format (although other text readable document formats will be accepted).

1.5.1 Due date for submissions

Submissions must be received before 5:00pm (AEST), **31 July 2015**.

1.5.2 Confidentiality of information provided to the ACCC

The ACCC strongly encourages public submissions. Unless a submission, or part of a submission, is marked confidential, it will be published on the ACCC's website and may be made available to any person or organisation upon request.

Sections of submissions that are claimed to be confidential should be clearly identified. The ACCC will consider each claim of confidentiality on a case by case basis. If the ACCC refuses a request for confidentiality, the submitting party will be given the opportunity to withdraw the submission in whole or in part. The ACCC will then assess the exemption application/s in the absence of that information.

For further information about the collection, use and disclosure of information provided to the ACCC, please refer to the ACCC publication *Australian Competition and Consumer Commission / Australian Energy Regulator Information Policy - the collection, use and disclosure of information*, available on the ACCC website.

1.5.3 Further information

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

Mr Michael Eady
Director
Infrastructure & Transport - Access & Pricing Branch
ACCC
GPO Box 520
MELBOURNE VIC 3001
Ph: 03 9290 1945
Email: michael.eady@accc.gov.au

1.6 Outline of this document

In its Issues Paper the ACCC sought industry comment on issues which would assist the ACCC in assessing the Viterra proposal against the matters in subclause 25(3) of the Code.

Chapters 2, 3 and 4 of this document present the ACCC's analysis on relevant consideration for the decision.

- Chapter 2 provides an outline of Viterra's proposed capacity allocation system.
- Chapter 3 outlines the current auction-based capacity allocation system framework.
- Chapter 4 of this document provides an overview of South Australia's bulk wheat export supply chain. It considers the characteristics of the SA port terminals, including their capacity and the demand for their services. It also considers the level of competition in upcountry storage and handling, as well as the transport network.

Chapter 5 lists the ACCC's preliminary views having regard to the matters set out in the subclause 25(3) Code. Chapter 5 uses the analysis and preliminary findings from the preceding 3 chapters to set out the ACCC preliminary assessment of the matters as per subclause 25(3) of the Code.

Chapter 6 sets out the ACCC's draft decision regarding the application.

2. Viterra proposed capacity allocation system

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

2.1. Background

Viterra currently has approval to allocate its port capacity via a series of auctions, and to then allocate residual capacity via a First In First Served (FIFS) process. Further information on the auction system is included in Chapter 3.

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

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

On 12 March 2015 Viterra submitted an application to the ACCC seeking approval of its new long term capacity allocation system, and a proposed set of protocols for implementing the system (the March protocols), under the Code. In the submission Viterra outlined that it:

> … proposes to make a number of changes to the Protocols, including to simplify various provisions (e.g. the Table A requirements) and improve readability for clients. However, the main purpose of the proposed changes is to replace the current capacity allocation system with an opportunity for clients to engage commercially with Viterra and to enter into long term agreements for port terminal services in South Australia.[3]

Viterra submitted that its proposal represents:

> both a direct response to feedback from clients, and a response to its strong desire for greater commercial certainty in relation to the operation of, and its ongoing investment in, port terminal infrastructure serving the South Australian grain industry.[4]

Viterra had previously proposed a long term capacity allocation proposal in September 2014 under the previous undertaking regime. The March protocols had certain changes to the system proposed in September 2014, mostly around transparency and information sharing.

On 10 April 2015, the ACCC published an issues paper on Viterra's proposed capacity allocation system, seeking views from industry.

Following the issues paper and submissions from industry, Viterra provided the ACCC with a revised set of protocols (the June protocols).and also published them on its website on 12 June It also published a further consultation notice. In the notice Viterra indicated it has amended the protocols to address concerns raised by stakeholders and the ACCC in the issues paper process. Viterra also said that it is inviting applications for Initial LTC applications.

Viterra outlined in the June consultation notice the main changes it has made in the June protocols compared to the 12 March protocols:

[3] Viterra Non Confidential submission to the ACCC, Paragraph 1.2, p.1.
[4] Ibid, Paragraph 1.6, .p.1.

(a) the 40% restriction set out in paragraph 3.2(d) above now applies at Outer Harbor and Port Lincoln during both the January to March and April to June Quarters (in the submission, we stated that it only applied for the January to March Quarter);

(b) we have inserted further clarity in relation to the required timing for payment of booking fees for Initial Long Term Capacity (see below); and

(c) we have set out that Viterra intends to spread the 2 million tonnes of Short Term Capacity across all port terminals broadly in line with the proportion of capacity offered at Auction at each port terminal during the 2014/2015 Year.[5]

Further details of Viterra's application are set out as relevant in chapter 5 of this Draft Decision. Viterra's full submission in support of its application is available on the ACCC's website at http://www.accc.gov.au/regulated-infrastructure/wheat-export.

2.2. Proposal overall

Viterra submits that:

(i) The operation of the capacity allocation system will be transparent. Viterra will publish clear information about the capacity that is available for booking, the process for booking and the results of the booking process;

(ii) Under the proposed capacity allocation systems, clients will all have an equal opportunity to acquire either long term capacity and/or short term capacity in order to satisfy their genuine exporting requirements;

(iii) The proposed system for allocating long term capacity is designed specifically to be fair in the sense that it provides a high level of flexibility for clients to negotiate and acquire services to meet their individual requirements. This includes a flexible duration for agreements, no minimum tonnage requirements, no minimum port terminal requirements, and no minimum slot requirements (or requirement to spread tonnages across different periods);

(iv) The fair operation of the proposed capacity allocation system is strongly promoted and protected by numerous safeguards that Viterra has included, in direct response to issues raised by clients and the ACCC (see Attachment 6);

(v) The fair operation of the proposed capacity allocation system will be further promoted and protected by the ability to appoint an independent person to audit Viterra's compliance with the non-discrimination provisions under the Code.[6]

2.3. Long term capacity allocation framework

2.3.1. Application procedure for LTC

Viterra proposes relatively few parameters about an exporter's ability to seek long term capacity. Viterra submits that the features of the LTC proposal include:

(a) a flexible duration. The only requirements are a minimum term of 2 years and a maximum term of 5 years (expiring on 30 September 2020). Clients will be able to enter into a long term agreement at any time for capacity that is not already contracted as long term capacity or reserved as short term capacity;

(b) no minimum tonnage requirements;

[5] Viterra Consultation Notice June 12 2015, p.2.

[6] Viterra submission, p.18.

(c) no minimum port terminal requirements;

(d) no minimum slot requirements (or requirement to spread tonnages across different periods); and

(e) an ability to negotiate the terms of the long term agreement either before or after Viterra accepts the client's offer to acquire capacity on its published standard terms for long term agreements.

4.10 Clients will also be able to submit offers for long term capacity in respect of any grain.[7]

2.3.2. Caps on applications

In the March protocols Viterra proposed a series of cap thresholds for the maximum percentage of long term capacity that exporters could apply for when seeking initial LTC at any one port per quarter. The caps were as follows:

> (a) 40% of the long term capacity that is initially made available at Outer Harbor or Port Lincoln during the January to March quarter; or
>
> (b) in all other cases, 50% of the long term capacity that is initially made available at any port terminal across any quarter,[8]

Viterra outlined its reasoning for the nominated LTC caps:

> Viterra considers that the Initial Nomination Cap is a reasonable limit on the acquisition of initial long term capacity by any individual exporter. [Confidential] Accordingly, imposing a limit of less than the Initial Nomination Cap would artificially cap individual exporters' businesses and potentially have an adverse impact on levels of ongoing investment in South Australian grain by exporters. Against this, the Initial Nomination Cap will ensure that multiple exporters will have access to long term capacity at each port terminal in each quarter (in addition to any short term capacity and traded capacity).[9]

The protocols describe how the LTC caps may be exceeded:

> 3.5 (c) Notwithstanding clauses 3.5(a) and 3.5(b), a Client may be allocated more than the Initial Nomination Cap as a percentage of the Initial Long Term Capacity available at a Port Terminal as a result of negotiations conducted in accordance with these Protocols.[10]

Information relating to stakeholder comments about the cap is included at section 5.2.3.3.

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

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

In response to stakeholder concerns, and following discussions with the ACCC, Viterra has adjusted the caps as follows in its June protocols, effectively also applying the 40% cap to the April-June quarter at Outer Harbour and Port Lincoln:

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[7] Ibid, paragraph 4.9-4.10, p.7.

[8] Ibid, paragraph 4.11, p.7.

[9] Ibid, paragraph 4.13, p.7.

[10] Viterra June protocols, p.12.

Initial Nomination Cap means:

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

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

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

Viterra's proposed protocols also establish an allocation process for LTC. The process includes:

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

In the case of oversubscription for a particular LTC slot, Viterra will enter negotiations with exporters to see if there is scope for Viterra to accommodate an exporters request or contemplate alternative arrangements:

4.25 These negotiations may involve Viterra determining whether:

(a) it is possible to increase long term capacity for particular port terminals during particular periods (subject to the requirement to retain a minimum amount of capacity for short term bookings). [Confidential] Viterra may be able to "scale up" capacity at particular port terminals and in particular periods (e.g. by engaging additional labour resources, enabling additional rail or road deliveries, requiring 24/7 operations or facilitating greater Department of Agriculture or vessel inspection resources);

(b) alternative slots may satisfy individual client's requirements;

(c) one or more clients may be willing to reduce the minimum amount of long term capacity specified in their offers (i.e. accept a slightly reduced tonnage allocation); or

(d) a client is prepared to accept an allocation in only some of the years specified in the initial offer.[12]

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

(i) Viterra's overarching objective of maximising the amount of Long Term Capacity allocated and maximising the efficient operation of the supply chain;

(ii) a Long Term Agreement with a longer term will generally be accepted by Viterra in priority to a Long Term Agreement with a shorter term;

(iii) nominations for Long Term Capacity at multiple Port Terminals will generally be accepted in priority to nominations for Long Term Capacity at fewer Port Terminals;

[11] Viterra June protocols glossary, p.6.

[12] Viterra submission, p.10.

(iv) nominations for Long Term Capacity in more Slots in a Year will generally be accepted in priority to nominations of Long Term Capacity in fewer Slots in a Year;

(v) nominations for larger amounts of Long Term Capacity will generally be accepted in priority to nominations for smaller amounts of Long Term Capacity; and

(vi) Long Term Capacity will be allocated in priority to Clients who:

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

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

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

(h) In having regard to and balancing the factors listed in clause 3.6(g), Viterra may have regard to the requirements of individual Port Terminals and the weight attributed to the various factors may differ across Port Terminals.[13]

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

The effect of these factors means that, out of the total LTC available, it is most likely that Viterra's trading arm Glencore, as the largest exporter in South Australia, will be allocated the maximum possible capacity allowed under the protocols for the periods it has applied for. Depending on Glencore's export plans, this may include the most valuable and sought after capacity.

Of the remaining LTC available, it is most likely that several historically larger exporters can best satisfy the above factors.

Further discussion of this process is in Chapter 5.

2.4. Short term capacity allocation framework

Viterra currently operates a FIFS allocation process for residual capacity not allocated after the auction. Viterra proposes to use the same framework to allocate STC on an annual basis, after conducting its negotiation based framework to allocate LTC at the commencement of the five years. Viterra will also use the process to allocate any additional STC that becomes available, either after being surrendered by an exporter and/or developed by Viterra (for example in response to elevated seasonal demand).

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

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

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

5.3 To ensure that all clients have an equal and fair opportunity to book capacity through the first-in-first-served system, the Protocols will provide that, during the first 2 business

[13] Viterra June protocol, p.14.

days after the shipping stem opens, each client (together with its related entities - unless the related entity operates a commercially separate export function) will only be able to make one booking each 15 minute period commencing on the hour.

> 5.4 The Protocols will also provide that no clients will be able to move bookings during this 2 business day period. This will ensure that "moved bookings" do not reduce the opportunities for new bookings in the immediate period after the shipping stem opens (and during which demand for first-in-first-served bookings is likely to be greatest).[14]

Viterra has reserved 500,000 tonnes of capacity per each quarter of the year as STC. Viterra argues in its submission accompanying the March protocols that:

> The 500,000 tonnes of capacity for short term bookings will be retained for all quarters and spread reasonably across all port terminals. This ensures that short term capacity will be available across all periods and port terminals.[15]

In the June protocols, in response to stakeholder concerns, Viterra has provided additional clarification on the amount of STC it will make available:

> 3.12 (b) Viterra's intention is that the Short Term Capacity referred to in clause 3.12(a) will be spread across all Port Terminals broadly in line with the proportion of Capacity offered at Auction at each Port Terminal during the 2014/2015 Year. For operational reasons, this cannot precisely reflect the proportion of Capacity offered at Auction at each Port Terminal during the 2014/2015 Year. However, Viterra's intention is that it will broadly be in line with this proportion.
>
> (c) If in any Quarter the proportion of Short Term Capacity offered at a particular Port Terminal varies from the amount offered at that Port Terminal in the corresponding Quarter of the previous Year by more than 10%, Viterra will publish reasons for that variance on the Viterra Website.[16]

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

2.5. Repositioning and tradability of capacity

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

> (a) long term capacity to any other client that, unless Viterra otherwise consents, has a long term agreement in place for the relevant marketing year in which the transferred slot occurs;
>
> (b) long term capacity to a client that does not have a long term agreement (or does not have a long term agreement in place for the period in which the transferred slot occurs) after the shipping stem opens for first-in-first-served bookings for the relevant marketing year; and
>
> (c) short term capacity after the shipping stem opens for first-in-first-served bookings for the relevant marketing year.[17]

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

> Except with Viterra's prior consent, clients will not be able to move long term capacity (e.g. to another month or port terminal) unless and until the shipping stem has opened for first-in-first-served bookings in respect of the marketing year to which the long term capacity

[14] Viterra submission, p.12.

[15] Ibid, p.6.

[16] Ibid, p.18.

[17] Ibid, p.13.

> relates. As set out above, clients will not be able to move bookings during the initial 2 business day period after the shipping stem opens.[18]

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

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

2.6. Payment terms

The March protocols did not specify when the booking fees for long term capacity needed to be paid by exporters. For example, the booking fee could potentially be required to be paid upfront for the full five years of the LTAs. Exporters noted this issue in submissions.[19]

The June protocols have been amended as follows to provide greater clarity about when booking fees for long term capacity will need to be paid:

> 3.9 Long Term Agreements – Booking fees
>
> (a) Unless agreed by Viterra and a Client in writing, Clients will be required to pay:
>
> (i) the booking fees for Long Term Capacity acquired in respect of the 2015/2016 Year (as specified in the Pricing Document) by no later than 1 September 2015; and
>
> (ii) the booking fees for Long Term Capacity acquired in respect of any Year subsequent to the 2015/2016 Year (as specified in the Pricing Document) by no later than 1 July in the previous Year.[20]

Payment terms are addressed in greater detail at section 5.2.3.4.

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

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

The protocols state that:

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

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[18] Viterra submission, p 13.

[19] See section 5.2.3.4.

[20] Viterra June protocols, p.17.

[21] Ibid, p. 36.

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

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

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

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

2.8. Current process to allocate long term capacity

The ACCC notes that Viterra commenced the process of allocating LTC. As part of commencing this process, Viterra released information to industry on the amount of LTC available across the five years of the proposed LTAs, and on the proposed distribution of STC for the 2015-16 season.

The ACCC notes that clause 17.2 of the proposed port loading protocols, sets out the steps to facilitate transition pending Variation Date. This clause sets out a process whereby Viterra can allocate LTC as per the process set down in the protocols, ahead of receiving ACCC approval of the amended protocols. The clause outlines that any allocation made in accordance with these provisions will be binding if:

> (i) in undertaking the offer and allocation process, Viterra and the Client comply substantively with the provisions contained in Part B of these Protocols; and
>
> (ii) the relevant Long Term Agreement is entered into or becomes unconditional after the Variation Date.[24]

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[22] Viterra protocols June 12, pp.50-51.

[23] Ibid, p.51.

[24] Ibid, p.37.

Viterra has indicated it has commenced this process:

> … to facilitate the potential allocation of Initial Long Term Capacity starting from the 2015/2016 Year, the proposed new Port Loading Protocols expressly contemplate that Viterra may start the Initial Long Term Capacity and application allocation process before the new Port Loading Protocols take effect.[25]

If the proposed variation is not approved, the LTC allocation will not proceed. In the 12 June notice, Viterra outlined that, if the proposed variation is not approved, it will:

> (a) not accept any offers made by clients to acquire Initial Long Term Capacity; and
>
> (b) commence the necessary processes under the existing Port Loading Protocols to allocate capacity for the Harvest Auction Period via auction.[26]

On 30 June 2015, Viterra paused its allocation process by sending a notice to exporters (and publishing the note on its website) stating that the deadline for applications for LTC would be delayed until a date to be advised by Viterra.

On 9 July 2015, Viterra sent a notice outlining revised Initial Long Term Capacity. The notice also set out that:

> However, given the changes to the details of the Initial Long Term Capacity that is available to be contracted under Long Term Agreements, the Initial Application Period will now end on the later of:
>
> > (a) 5.00pm on Thursday, 30 July 2015, provided that Viterra has given at least 5 Business Days' notice that this is the "Initial Application Date"; and
> >
> > (b) 5.00pm on such later date as advised in writing by Viterra, provided again that Viterra has given at least 5 Business Days' notice that this later date is the "Initial Application Date."[27]

[25] Viterra Notice - Applications for Initial Long Term Capacity for the 2015/2016 and subsequent seasons, 12 June 2015.

[26] Ibid.

[27] Viterra Notice – Application for Initial Long Term Capacity for the 2015/2016 and subsequent seasons, 9 July 2015.

3. Current auction system arrangements

This chapter provides a brief overview of the history of the current Viterra auction system, in addition to Viterra and stakeholder views on the system.

The ACCC notes that exporters have expressed general support for long term agreements and the discontinuation of the auction system. In relation to the auction system, exporters have detailed their key concerns with the operation of the Viterra auction system in particular and with auction systems in general.

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

3.1. Introduction of the auction system

In 2011, during its consideration of Viterra's access undertaking, the ACCC considered that Viterra's FIFS system of capacity allocation was not an appropriate mechanism to allocate all port capacity. This view took into account the expected capacity constraints at South Australian ports, as well as the limited competition to neutralise the incentives for self-preferential treatment by Viterra.[28]

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

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

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

> … the use of an auction system to allocate capacity is appropriate and should allow for port terminal services to be used efficiently by ensuring that, in periods of constraint, capacity is allocated to those users that value it most.[29]

In withdrawing the notice, the ACCC acknowledged:

> …. that a reduced risk remains, given the auction system is untested in practice, however [the ACCC] considers in all the circumstances that it is appropriate to withdraw the Auction Objection Notice. [30]

In light of this risk, the ACCC noted that:

> Viterra has committed to conducting a review of the operation of the auction system following completion of the Harvest Shipping period ending in 2013. This review mechanism provides

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

[29] Ibid, pp. 5-6.

[30] Ibid.

> an opportunity for Viterra to determine whether any further changes are necessary or desirable. [31]

3.2. Auction system review

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

After conducting and completing the review, Viterra observed that:

> Nearly all respondents requested that the major allocation of Port Capacity occur via first-in first served or Long Term Agreements rather than auction. This, however, refers to the primary method of allocation of shipping capacity and is outside the scope of the Auction Review.[32]

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

> It is clear to all involved the auction scheme has failed to deliver its intended outcome, it appears fundamentally flawed and that further amendments to the auction process would be unlikely to resolve the issues.[33]

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

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

> Fundamental changes to the way the auction allocates capacity would require significant consultation and system modifications. The proposed solution was considered prior to implementation of the current system, and was not adopted because it may not result in meeting Viterra's undertaking requirement to allocate capacity to those who value it the most.[34]

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

> Changes to the rebate structure would also involve very significant modifications to Viterra's current role and obligations (e.g. given likely issues in relation to how auction system proceeds should be invested). Viterra does not propose to move away from a rebate-model auction. [35]

and:

> Viterra's view is that calculating the rebate on a per auction basis is likely to increase the administrative burden and costs for industry without any clear or direct benefit towards the ultimate goal of creating a disincentive to overbooking. That clients may bid different amounts for different slots in different auctions is consistent with the fact that the auction is designed to allocate capacity to clients at the value they attribute to those individual slots. [36]

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

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

[33] Ibid p.4.

[34] Ibid p.3.

[35] Ibid p.3.

[36] Ibid p.3.

As a result of the review, Viterra made some adjustments of a more technical/practical nature to the operation of the auction system. A further two years of auctions have been held after the review. A number of the problems identified in the review have persisted.

As noted in Viterra's submission:

> Over the past 4 seasons, these shortcomings, risks and challenges have resulted in a number of clients deciding not to acquire capacity, or acquire only small amounts of capacity, through the auction process in South Australia. Those clients have either elected to participate primarily in the secondary first-in-first-served system, or have made a commercial decision not to participate in the acquisition of grain in South Australia.[37]

3.3. Viterra submission on the auction system

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

> … both Viterra and a number of clients have identified significant shortcomings with, and challenges inherent in the operation of, any revenue neutral auction for the supply of port terminal services capacity.[38]

Viterra submits that the key shortcomings of the auction are:

- the increased cost and risk for exporters
- the arbitrage opportunities in "chasing the rebate"
- the impact on operational efficiency
- that the disincentive for commercial engagement leads to a "one-size-fits-all" system.[39]

In the submission Viterra also highlights the amount of auction premiums paid by exporters and when rebates were paid[40].

Table 3.1 – Viterra auction results

Season	Aggregate Premiums	Tonnage acquired at auction	When premiums paid	When rebate paid
2012/13 – Non-Harvest Period Auction (1)	$32,739,000	814,000	26 November 2012	10 December 2013
2012/13 – Non-Harvest Period Auction (2)	$3,304,500	358,000	2 January 2013	10 December 2013
2013/14 – Harvest Period Auction	$3,529,500	1,479,000	16 April 2013	29 October 2014
2013/14 – Non-Harvest Period	$8,910,500	877,000	8 May 2013	29 October

[37] Viterra submission accompanying application to vary Port Loading Protocols, p.4.

[38] Ibid, p.2.

[39] Ibid pp.2-3.

[40] Ibid.

Auction (1)				2014
2013/14 – Non-Harvest Period Auction (2)	$499,500	492,000	31 May 2013	29 October 2014
2014/15 – Harvest Period Auction	$19,352,500	1,275,000	16 April 2014	TBD
2014/15 – Harvest Period Auction	$19,352,500	1,275,000	16 April 2014	TBD
2014/15 – Non-Harvest Period Auction (1)	$39,427,500	1,165,000	14 May 2014	TBD
2014/15 – Non-Harvest Period Auction (2)	$66,582,500	1,270,000	23 June 2014	TBD

As outlined below, the auction has also failed to effectively allocate large amounts of capacity. The auction results illustrate the low proportion of offered capacity awarded via the auction system each year. The remaining capacity was then made available via the FIFS system. In all cases, there has been significant take up of the capacity in the subsequent FIFS process.

Table 3.2**: Viterra auction results 2012-2013 to 2014-2015**

	2012-13 **a**	2013-14	2014-15
Total capacity offered (tonnes)	4,625,000	6,535,000	7,000,000
Total capacity awarded (tonnes)	1,172,000	2,848,000	3,710,000
Average premium per tonne b	$ 30.75	$ 4.54	$ 33.79
Total number of auction rounds	216	173	379
Proportion of offered capacity awarded	25%	44%	53%

a Viterra's 2012-13 auction results relate only to auctions for the non-harvest period from 1 February to 30 September 2013.

b Average premiums are based on total capacity awarded and total auction premiums paid across auctions each season.

Source: Compilation of Viterra auction results, as available on the Viterra website.

3.4. Industry views on the auction system

As expressed in submissions, exporters' key concerns with the auction system include that:

- the auction system does not allocate a significant proportion of overall capacity.
- the auction process is resource intensive, both leading up and during the actual auction
- exporters drop out of the auctions due to risk exposure, and capacity is awarded to exporters with biggest risk appetite, rather than to those who necessarily value it the most
- auction premiums tie up capital, which potentially could be invested in SA, for up to 18 months

- auctions distort the underlying commodity market and other related markets, and that it is difficult to trade in the grain acquisition market as exporters who have shipping slots need to execute their auction acquired slots to avoid losing rebate premiums.

ADM submits that it does:

> … not support the current auction system as the primary allocator of shipping capacity. We believe there is substantial evidence that auctions distort the underlying commodity market. The high auction premiums we have seen since the inception of the auction system have inhibited ADM's growth in the Australian market. The inflation of auction premiums causes an imbalance in the risk reward scenario in the Australian Grain export market.[41]

ADM also outlines several reasons that it believes the auction should not be the primary allocation method. These include that the auction has allocated on average only 43 per cent of capacity, results in an inefficient use of potential working capital and that capacity is awarded to parties with the biggest risk appetite and not those who value it most.

On auctions generally, Quadra submits that:

> these systems are the single major contributor to the current structural issues seen in the Australian Wheat market over recent seasons. They are an artificial mechanism that have prevented the track & FOB markets behaving in a rational & responsive manner.[42]

Furthermore Quadra notes:

> Participants in the supply chain who do not own assets have suffered large financial losses on the back of this irrational export market, and the long term health of a competitive export industry need to be considered when evaluating the fairness of such allocation mechanisms.[43]

Noble in its submission references the "the inefficient auction mechanism" and notes that it has been demonstrated to be:

> … a cost prohibitive platform in allocation of shipping capacity. A total of upwards of AUD 480 million in capital between Western Australia and South Australian Ports has been tied up in auction premiums at an average of AUD 28.70 underpinning 80% of total available elevation capacity. This significant industry capital tie up restricts the trades ability to react to dynamic market forces, distorts inherent trade flows and the unsustainable high cost burden acts as a barrier to entry for a large proportion of the trade which in turn restricts interior competition for grain at the farm gate.[44]

Bunge submits:

> … that the current Auction system used in South Australia has not provided a net benefit to the Industry participants, and created extreme risks and market distortions as a direct consequence of Auction Systems and its outcome. Therefore Bunge's view is that the current status quo is not in the industry's benefit, nor is it sustainable. Over the longer term it is quite probable it may result in reduced competition by increasing the likelihood of participants withdrawing from the market due to the price distortions and excessive risks.[45]

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[41] ADM submission in response to ACCC Issues Paper, p.1.

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

[43] Ibid.

[44] Noble submission in response to ACCC Issues Paper, pp.1-2.

[45] Bunge submission in response to ACCC Issues Paper, p.1.

CBH agrees with "the shortcomings of the current auction system which Viterra identifies at para 3.2 of its Submission."[46]

SA farmer Geoff Ryan submits:

> I believe it would be a detrimental move for SA to be the only state confined to the auction system, now WA has moved away from it, as it could make us less attractive for marketers.[47]

AGG in its submission believes:

> Replacing the "Auction system" will reduce exporter execution risk and may provide more reasonable access to capacity for small exporters. However, we contend there needs to be more transparency and definition to Viterra's proposal.[48]

In contrast to the views of exporters, the farmer representative group Grain Producers SA (GPSA) supports the retention of the auction system. GPSA submits that:

> The Auctioning of capacity is on currently available information the most transparent and fair mechanism for allocating port capacity. [49]

Given the concern surrounding Viterra's vertical integration, GPSA notes:

> The current auction system requires the rebating of the auction premium to all executors of grain onto the shipping stem. This ensures that the vertically integrated marketer Glencore is incentivised equally with competing exporters to execute their Viterra shipping stem. How will the LTA system ensure that the same level of incentivisation continues?[50]

GPSA also submits that:

> There is no benefit to the consumer (farmers) in changing from the auction system to the Glencore/Viterra Application indeed there are a number of negatives that we identified below.
>
> The Glencore/Viterra Application shifts more production risk to the farmers. The farmer already carries the bulk of the production risk. A shift away from the auction system increases that risk without reduction in logistics or supply chain risk. This shifting of risk is identified in the Glencore/Viterra Application.[51]

In response to a question in the Issues Paper about appropriate safeguards, the GPSA submits that the:

> Glencore/Viterra application has excessive discretion for Glencore/Viterra and the current Auction system should be continued to avoid the risks to exporters and consumers alike.[52]

Both Avant Agri and Profarmer comment broadly on the needs for consistency in relation to capacity allocation system across the ports across Australia.[53]

3.5. Potential effects of continuing the auction system

In light of their concerns with the auction system, some exporters in discussion with the ACCC have indicated they may not participate in any future auctions. Most stated that they

[46] CBH submission in response to ACCC Issues Paper, p.2.
[47] Geoff Ryan submission in response to ACCC Issues Paper.
[48] AGG submission in response to ACCC Issues Paper.
[49] GPSA submission in response to ACCC Issues Paper, p. 3.
[50] Ibid p.4.
[51] Ibid p.7.
[52] Ibid p.11.
[53] Profarmer submission in response to ACCC Issues Paper, Avant Agri submission in response to ACCC Issues Paper.

would however consider accessing FIFS capacity and/or participate in the secondary trading market. Viterra also makes this observation in its submission.[54]

For example, ADM submits that:

> If the auction system is retained in South Australia, ADM would genuinely consider withdrawing from South Australia altogether or, only participate in the South Australian market on a short term / spot basis.[55]

Given these views, the ACCC notes that the continuation of the auction system may not be a popular outcome among exporters.

The ACCC notes that a significant risk of continuing the auction is that only a few large exporters would participate, which may lead to a further increase in the market concentration in South Australia. As the auctions are held annually the effect would be confined to a 12 month window, although it may well be replicated in subsequent seasons if the auction continued.

The ACCC notes it is difficult to be certain as to the precise response of industry if and when the auction is run.

3.6. ACCC observations on the auction system

The ACCC notes that a number of submissions were received by the ACCC concerning the existing auction system.

The ACCC is of the opinion that the auction system has not achieved the desired objectives that it was introduced to achieve. The auction has a number of limitations, most of which were highlighted by industry at the time of Viterra's initial review. Furthermore, the ACCC notes that there is now a general level of distrust among exporters towards auction mechanisms for allocating capacity, and reluctance to continue to participate in future auctions.

Consistency between capacity allocation methods

The ACCC notes the submissions by Profarmer and Avant Agri that it is desirable to have the same allocation system operating in all states in Australia. The ACCC notes that there may be administrative benefits to having the same system in all states. For example, participating exporters would only have to learn one system for the allocation of capacity.

However, the ACCC notes that there is no mechanism in the Code to require all PTSPs to introduce the same capacity allocation system, and that there may be reasons why the same system would not be appropriate in all locations. Historically, the ACCC notes that, under the previous undertaking regime, GrainCorp has operated a long term capacity and first-come-first-served capacity allocation system, whereas Viterra and CBH have used auction systems. Also, even if Viterra does bring in an LTC system, it is unlikely to be identical in all aspects to GrainCorp or CBH's systems. Some smaller port operators may wish to operate on a more ad hoc booking system.

In any case, the ACCC considers that its main question should be about the appropriateness of Viterra's proposed capacity allocation system as presented to the ACCC for consideration. It does not consider it necessary to seek to introduce consistent capacity allocation mechanisms across the country, or to rule out auction mechanisms on the basis that GrainCorp and CBH no longer use them.

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[54] Viterra submission, p.4.

[55] ADM submission in response to ACCC Issues Paper p.1.

Issues with auction design

The ACCC concurs with industry that the following aspects of the auction currently used by Viterra have undermined its ability to effectively allocate capacity.

Where relevant, the ACCC notes similarities or differences to the auction system used by CBH until recently to allocate capacity at its ports in Western Australia.

Table 3.3: Issues with Viterra auction

Issue	ACCC comments
Length of the auction and auction closure	The auction can only close when all available shipping slots are at, or under capacity. There is no scope for Viterra to bring the auction to a close when a conclusion is evident and an allocation possible (as was used by CBH in WA). Consequently the auction process requires exporters to dedicate staff over an extensive period of time. Not all exporters have access to recourses to prepare and participate in the auction process. A mechanism to close the auction early would have also decreased the risk of an auction being 'gamed'.
Number and timing of auctions	Three auctions are held each year, with the option of a further auction/s. In 2013-14 and 2014-15, all auctions were held in April, May and June prior to the relevant season starting in October. As a result, Viterra's auction system attempts to allocate capacity up to 15 or 16 months in advance of the shipping year. This compares to the five to six auctions held for the CBH auctions.
Rebate pool and calculation	Annual pool for each port and the rebate calculation is formula based, accounting for high and low demand slots over all auctions in each year Due to the annualised nature of the rebate, it is not possible to calculate the size of the rebate payable to any of the slots until after the final auction has been completed. For most exporters, but especially smaller exporters, the uncertainty surrounding the rebate process has affected their ability to participate in the auctions. There is evidence that exporters have 'chased the rebate' in making applications for capacity in the auction, potentially extending its length of time and causing problems with overall allocations. CBH used an auction rebate pool on a per auction basis.

Certain of these issues may be addressed by amendments to the auction design. For example, it would be possible to introduce an ability to close the auction even when certain slots remain oversubscribed, if the port operator considers that it can fulfil the capacity profile sought. This may help to end the auction early and reduce the level of auction premiums.

However, the ACCC notes that making amendments to the auction design may not resolve all of the issues with the auction, and premiums may still be high even if significant changes were made.

Negative aspects of the auction

As illustrated at table 3.2, the auction does not allocate capacity effectively. At its best it has only allocated 53 per cent of capacity. However, the significant uptake of capacity in subsequent FIFS processes demonstrates that there is demand for capacity that is not being effectively allocated via the auction mechanism.

The major concern that has been raised by exporters is the significant level of auction premiums incurred. As noted above in table 3.1, the average premiums in the 2012-13 and 2014-15 auctions were above $30 per tonne, although the average premium on 2013-14 was lower at less than $5. The total premium pool in 2014-15 was above $125m. Many exporters do not have a risk appetite and/or sufficient working capital to have capital tied up for such long periods. There is little benefit in exporter capital being tied up for long periods, especially during the peak shipping period, when it might be of most benefit to growers and the industry overall. Also of concern for exporters has been the delay in finalising and processing rebates.

The overriding objective of the auction system was to ensure capacity would be allocated to the exporters who valued it most. The auction premium was designed to achieve this. The particular calculation method for the auction rebate was devised to encourage exporters to ship from slots where there was the least level of demand, encouraging the rapid closure of the auction and the use of the port terminal facilities across the whole of the year. However, in practice this does not appear to have been achieved. Many exporters may have found the system too difficult to understand and/or effectively participate in.

The ACCC also concurs that the value of the rebate for the exporter who initially acquired the capacity has affected how capacity and grain is acquired and traded in SA. Typically grain can be traded multiple times prior to shipping, and capacity can also be traded between exporters. However, most exporters have been reluctant to engage in these trading activities given the associated risk of missing out on their rebates if they do not execute auction capacity successfully. This has been especially the case with the most recent auction where premiums were high and there was a very significant cost associated with a failure to execute.

Positive aspects of the auction

The ACCC notes however that the auction has several desirable features.

In particular, the auction allows for a level playing field. All auction participants have a nominally equal starting position in the auction. This means that (subject to prudential requirements) both traditionally larger and smaller exporters are able to participate on an annual basis in the SA allocation process. The procedure also allows for new entrants to obtain capacity in any given year. Over the last three years, perhaps reflecting this nominally level playing field, a number of exporters have been able to access SA shipping slots. However, the ability to participate is of course limited in practice by exporters' ability to provide the necessary capital for auction premiums. As is noted in Chapter 4 below, in practice the SA market has been dominated by a small number of exporters that have significant market share.

Another benefit of the auction is that not all shipping slots garnered high auction premiums. This has meant that exporters have been able to participate in the auction to obtain less premium slots. Any residual capacity was also made available in the FIFS process where many exporters had the ability to secure it, subject to significantly less risk than under the auction process.

The ACCC also notes the GPSA argument relating to the rebating of the auction premium to all executors of grain, and that this system means that the auction system keeps Glencore incentivised to execute capacity it holds.[56] The ACCC agrees with GPSA that the rebate

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

system provides an incentive on Glencore to not obtain excess capacity than it actually desires, as any rebate not received will go to Glencore's competitors. In the context of the vertical integration present between Viterra and Glencore, the ACCC considers that this is a desirable mechanism. This is in contrast to the LTA proposal where Glencore, if it does not execute capacity, will only pay a penalty to Viterra, essentially constituting a transfer of funds between two arms of the same business. However, the non-discrimination obligation may partly address the GPSA's concerns that Viterra will be able to favour Glencore ahead of any other exporter using its facilities.

Finally, one of the key benefits of the auction relates to transparency. All exporters have had access to clear documentation setting out what capacity is available, and the procedures for participating are defined. Likewise, at the end of the auction Viterra publishes information outlining its operation and allocation outcomes.

The relevance of the auction system is discussed further in the ACCC's analysis below about subclause 25(3)(j) of the Code in Chapter 5.

4. South Australian bulk wheat port terminal services

The ACCC's decision on whether to accept the proposed capacity allocation system put forward by Viterra is necessarily informed by the nature of the current bulk grain export and related markets. This chapter provides summary information on South Australian grain production, exports, and the supply chain.

4.1. Viterra's port terminal facilities and capacity

Viterra operates six bulk wheat port terminals across South Australia, located at Port Adelaide (Inner Harbour and Outer Harbour), Thevenard, Port Lincoln, Wallaroo and Port Giles. Relevantly, Viterra is a subsidiary of Glencore International Plc. Glencore trades in grain and other commodities across Australia, and internationally. Glencore is currently the largest exporter operating in South Australia.

Viterra also operates an extensive upcountry grain storage and handling network across South Australia. Viterra provides transport services using rail and road for their customers.

4.2. Grain production in South Australia

Grain production in South Australia is widely distributed and reliant on well-coordinated storage, handling and transportation links at harvest. Viterra divides grain production and storage in South Australia into five key areas:

- Eyre Peninsula – stretching from Pitumba in the west to the Spencer Gulf in the east. This area represents around 28 per cent of total state production;
- Northern Area – stretching from Quorn in the north to Roseworthy and Stockwell in the south. This area represents around 30 per cent of total state production;
- Yorke Peninsula – this area represents around 19 per cent of total state production;
- Murray Mallee – which includes parts of Victoria. This area represents around 14 per cent of total state production; and
- South East – stretching from Tailem Bend in the north to Millicent in the south. This area represents around 7 per cent of total state production.[57]

GPSA noted in its submission to the ESCOSA review of rail access arrangements that:

> Total grain production in South Australia from an estimated 3,000 grain producing businesses for the 2014-15 season was 7.63 million tonnes from 4.04 million hectares.[58]

Total grain production in South Australia has varied over the last ten years. According to data from the Australian Bureau of Agricultural and Resource Economics and Sciences (ABARES), winter grain production in South Australia has ranged significantly from a low of 2,793 million tonnes in 2006-07 to 9,317 million tonnes in 2010-11.[59] According to ABARE

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[57] ABB Grain Ltd, Submission to the ACCC, 16 April 2009, p. 13. Viterra Operations Ltd, "Storage and handling", < http://viterra.com.au/grain/australia/storagehandling.> (viewed on 30 March 2011).

[58] GPSA Issues Paper Submission to the ESCOSA SA Rail Access Regime Review, <http://www.escosa.sa.gov.au/library/20150407-SARailAccessRegimeReviewIssuesPaperSubmission-GrainProducersSA.pdf>

[59] ABARES, Agricultural commodity statistics 2014, December 2014, p. 25.

data over the last four years to 2013-14, South Australian grain production averaged 7,939 million tonnes. [60]

The Department of Primary Industries and Regions SA's (PIRSA) 'Grains in SA' document notes that:

> South Australia produces 20% of Australia's grain produce and averages seven million tonnes of production per year.[61]

4.3. Grain export market

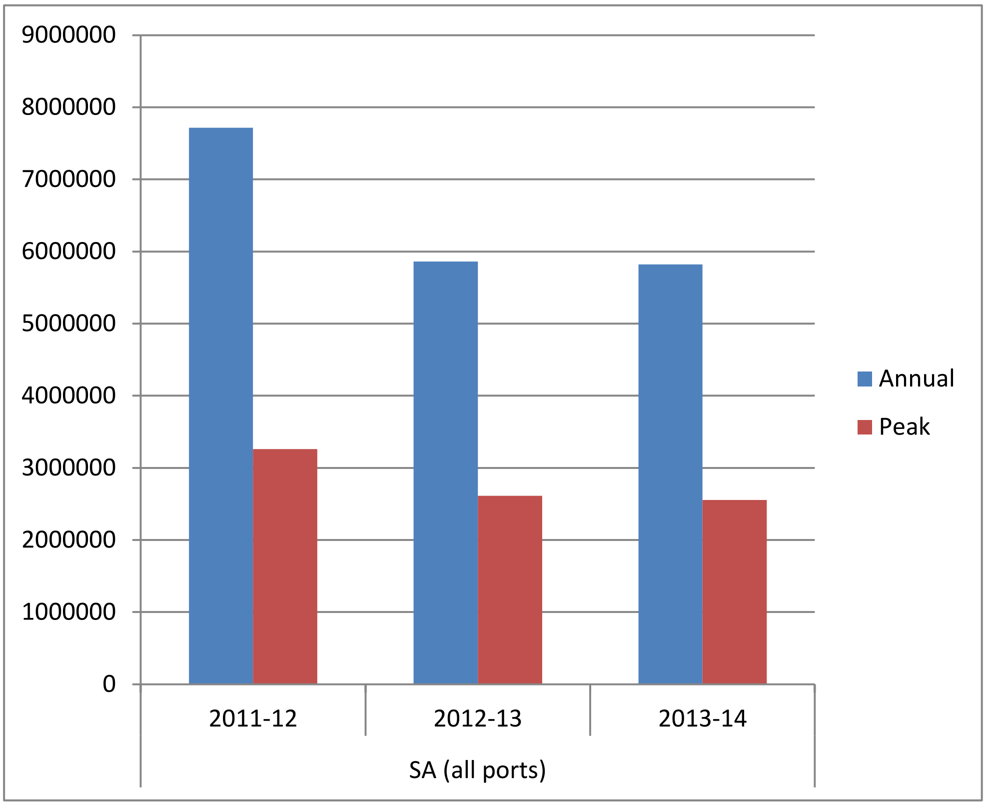
PIRSA has noted that:

> About 80% of South Australia's grain is exported to key markets across the world, with approximately 5.26 million tonnes exported each year. [62]

Similarly, AEGIC has observed that the SA supply chain is structured to "deliver grain one way to port" and notes that about 85 per cent of the grain produced in SA is exported.[63]

Chart 4.1 shows the annual and peak period exports for SA over the last three completed seasons.

Chart 4.1: Total overall annual and peak month (Feb- May) exports from SA (tonnes)



Source: Australian Crop Forecasters (data from 2011-12 to 2014-15).

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[60] Ibid.

[61] "Grains in South Australia", Primary Industries and Regions SA, May 2015, p.2.

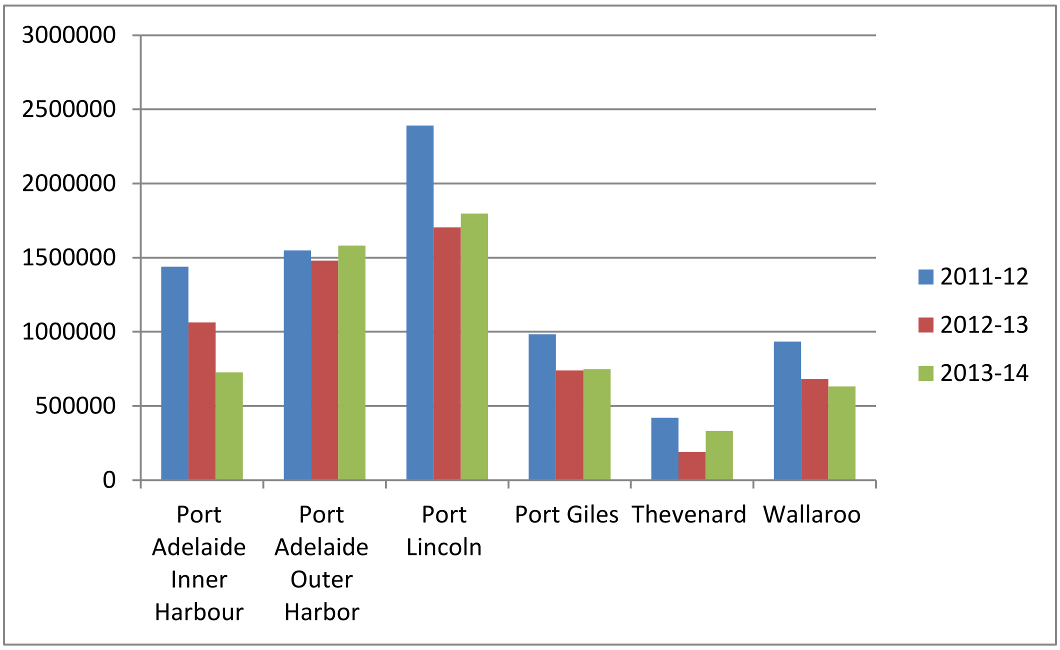
[62] Ibid p.5.

[63] Tamara Stretch, Chris Carter and Ross Kingwell (Australian Exports Grains Innovation Centre), "The cost of Australia's bulk grain export supply chains An information paper", January 2014, p 5.

Chart 4.2 below illustrates the varying overall levels of demand across the Viterra port terminals. As evident there is significantly greater level of demand for capacity from ports like Port Adelaide Outer Harbour and Port Lincoln compared with Thevenard and Wallaroo.

Additional data on total monthly exports from SA port terminals over the three years to 2013-14. is included in Appendix A.

Chart 4.2: Total tonnage exported by SA port terminal 2011-12 to 2013-14



Source: Shipping stem data provided by Viterra.

4.3.1. Market Share in SA

Over the past three years there have been on average 20 exporters shipping grain out of the six Viterra ports, including Glencore.

In its submission, Viterra has submitted that the top 5 historical exporters from SA are most likely to take up long term capacity agreements. As outlined in the table below, after the top 5, on average an additional eight to fourteen exporters have executed shipping from SA.

The ACCC has used this classification approach for the purposes of considering which exporters may apply for and be successful in their LTC applications. This draft determination considers large exporters to mean those who have consistently been one of the top 5 exporters per port across the last 4 years and/or overall. On this basis, as outlined in chart 4.3 below, the top 5 exporters in SA are Glencore, Cargill, ADM, CBH and Emerald.

Table: 4.1: Total tonnage exported by SA port terminal, 2011-12 to 2014-15

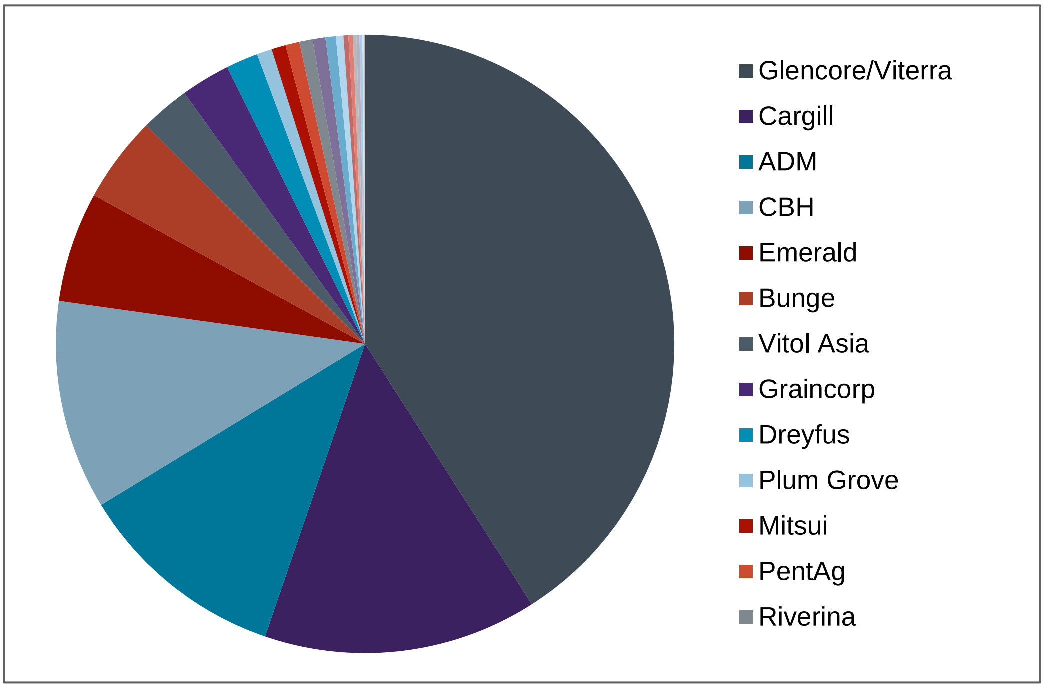
Top 5 aquired/All other exporters aquired				
Season	Exporter	Tonnes acquired	Average per quarter	% of total tonnes aquired
2011/2012	Top 5 exporters	6,498,940.04	1,624,735.01	90.34%
	All other exporters (9)	694,847.73	173,711.93	9.66%
2012/2013	Top 5 exporters	5,005,760.00	1,251,440.00	88.06%
	All other exporters (8)	678,573.30	169,643.33	11.94%
2013/2014	Top 5 exporters	4,894,532.99	1,223,633.25	76.45%
	All other exporters (12)	1,507,400.00	376,850.00	23.55%
2014/2015	Top 5 exporters	4,633,866.00	1,158,466.50	76.02%
(as at 4 March 2015)	All other exporters (14)	1,461,666.00	365,416.50	23.98%

Source; Viterra submission 12 March 2015

Note: The table has been annotated to include additional data column - percentage of total tonnes acquired.

Chart 4.3 Total Exports by Exporters (2011-12, 2012-13, 2013-14, 2014-15 to date)

Source: Australian Crop Forecasters



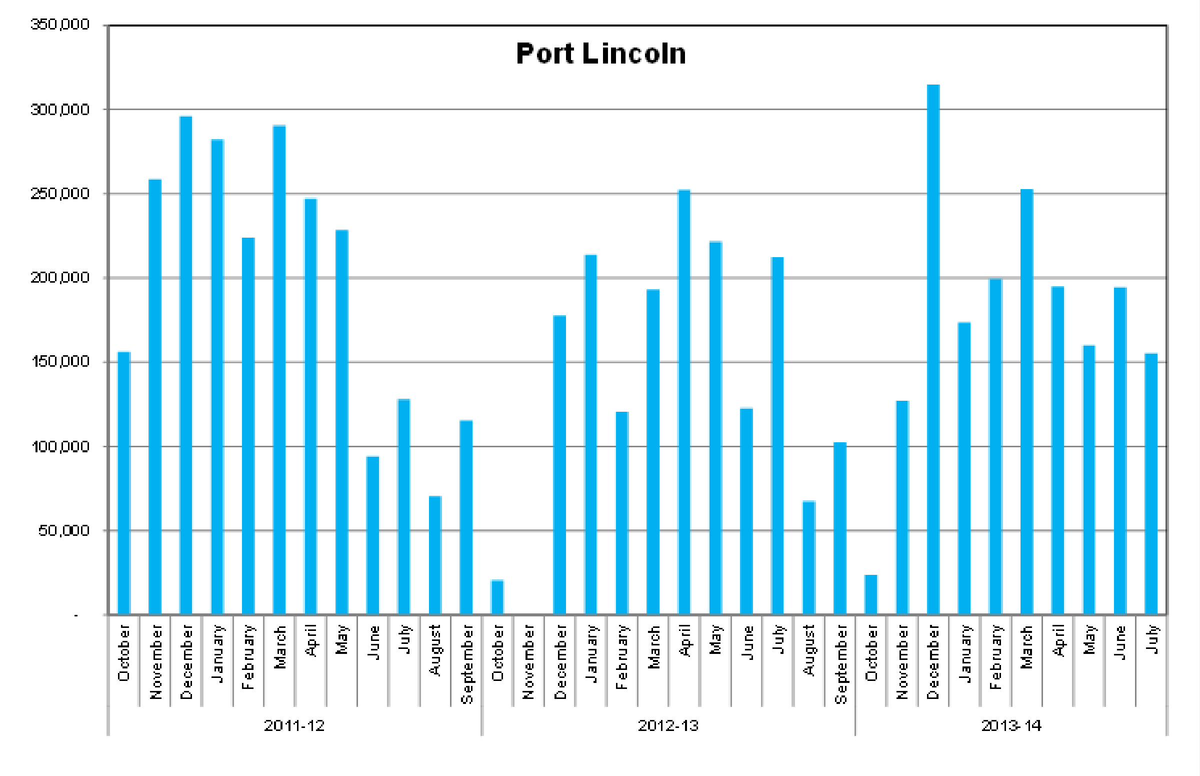
4.3.2. Shipping and exporter shares in peak periods

Capacity constraints during peak periods are experienced at the majority of bulk wheat ports in Australia. These periods occur when new season grain is available to be shipped and may differ depending on harvest times in the production zones. Demand for shipping slots during these peak periods exceeds capacity to some extent even in poor harvest years.[64] Exporters will also typically achieve the highest prices for grain in international markets during the peak period, due to low exports from northern hemisphere grain producing nations.

The ACCC has previously taken the view that the mere likelihood of excess demand at some points during the wheat export year is not sufficient to warrant requiring a specific approach to capacity allocation.[65] However, it is a relevant consideration when examining the effect of a particular capacity allocation approach. Accordingly, it is useful to establish the relevant peak periods in SA. The ACCC's key concern is the extent to which a vertically integrated port terminal service provider can discriminate in favour of its own trading business by allocating itself the majority of peak period capacity.

The peak period in SA generally appears to fall between February and May each year, as illustrated with respect to Port Lincoln at chart 4.4 below. However, export patterns may have been influenced by the auction system, which rewards exporters who ship in periods where there would be typically less demand.

Chart 4.4 Port Lincoln total monthly exports, 2011-12 to 2013-14



Port Lincoln and Outer Harbour are two key ports of interest for exporters, as they are the largest facilities and best able to fill larger ships for export. Capacity at these two ports will likely be constrained across peak shipping. Charts 4.4 and 4.5 highlight the relative exporter share of exports between exporters during peak periods (February to May) compared with non-peak periods. This capacity allocation has occurred under the current capacity allocation system, of auction and FIFS.

[64] Viterra Operations Limited Port Terminal Services Access Undertaking Decision to Accept 29 September 2011, ACCC, p.49.
[65] Ibid.

Chart 4.5 and 4.6 below illustrate relatively little difference in the share by exporter between annual and peak figures. The increase in exporters between 2012-13 and 2013-14 is also likely to be a consequence of the large amount of residual auction capacity that was allocated via FIFS.

Chart 4.5 Port Adelaide Outer Harbour annual and peak (Feb-May) exports by exporter

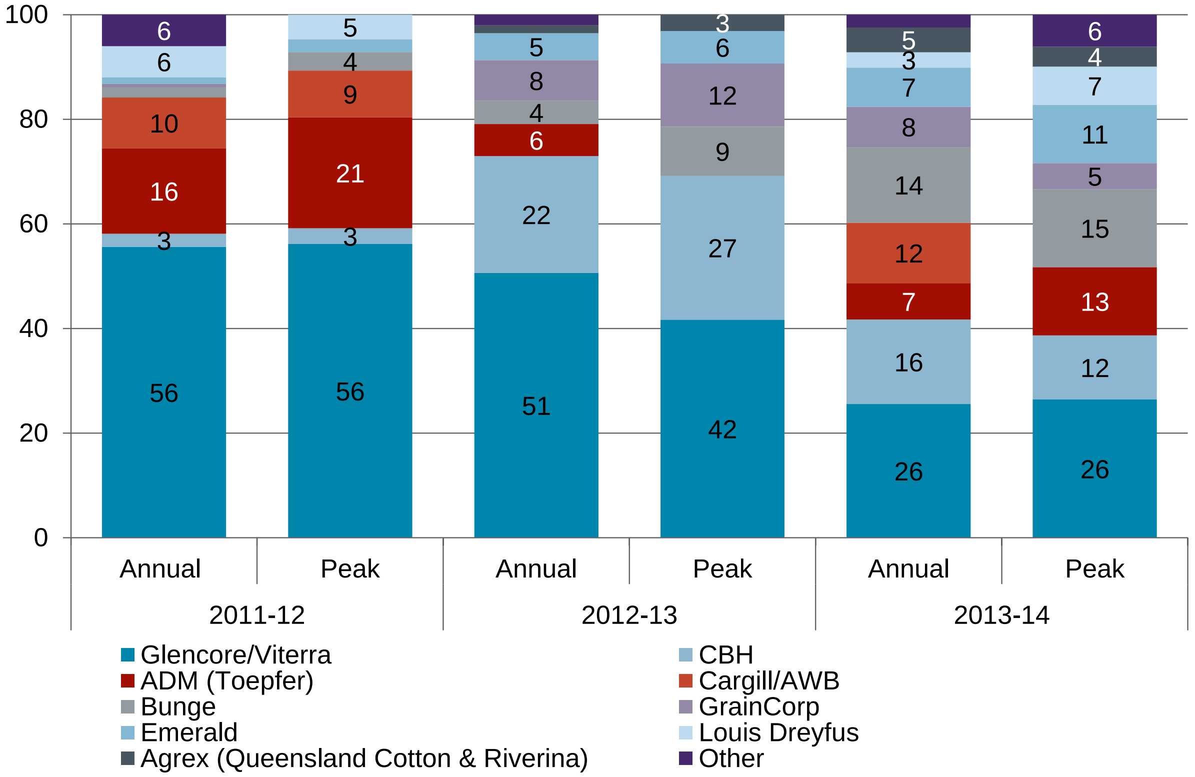
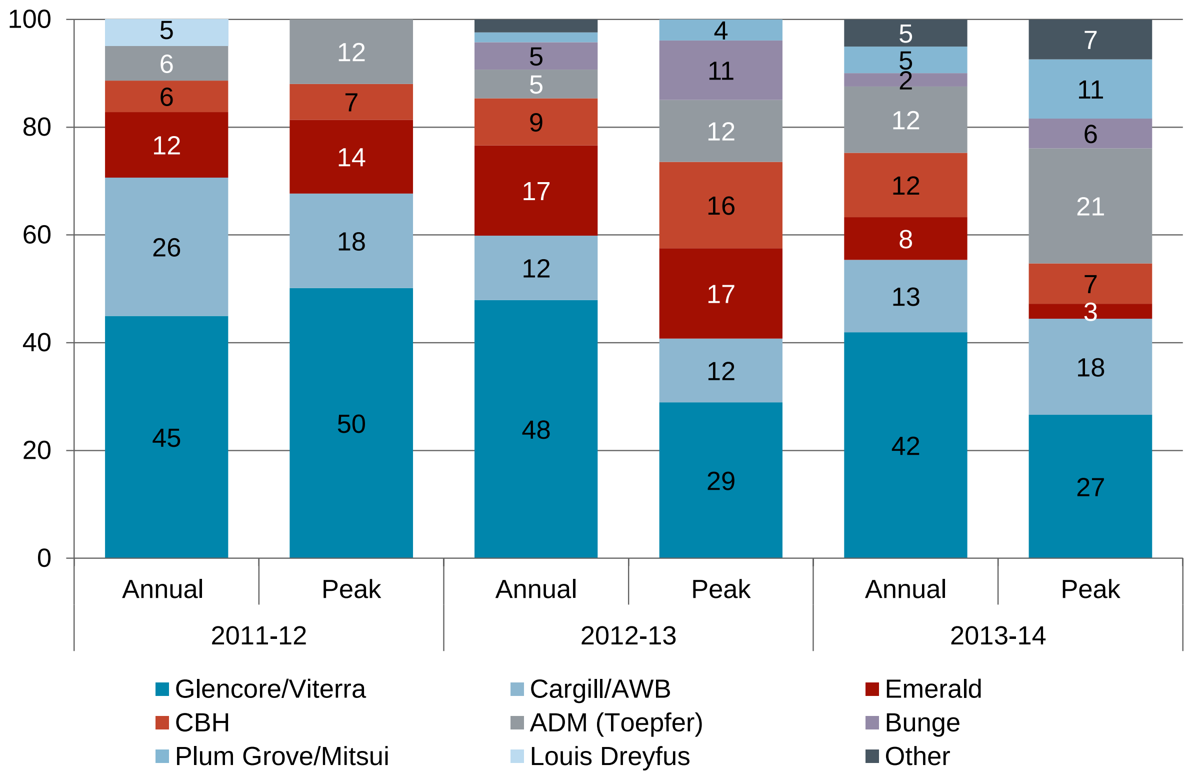


Chart 4.6 Port Lincoln annual and peak (Feb-May) exports by exporter



The ACCC does note however that it is unlikely to be economically efficient to have sufficient port terminal infrastructure to accommodate the entire export task within a three to six month window that goes un-utilised for the remainder of the year. Therefore, while exporters' preference may be to export the majority of grain within a peak period, spreading of the export task into the non-peak period is an efficient infrastructure use outcome.

4.3.3. Additional demand, including new entrants

In addition to known historical levels of demand for port capacity in SA, as demonstrated by the above charts, the ACCC notes that there may be additional demand from new entrants and also some existing exporters who previously have only shipped on an ad hoc basis from SA port terminals. For example, as evident in chart 4.3, GrainCorp has not shipped a great deal from SA under the auction system. The prospect of LTC and FIFS STC may attract such exporters to the SA market.

Many smaller exporters have not participated heavily in the auction due to concerns around the auction rebate and high premiums. Some have secured capacity through the FIFS arrangements. As discussed in greater detail in Chapter 5, smaller exporters may also be interested in applying for both LTC and STC, potentially for amounts in excess of their previous shipping commitments from SA.

In addition to the current exporters who have shipped from SA there are also a range of companies and organisations that acquire and accumulate grain directly from growers, for example Australian Grain Growers cooperative. PIRSA concludes that "around 40 traders operate in South Australia, ultimately distributing grain internationally through around 20 exporters."[66] The ACCC notes that these organisations may also be potential new entrants into the bulk wheat export market, subject to their ability to access shipping capacity. Equally, their ability to participate in the grain acquisition market may be indirectly affected

[66] "Grains in South Australia", Primary Industries and Regions SA, May 2015, p.4.

by the introduction of long term agreements, subject to its effect on related markets. This is discussed in greater detail below in Chapter 5.

4.3.4. Long term capacity proposal and historic shipping data

To understand what capacity exporters might secure in accordance with the new proposal, the ACCC has considered historical SA shipping data against the framework of the LTC allocation process. The following analysis outlines how capacity may be allocated at Port Lincoln.

Two of Viterra's six port terminals, Port Lincoln and Outer Harbour, are larger facilities that are able to service significantly larger vessels than the other SA ports, and also have rail links to a large number of upcountry storages. Exporters accordingly consider these ports to be more desirable. This means that capacity at these ports at peak shipping periods is generally constrained. It was in part because of this level of constraint that the ACCC in 2011 decided the introduction of an auction to allocate capacity was appropriate.[67]

The ACCC has compared the historic shipping patterns for Viterra's facilities to the total amounts of port capacity proposed by Viterra to be available for LTC and STC. This has been presented graphically in the charts in Appendix A.

Key observations from the shipping data, and as demonstrated by the charts below for Port Lincoln (and in Appendix A for other ports), are that:

- Considering the baseline (or minimum capacity) of STC and LTC available for exporters under the Viterra proposal, the data indicates that, over the past four years, there are many occasions where capacity constraints would exist across a number of ports. This occurs even in years where there is a smaller than average harvest.
- Exporters have demonstrated an ongoing interest in shipping from the premium shipping ports of Port Lincoln and Outer Harbour. Looking at those ports specifically, there is likely to be excess demand for shipping slots during the peak season, in particular at Port Lincoln.
- Capacity constraints can be observed at all six ports during the peak shipping period.

At Port Lincoln the following information illustrates the extent to which historic capacity demands would have been satisfied via the proposed long term capacity allocations. The charts assume that Viterra would allocate to Glencore the maximum amount of long term capacity available to any one exporter (i.e. 50 and 40 per cent of total long term capacity at respective ports across the year), with other large exporters sharing the remaining long term capacity, as allowed under the oversubscribed capacity allocation process.

Chart 4.7 below illustrates that the likely available long term capacity at Port Lincoln (indicated by the black line) is unlikely to be sufficient to satisfy the demands of historically larger exporters from the port. Previous export activity that falls above the black line will not be satisfied by LTC. This suggests that these exporters (which include Glencore and other large exporters) would need to seek STC to satisfy their possible total demand. This will mean that these exporters would be likely to participate in the short term allocation via FIFS.

[67] Viterra Operations Limited Port Terminal Services Access Undertaking Decision to Accept 29 September 2011, ACCC.

Chart 4.7: Port Lincoln: Indicative long term capacity - Viterra and other larger exporters' shipments, within and above LTA capacity limits

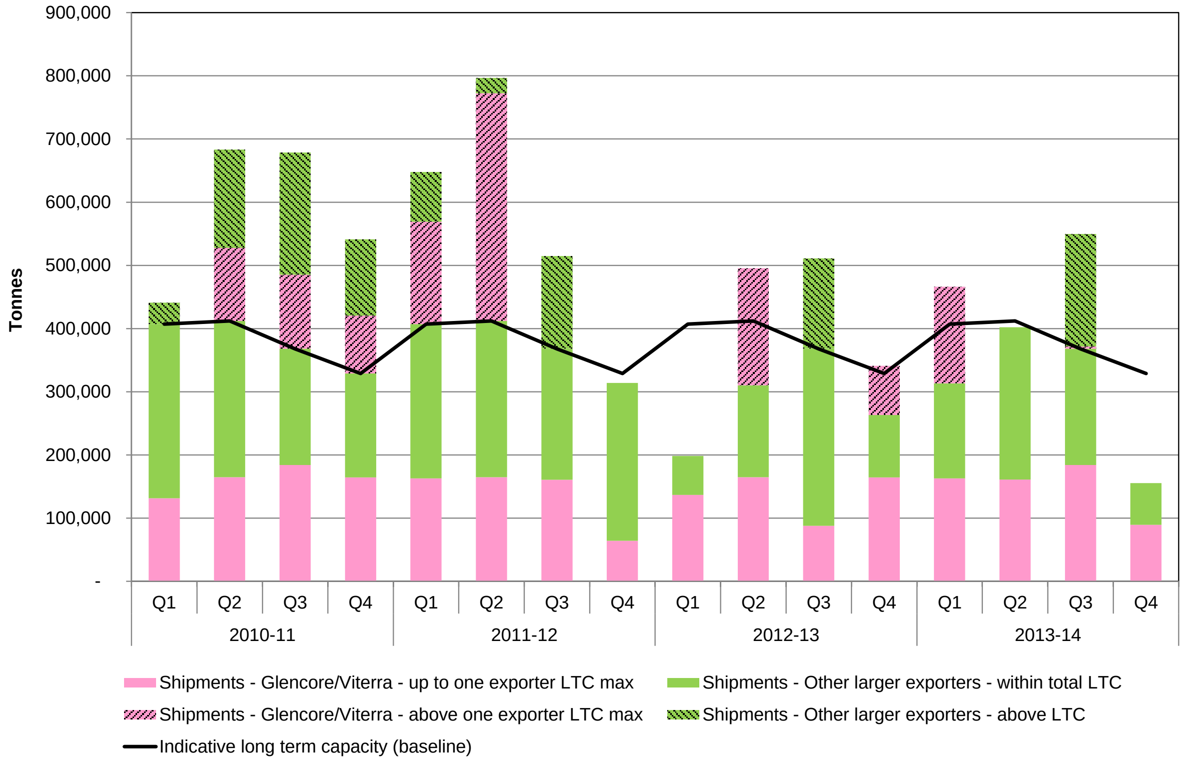
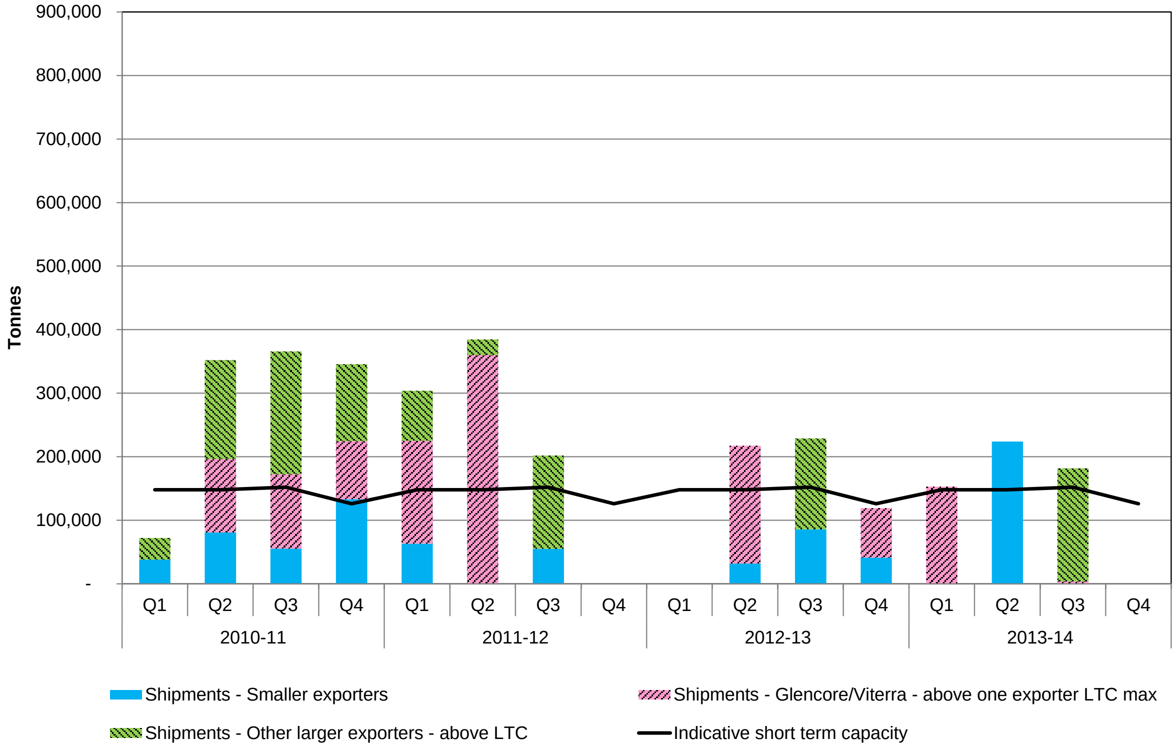


Chart 4.8 below illustrates the extent to which STC can satisfy the remaining market demand from both small exporters (seeking all of their demand) and large exporters (seeking residual demand after they obtain LTC).

Chart 4.8: Port Lincoln: Indicative short term capacity - Smaller exporters' shipments and larger exporters' shipments above LTA capacity limits



The charts demonstrate that there is likely to be oversubscription for long term capacity, at least in peak periods, although under the existing protocols it is not clear which exporters may miss out. However, it is possible that some unmet demand at Port Lincoln may be redistributed across port terminals, noting that many already experience constraint.

The Port Lincoln charts do not explicitly account for the likelihood that exporters which secure LTC can compete with the rest of the market for the STC available, further limiting the available supply of STC for smaller exporters.

4.3.5. Access to STC

As noted in Chapter 2, Viterra proposes to make 500,000 tonnes of capacity quarterly, or two million tonnes of capacity available annually, for acquisition as short term capacity. This capacity will be allocated via a FIFS process which all exporters can participate in. Viterra submits that the data below confirms that two million tonnes is a sufficient amount of STC to make available to market, especially for the likes of smaller exporters (excluding the top five), on the basis that these other exporters have always exported less than 500,000 tonnes on average per quarter.

Table : 4.2: Exports by top 5 exporters and all other exporters

Top 5 aquired/All other exporters aquired				
Season	Exporter	Tonnes acquired	Average per quarter	% of total tonnes aquired
2011/2012	Top 5 exporters	6,498,940.04	1,624,735.01	90.34%
	All other exporters (9)	694,847.73	173,711.93	9.66%
2012/2013	Top 5 exporters	5,005,760.00	1,251,440.00	88.06%
	All other exporters (8)	678,573.30	169,643.33	11.94%
2013/2014	Top 5 exporters	4,894,532.99	1,223,633.25	76.45%
	All other exporters (12)	1,507,400.00	376,850.00	23.55%
2014/2015	Top 5 exporters	4,633,866.00	1,158,466.50	76.02%
(as at 4 March 2015)	All other exporters (14)	1,461,666.00	365,416.50	23.98%

Source; Viterra submission 12 March 2015

Note: The table has been annotated to include an additional data column on percentage of total tonnes acquired.

4.4. Alternative port developments in South Australia

As outlined in Viterra's submission, Cargill has recently trialled an export program from SA. The trial relies on using Cargill's upcountry Grain Flow storage network, trucking the grain to port and the use of a mobile ship loader at Inner Harbour.[68]

Viterra also provided information about a second trial also at Port Adelaide, and submitted an article with its initial March submission that suggested EP Grain was contemplating alternative export pathways.[69]

4.5. Containerised exports

In contrast to bulk grain export, containerised exports are not subject to the regulations under the Code. Evidently, container exports use different port infrastructure, and are shipped in smaller quantities. However, containerised grain may also use much of the same infrastructure, such as upcountry storage or transport infrastructure.

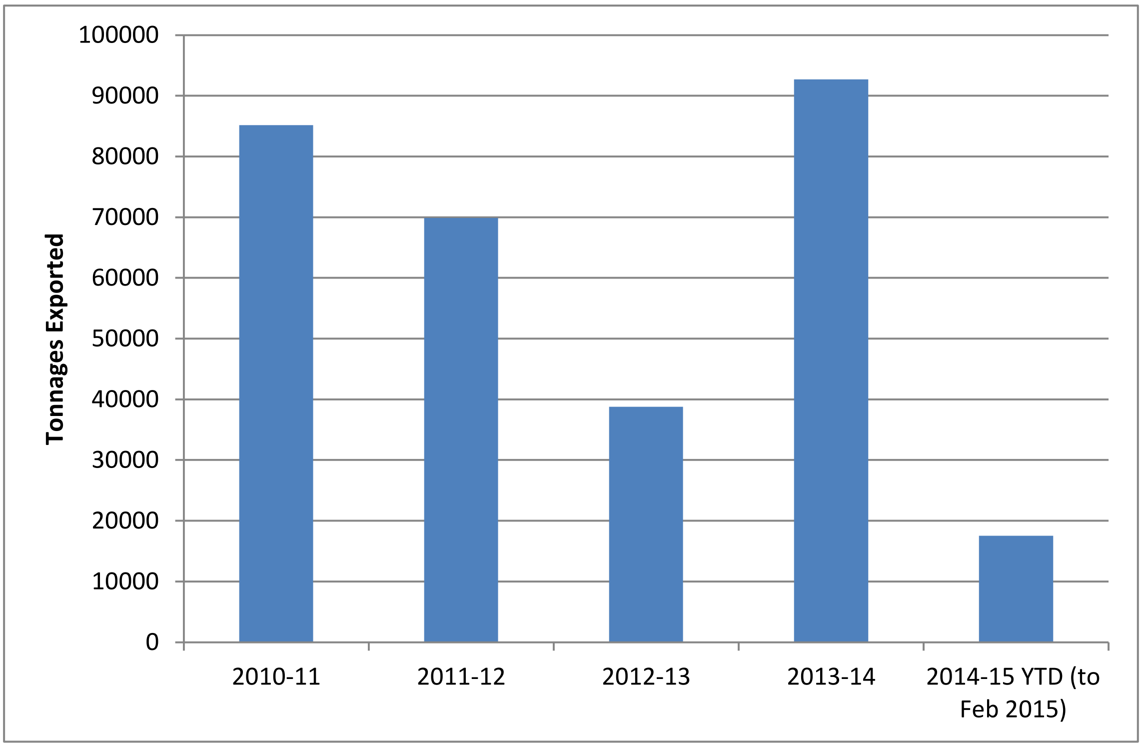
Containerised grain exports provide limited competitive constraint on bulk exports in South Australia. This may increase over time. In South Australia, the use of containers as a means of exporting wheat has fluctuated but not significantly increased overall since 2010 -11from 85,180 tonnes to 92,699 tonnes in 2013-2014.[70] In SA containers are not exported through Viterra's port terminals.

[68] Viterra submission accompanying application to vary Port Loading Protocols, p.4 and Attachment 4.

[69] Ibid, Attachment 4.

[70] Australian Crop Forecasters data.

Chart 4.9: Containerised wheat exports from South Australia



Source: Australian Crop Forecasters (data from 2010-11 to 2014-15).

4.6. Storage and handling services in South Australia

Viterra operates an extensive upcountry network of storage facilities across SA. It is vertically integrated, with a total storage capacity of more than 10 million tonnes.[71][72]

Cargill is the second largest operator of upcountry storage and handling services in SA through its GrainFlow[73] network,. It has sites at Crystal Brook, Mallala and Pinaroo. These sites have rail access. A fourth site at Maitland has no rail access. However Cargill has stated in the ESCOSA rail review that it has had considerable difficulty seeking rail access under the present SA rail access regime.

There are a small number of additional small to medium storage providers.

As noted be AEGIC, the storage network in SA has been designed to “accept large volumes of grain in a very short time during the harvest period.”[74] Consequently:

> [growers] have capacity to store only about 30 per cent of an average harvest and will often store much less than this on-farm with warehouse storage being the major storage used at harvest time. [75]

A further challenge for new entrants in the upcountry market is that:

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[71] Viterra Operations Ltd, “Storage and handling”, < http://viterra.com.au/grain/australia/storagehandling.> (viewed on 30 March 2011).

[72] “Grains in South Australia”, Primary Industries and Regions SA, May 2015, p.4.

[73] GrainFlow is a wholly owned subsidiary of Cargill Australia Ltd. GrainFlow operates a network of 22 storage centers along the east coast and into South Australia, See: “GrainFlow”, Cargill website, <http://www.cargill.com.au/en/products/GrainFlow/index.jsp.>

[74] Dr Peter White, Dr Chris Carter, Prof Ross Kingwell, “The puck stops here! Canada challenges Australia’s grain supply chains”, May 2015, p.29.

[75] Ibid.

"80 per cent of the grain is received into just 20 per cent of sites with the least-used 20 per cent of sites receiving less than one per cent of the grain. [76]

4.7. Transportation in South Australia

4.7.1. Overview

South Australia's grain producing regions are generally located near the South Australian coastline, which means that the distance between upcountry storage and port is relatively short. Consequently it is increasingly common for grain to be moved to export facilities via road transport. While it may have other externalities, road transport in these circumstances can be less expensive and more efficient.

The following section considers:

- the use of road transportation.
- the use of rail transportation, including the current ESCOSA review in rail
- the role of Export Select.

4.7.2. Road transportation

Road transport is typically used by growers to deliver their crop into the Viterra network upcountry. Some growers can deliver direct to their local port.[77] Viterra also contracts with road transport operators to move grain through their system, including from upcountry storage to port.

Delivery by road to port is also an option for exporters. They can deliver from third party storage sites to the ports and/or arrange to outturn from Viterra's storage network and move grain to port directly. However given that most growers deliver into the Viterra upcountry network and Viterra provide a bundled storage, handling and logistics product there is limited incentive and/or opportunity for exporters to make their own transport arrangements.

4.7.3. Rail transportation

Genesee and Wyoming Australia Pty Ltd (GWA), an Adelaide based business formed in 2006, is the primary provider of grain rail freight in South Australia. GWA is a wholly owned subsidiary of Genesee and Wyoming Inc (GWI), a business based in the United States. GWI purchased the rail network in South Australia in 1997 from the South Australian Government, which had made the decision to privatise the network.

There are a number of rail lines which can carry grain under GWA arrangements. These are located on the Eyre Peninsula, north of Adelaide, and in the Murray - Mallee region. Most recently Viterra has announced it will no longer use rail in the Mallee and instead will trucks to move grain from this region to other upcountry sites and/or port.[78]

An Australian Rail Track Corporation (ARTC) controlled interstate line also runs through SA. Access is governed by an ACCC approved access undertaking.

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[76] Dr Peter White, Dr Chris Carter, Prof Ross Kingwell, "The puck stops here! Canada challenges Australia's grain supply chains", May, 2015, p.29

[77] "Grain Delivery", Viterra, http://www.viterra.com.au/storage-handling/harvest-2014-15/grain-delivery-2014-15, (viewed 30 June 2015).

[78] Alisha Fogden, "Mallee rail future in doubt", Stock Journal, 21 May 2015, <http://www.stockjournal.com.au/news/agriculture/cropping/general-news/mallee-rail-future-in-doubt/2732626.aspx> (viewed 26 June 2015).

4.7.3.1. ESCOSA review into SA rail access arrangements

The Essential Services Commission of South Australia (ESCOSA) is conducting a review into the Access Regime that applies to the intrastate railways in South Australia. It has received nine submissions from interested parties including GPSA, Viterra, Cargill and Genesee and Wyoming. Relevant to this draft decision, a range of submissions provided to ESCOSA that highlighted concern with rail access arrangements in SA.

Cargill has storage and handling facilities in SA and has loaded grain onto rail at some of those sites to move it from SA to Victoria using the ARTC network, noting in its submission:

> … we do not operate a service to any SA ports today. In part this is due to the difficulty in operating on the SA rail network.[79]

Cargill submitted six observations or questions:

> 1. GWA provides general information for access seekers, however, a clear rate of charges is not published like other below rail operators. See ARTC or John Holland (page 60).
>
> 2. Closed door discussions on the future of the Pinnaroo and Loxton to Tailem Bend lines, between Viterra and GWA.
>
> 3. Will the maintenance on the lines be dependent upon GWA providing an above rail service on the line?
>
> 4. Perception that the access cost to port can be prohibitive and minimise competition for above rail services.
>
> 5. Previous enquiries for access on GWA controlled network has resulted in prohibited access costs
>
> 6. Last mile at Outer Harbour[80]

GPSA highlights a number of concerns with the current arrangements:

> There has been no additional competition since the ROA Act was introduced in 1997
>
> Cost of grain freight continues to increase rapidly. Location Differentials (LD's) the cost farmers pay to get grain from local silo to port, has increased 19% over the last 5 seasons.
>
> A smaller percentage of SA's grain is transported by rail each season
>
> Reasonable maintenance levels and longevity of this essential service is in jeopardy.[81]

Viterra however notes in its submission to the review:

> Viterra, as an access-seeker under the Act, has been able to commercially negotiate access arrangements with GWA directly for access to the regulated services and infrastructure. These commercial negotiations were successful without the need to rely on the Access Regime under the Act.[82]

Viterra also notes that:

> Compared with road movements, for the majority of Viterra's current business, rail freight currently provides the most efficient logistics solution to manage peak harvest grain receival and export demand. [83]

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[79] Cargill Issues Paper Submission to ESCOSA SA Rail Access Regime Review, <http://www.escosa.sa.gov.au/library/20150407-SARailAccessRegimeReviewSubmissionIssuesPaper-Cargill.pdf>

[80] Ibid

[81] GPSA submission to ESCOSA SA Rail Access Regime Review.

[82] Viterra Issues Paper Submission to ESCOSA SA Rail Access Regime Review, http://www.escosa.sa.gov.au/library/20150407-SARailAccessRegimeReviewIssuesPaperSubmission-Viterra.pdf

[83] Viterra submission to ESCOSA SA Rail Access Regime Review.

Submissions also highlighted the difficulty of keeping grain on rail. Genesee and Wyoming submitted:

> For the most part intrastate rail operates in a highly competitive transport environment. Due to the low tonnages and access to high quality road infrastructure, regional rail as a mode of transport within South Australia, both above and below, is a price taker and must vigorously compete with road transport operators for business on the basis of service.[84]

4.7.4. Export Select

Viterra currently makes available port terminal services as either a stand-alone service - Export Standard, or bundled with Viterra's freight services. On its website, Viterra notes how it:

> … utilises the strength of its supply chain and long-term agreements with road and rail service providers to optimise the movement of grain through our storage and handling network and transport grain to port cost-effectively.[85]

Furthermore it notes how Export Select:

> … ensures timely and efficient movement of grain from up-country sites to port for shipping and is a significant contributor to managing an efficient accumulation and logistics operation in a deregulated environment.[86]

Viterra provide a rebate to exporters that use Export Select. While not guaranteed, use of the Export Select product is more likely to ensure an exporter's grain is received at port on time as per the specifications required. Customers who use Export Select are "are also protected from adverse freight rate movements, as these rates are fixed at the time of transfer"[87]. Historically, utilisation of direct to port access in conjunction with using Export Standard (the stand alone storage and logistics option) has been limited.[88]

[84] Genesee and Wyoming Issues Paper Submission to ESCOSA SA Rail Access Regime Review, <http://www.escosa.sa.gov.au/library/20150407-SARailAccessRegimeReviewIssuesPaperSubmission-GWA.pdf>

[85] "Storage and handling", Viterra Operations Ltd, < http://viterra.com.au/grain/australia/storagehandling.> (viewed on 30 March 2011).

[86] "Export Select Freight Rates", Viterra Operations Ltd, <http://www.viterra.com.au/storage-handling/export-select-rates-2>.

[87] Ibid

[88] Viterra Operations Limited Port Terminal Services Access Undertaking Decision to Accept 29 September 2011, ACCC, p.77.

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

5.1. Overview

This chapter sets out the ACCC's preliminary views on Viterra's proposed variation to its approved capacity allocation system in its port loading protocol, to introduce long term agreements as a means of allocating capacity. Where relevant, the ACCC has drawn on information contained in Chapters 2 to 4 to inform its assessment.

The ACCC's preliminary assessment is set out against the matters in clause 25(3)(a) to (i) of the Code, which the ACCC must have regard to. These were set out in Chapter 1 of this document.

The ACCC has considered several factors together where the relevant matters are closely related and involve similar considerations. For example criterion (a) and (h) are considered together as it is in the interests of exporters that access is provided efficiently, fairly and consistent with the non-discrimination provision.

The ACCC notes that Viterra's initial proposal as outlined in the March protocols received mixed support from stakeholders. Exporters supported the discontinuation of the auction system, but also highlighted concerns or flaws with use of the proposed long term arrangements to allocate capacity. GPSA did not support the proposed long term arrangements proposal at all.

As detailed in Chapter 2, following the receipt of submissions from industry, and after discussion with the ACCC, Viterra developed its amended June protocols. Certain of stakeholders' key concerns, which are explored below, have now been addressed or partially addressed.

The ACCC though does have a number of concerns about the proposal, primarily about the considerable discretion Viterra will have in relation to the allocation of LTC, including the LTC oversubscription process. The release of this draft decision will now provide stakeholders an opportunity to consider the recent amendments and how they will operate in practice.

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

- Raise concerns with respect to allocation of capacity in an efficient, fair and non-discriminatory manner, given the level of discretion Viterra will have to allocate LTC, and raise concerns with regard to the interests of exporters wanting access to port capacity. In particular, the LTC capacity allocation framework preferences larger exporters (including Glencore) to the potential detriment of smaller exporters, although all exporters will have an opportunity to obtain capacity through the STC allocation process.

- Provide sufficient information to exporters, including on the amount of STC available. The ACCC notes Viterra's decision to publish LTC on its website should also alleviate concerns surrounding a lack of information relating to LTC.

- Are likely to provide exporters flexibility to manage their shipping programs. The protocols carry over a number of existing arrangements that operate successfully in the current protocols.

- Are likely to allocate capacity, especially at times of peak use.
- Will be in the business interests of Viterra, by ensuring throughput for five years at its port terminals and along its vertically integrated supply chain.
- Raise potential concerns about the effects on upstream and downstream markets, and the public interest overall. If Viterra allocate LTC in a manner that favours only a few large exporters this could force other exporters to exit the SA grain industry. However the ACCC also notes that Viterra under the protocols will have discretion to allocate capacity broadly and across a range of exporters, which could provide greater certainty to exporters and growers.
- May limit the potential for competition to emerge upstream in storage, transport and handling. Exporters who secure large long term agreements with Viterra may enter agreements relating to upcountry services and/or transport, foreclosing opportunities for new entrants and existing small operators in those markets. However, the ACCC notes the strong market position already held by Viterra in these upstream markets.
- May, in relation to competition in related markets prompt existing or new entrant exporters, who do not receive adequate capacity allocation, to develop alternative export pathways. However, given the extent of Viterra's vertical integration, barriers to entry along the bulk wheat export supply chain are already high in SA, meaning that at least over the short to medium term it is unlikely that any competing port terminal facilities will be developed. The ACCC does acknowledge ad-hoc and temporary alternative export pathways have been trialled in South Australia.
- May assist Viterra to realise greater efficiencies at port overall, and across the existing supply chain. This in turn, should ensure better services, potentially lower costs for Viterra, and possibly additional capacity at port.

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

5.2.1 Overview

This section sets out the ACCC's key findings on the proposal and possible implications of its implementation having regard to the matters set out at subclauses 25(3)(a) and (h) of the Code. The ACCC believe it is appropriate to consider both subclauses 25(3)(a) and (h) of the Code concurrently as it is in the interests of exporters that access to port terminal facilities is provided fairly and consistently in accordance with clause 10 (non-discrimination).The ACCC notes that some matters that are in the interests of exporters may not be relevant under (3)(a), these are also considered below.

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

Under subclause 25(3)(h) the ACCC must consider the interests of exporters wanting access to port terminal services when considering a capacity management proposal.[89] This will involve considering whether, under the new arrangements, exporters will still be able to compete in the grain export and acquisition market on their relative merits. Competition on

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

the relative merits of exporters would be hindered if terms and conditions of access unduly favour one or more exporters over others, thereby distorting the competitive process.

As discussed in greater detail below, public submissions received from exporters during the ACCC's consultation process raised a number of issues concerning access. Some exporters supported the proposal and do not believe their access opportunities will be compromised. However, others submitted views to the contrary. GPSA also expressed concerns about the scope for future competition under the proposed regime. The ACCC notes that stakeholders have not had the opportunity to comment on the revised June protocols.

The ACCC must also consider, whether the capacity allocation system will operate fairly and consistently with clause 10 (non-discrimination) of the Code.[90] This is especially relevant given that Viterra is a vertically integrated terminal operator and exporter (and is dominant across the whole of the bulk wheat export supply chain in SA). This includes through the operation of it associated entity Glencore, to date the largest grain trader in SA.

Viterra therefore has an incentive to favour itself over other exporters at its port terminal facilities. Should Viterra, in the process of allocating LTC, be required to refer to the oversubscription allocation process, it will need to consider a series of factors which large exporters, including Glencore, are best be able to satisfy. For example, Viterra will most likely allocate slots to exporters who can apply for the most amount of capacity, spread across the most number of ports for the longest period of time. In light of the allocation factors, Glencore is likely to continue to be given a substantial proportion of capacity allocated. There have been two small-scale alternative export operations in South Australia in recent times. However, absent significant competition at the port or across the supply chain, Viterra will be unlikely to be sufficiently incentivised to allow third party exporters fair access to its ports, in the absence of appropriate regulatory oversight. The ACCC must accordingly consider if the terms of the protocols support Viterra's adherence to the non-discrimination obligation.

Relevantly, the ACCC's findings and analysis in Chapters 2, 3 and 4 indicates that:

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

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

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

- Customers who export less grain are the least likely to be able to negotiate LTC access. However they may not all seek LTC in the first place (or may only seek small

[90] See cl 25(3)(a) of the Code.

amounts) and can also seek capacity via the STC FIFS process and the secondary market. If an exporter cannot commit to large shipping parcels, they will be less likely to secure meaningful LTC shipping slot allocations. Although they may not be excluded from LTC entirely, it will be up to Viterra to decide which LTC the exporter obtains.

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

Key areas of the capacity allocation system proposed in the protocols relevant to criteria (a) and (h) considered below include:

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

The section concludes with overall preliminary views on criteria (a) and (h).

5.2.2 Broad support for long term capacity agreements

Introduction

The ACCC has previously recognised the potential benefits of long term agreements to both port terminal service providers and exporters, and that these types of arrangements may be appropriate in some cases. Potential benefits of long term agreements can include greater certainty for exporters in planning their long-term grain export programs and assist the infrastructure owner with supply-chain planning.[91]

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

> (a) greater certainty in planning longer-term export programs;
>
> (b) a greater ability to build long term relationships with overseas customers;
>
> (c) a greater ability to align booked capacity more closely with supply chain planning; and
>
> (d) creation of a commercial environment that encourages investment in, and expansion of, infrastructure. This, in turn, can facilitate improvements in the efficiency of port terminal facilities and the availability of additional capacity.[92]

Submissions and analysis

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

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

[92] Viterra submission p.1.

> Feedback from Viterra's clients has overwhelmingly indicated that they desire the certainty of longer-term contractual arrangements and the flexibility of commercial negotiations in preference to the current auction system.[93]

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

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

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

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

> LTC will allow major exporters to have a similar risk profile for their trading activities as if they owned the facilities, without having to duplicate systems that are already in place and large enough to service the Australian grain industry. [94]

As noted above, the ACCC has recognised that there are a range of potential benefits for exporters in moving to long term agreements. However, under the proposal, not all exporters are equally likely to realise the benefits of long term agreements. Such an outcome is perhaps foreshadowed by the varying levels of support noted by a range of exporters.

As outlined in Chapter 4, exporters are very critical of the auction system, especially the system of premiums and rebates. If long term agreements were introduced, exporters would not be subject to this cost of premiums and associated risks. However, the ACCC also notes that long term agreements themselves are not without risk for third-party exporters due to the 'take-or-pay' nature of the agreements.

As noted in previous chapters, exporters' support for the proposal is not shared by the grower group GPSA. The GPSA submits that:

> The Glencore/Viterra Application for a capacity allocation system introducing long terms agreements (LTA'S) is fundamentally anticompetitive and proposes no cost mitigation or reduction to consumers.[95]

More broadly, the GPSA in the submission outlines its concern about the SA supply chain as a whole. The GPSA believes any decision on the long term agreements should be postponed until recommendations from the 2012 SA Select Committee on the Grain Handling Industry are addressed.[96]

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[93] Ibid.

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

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

[96] Ibid.

Conclusion

The ACCC's preliminary view is that a capacity allocation system using long term agreements can provide a range of potential benefits to all stakeholders and can thereby be said to be in the interests of exporters. However, the ACCC notes that there are also risks associated with the LTC allocation process (as discussed below). Exporters have not had the opportunity to comment on the June protocols and/or the decision by Viterra to suspend the LTC allocation process. The ACCC is seeking exporter's final views on the appropriateness of accepting the proposal.

Given that they are a further step removed in the supply chain, it is less clear what benefits the proposal may provide to growers. The ACCC notes the key concerns highlighted by growers. The possible benefits of the proposal for growers are explored in more detail in the decision below, and separately in relation to the other matters (g) and (e).

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

Viterra has now proposed several amendments to the initial proposal, contained in the June protocols. These may alleviate the specific concerns expressed by some exporters and growers about the LTC allocation process.

5.2.3 Long Term Capacity

As set out in Chapter 2, the long term capacity (LTC) allocation process is negotiation based. Subject to exporters agreeing to reduce their interest in a particular slot, oversubscribed capacity will then be allocated to exporters who can make the biggest commitment to shipping from SA.

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

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

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

5.2.3.1 Five year term

Introduction

The proposed LTC allocation process will allow exporters to seek capacity for a period of two to five years. Exporters can also request LTC throughout each year, subject to certain timing parameters relating to STC.

In comparison, the current auction system commences annually in May. Capacity is made available in several tranches: the harvest period (October to January) and the non-harvest period (February to September). A secondary FIFS allocation is used for residual capacity.

In having regard to 25(3)(a) and (h), the ACCC must consider how the prospect of up to five year term LTC agreements may affect all exporters' ability to seek LTC capacity.

Submissions and analysis

Viterra has argued that the proposal overall is very flexible and caters to the needs of a range of exporters. Viterra notes that exporters can apply for LTC agreements for between two and five years.

In submissions some stakeholders address the length of term specifically and/or the effect having a term of up to five years long on the allocation process as a whole.

Noble submits:

> The 'term' of the agreement should be based on a fixed three (3) year rolling term that provides all exporters adequate opportunity to participate. A flexible duration of two (2) to five (5) years only increases the subjective assessment surrounding the final allocation of shipping capacity.[97]

ADM highlight issues surrounding commercial negotiation and long term agreements:

> ADM support commercial negotiations as a means of limiting fobbing costs but the commitment to long term capacity precedes those commercial negotiations … It would be preferable to know the exact terms of any LTA prior to requesting capacity, being that the outcome of any commercial negotiations could have a material impact on the client's appetite for volume and for specific ports/slots in South Australia.[98]

Several exporters, including those with port infrastructure who also offer long term agreements, support Viterra's proposed term:

- CBH submits that '…the proposed duration of LTAs… caters to exporters varying needs due to their different customer bases and operational requirements".[99]
- GrainCorp indicated it is comfortable that the agreement provides "ample flexibility (through term lengths and the no minimum tonnages, terms or port terminal requirements)".[100]
- Emerald also expresses broad support for the proposal and the need for long term certainty.[101]

GPSA believes it is probable that a large proportion of total LTC will be taken up in the initial allocation process and that the protocols will "limit the scope for new entrants to enter the market". GPSA submits that:

> 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.[102]

The GPSA submission notes that "it is very possible new export companies will arise"[103] and queries if the protocols can accommodate this outcome.[104]

Some larger exporters have also stated that a five year agreement is not consistent with their risk profiles, especially without scope to adjust capacity commitments where supply is

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[97] Noble submission in response to ACCC Issues Paper, p.2.

[98] ADM submission in response to ACCC Issues Paper, p.3.

[99] CBH submission in response to ACCC Issues Paper, p..2

[100] GrainCorp submission in response to ACCC Issues Paper, p.2.

[101] Emerald submission in response to ACCC Issues Paper, Bunge submission in response to ACCC Issues Paper.

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

[103] Ibid, p.10.

[104] Ibid.

not sufficient in the market. Both CBH and GrainCorp query what scope there is under the long term agreements to manage periods where there is constrained supply.[105]

The ACCC notes also that the wheat industry in Australia has changed significantly over the last five years, and this may discourage exporters from committing to five years of capacity on a take-or-pay basis. For example, in the past five years, there has been new port developments, new exporters, expansions in upcountry storage, growth in container exports, a shift to the use of road transport and changes to government regulation of bulk wheat exports.[106]

Conclusion

The ACCC has previously expressed concern about the term of agreement in relation to other port operators' long term agreements. GrainCorp decreased its initial five year term to a three year proposal term following stakeholder submissions that a five year term would create a barrier to entry for small to medium exporters looking for growth opportunities.[107] Also the ACCC draft decision to approve CBH's long term proposal (subsequently withdrawn) incorporated three year agreements.[108]

A commitment to a five year term is a significant proposition for any exporter (albeit with the benefit of a corresponding increase in certainty). A five year term has some risk for exporters given the challenges of exporting from SA (including the risk of drought) and the potential for change in the Australian industry. A commitment to a five year term may be especially difficult for small to medium exporters.

The ACCC considers that the prospect of a LTA with a five year term will allow some exporters to realise the benefits of long term certainty over an extended duration. However, exporters who miss out will equally be disadvantaged in the South Australian market over an extended duration.

The ACCC believes a five year term for the proposal may be too long if in practice it results in the allocation of meaningful capacity to a few very large exporters. The ACCC believes that large exporters with historical shipping activity from SA are most likely to secure LTC sought. This is because, as noted below in section 5.2.3.2, the oversubscription process favours larger exporters who are able to seek larger amounts of capacity, over more ports or months, for a large number of years. Where larger exporters will be more able to commit to a five year term, this will advantage them in the oversubscription process. While exporters are able to apply for LTAs of between two and five years, the ACCC notes that the oversubscription process will encourage exporters to apply for longer terms.

Given that Glencore is the largest exporter from South Australia, and hence is best positioned to apply for LTA capacity, it is likely that Viterra will allocate Glencore the maximum allowable premium capacity per port, per quarter for premium slots, in the case of oversubscription. This will have the effect of limiting overall the amount of LTC that will be available to other exporters.

Such an outcome will be at the expense of new entrants and smaller exporters, which may be important for facilitating competition in the bulk wheat export industry.

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[105] See CBH submission in response to ACCC Issues Paper, GrainCorp submission in response to ACCC Issues Paper.

[106] See AEGIC report "The Cost of Australia's bulk grain export supply chains' and ACCC determinations on Victorian port terminal service exemptions 2015.

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

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

That said, the ACCC considers that the term cannot be considered in isolation. In particular, the ACCC considers that it needs to consider the term in light of the process used for allocation of long term capacity (as discussed at 5.2.3.2). The ACCC notes that the five year term of the proposal may have the effect of entrenching a particular market structure for a long period of time.

The ACCC notes that reducing the term of the proposal (for example allowing three year contracts only) would resolve many of the concerns outlined above. As noted above both GrainCorp and CBH put forward three year maximum terms in proposals to the ACCC (although CBH has subsequently signed five year agreements in an unregulated environment). In relation to this proposal, Viterra could allocate LTC for the period 2015/2016, 2016/2017 and 2017/2018.

A shorter three year maximum term may allow more exporters to compete for key LTC shipping capacity. It is more likely that a greater proportion of exporters would be willing to commit to an agreement of less than five years. In turn this would have a positive effect on competition in the related grain acquisition market and therefore be in the interests of growers. The ACCC notes that a reduction to a three year term compared with a five year term is likely to be of greater benefit to exporters than to the infrastructure owner.

Three year long term agreements would also provide the ACCC and the industry as a whole the opportunity to revisit this process in a more timely manner, rather than entrench a potentially uncompetitive outcome for five years. The ACCC notes that exporters have expressed support for long term agreements, but at the same time expressed, both in submissions and in discussions with the ACCC, several concerns with the model proposed by Viterra. A three year term would allow the system to be reviewed in a more timely way. The ACCC also notes that a review of the Code is to commence no later than 30 September 2017.[109]

As noted in Chapter 3, at the time of Viterra's introduction of the auction system, the ACCC noted that the system was new and that a review may allow for any concerns to be addressed. The Viterra-led review process did identify a series of concerns, although many of these were not addressed by Viterra.

With this in mind, the ACCC is seeking views in response to this draft decision from exporters as to the extent of their support for Viterra's LTA proposal. This includes the risk that, as a consequence of the five year maximum term, a number of exporters may not be able to develop applications that obtain any significant LTC, and that much of the long term capacity could be distributed between two or three exporters. Furthermore, all exporters, including those who receive very large LTC allocations, will all compete vigorously for STC.

5.2.3.2 Oversubscription allocation process

Introduction

As set out in Chapter 2, the long term agreement proposal caters for an allocation process in the case of the likely oversubscription of LTC. Historical shipping data suggests this is more likely to occur for shipping slots at Port Lincoln and the Port Adelaide (Inner and Outer Harbour) across the period of January to June.[110]

In the event of LTC oversubscription, Viterra will apply a decision making process that culminates in it exercising discretion as to the allocation of the oversubscribed LTC shipping

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

[110] As noted in Attachment A at p.96, shipping data relating to Port of Adelaide (Inner and Outer Harbour) should be considered in conjunction with each other.

slots. Given the oversubscription allocation framework, this decision making process could be used to allocate the majority of the LTC available.

Submissions

The following submissions discuss the oversubscription process, the level of discretion Viterra will have under the protocols and the level of uncertainty surrounding how overall LTC allocation process will operate.

Quadra expresses the concern that under the proposed protocols "The market is relying on the BHC being completely objective in fairly awarding export stem in over-bid months (Jan-Mar period)."[111]

Noble queries how historical exports will be taken into account, noting that:

> … under clause 3.6 point g (vi) allows Viterra to review in respect to the ability to accumulate grain at the respective Port which ultimately underpins bulk exports. … The subjective measurement on allocation of capacity does not provide confidence to the participant that largely remains on historical performance, where capacity was awarded to those under auction with the deepest pockets …[112]

AGG also submits that "there is too much discretion on how Viterra can allocate oversubscribed capacity. Certainty and transparency is required for fairness."[113]

GPSA submits that the LTC allocation process is "Unlikely to be fair and definitely not transparent. All negotiations are behind closed doors and only open to the entire market after the negotiations and arrangements have been concluded."[114]

GPSA also argues that the "discretion afforded Glencore/Viterra is extraordinarily broad" and argues the allocation process will benefit:

> Large incumbent exporters e.g. Glencore… These allocation principles are subjective, lack transparency and favour a reduction in competition.[115]

Avant Agri submits that the proposed system will not be fair unless it is modified and submits that the 40 and 50 per cent caps are too high.[116]

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

ACCC analysis

The ACCC considers that the main issue in relation to the LTC oversubscription allocation, process, having regard to cl 25(3)(a) and (h), is how exporters will need to compete for oversubscribed LTC, and the process that Viterra will then use when considering how to allocate that oversubscribed LTC. The length of commitment, amount of total capacity sought and spread of capacity across ports and months will be key factors Viterra will consider when allocating oversubscribed LTC.

The ACCC considers that the largest incumbent exporters (including Glencore) will find the proposed LTC allocation process most aligned to their existing approaches to shipping from SA. As discussed in Chapter 4, Glencore, CBH, Cargill and ADM have all executed large shipping programs and may be well poised to satisfy the LTC oversubscription capacity

[111] Quadra submission in response to ACCC Issues Paper.

[112] Noble submission in response to ACCC Issues Paper, p.3.

[113] AGG submission in response to ACCC Issues Paper, p.1

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

[115] Ibid.

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

allocation criteria and related decision making factors set out at clause 3.6(g) of the protocols.

Some large exporters can be confident that they can consistently accumulate and export large tonnages from SA, and through the LTAs could do so at a lower cost and risk than the current auction mechanism. Given this, the ACCC considers that large exporters will seek premium slots across preferred ports for five years. To do this, they may need to seek and commit to other less favourable shipping positions, as per Viterra's oversubscription allocation criteria at clause 3.6(g). Therefore it is probable that a large amount of LTC capacity will be allocated during the first LTC allocation process, especially for the first two years.

The ACCC notes that the five year term is a key factor in determining who receives the best LTC allocations under the provisions at clause 3.6(g) of the protocols. Equally, as discussed above in 5.2.3.1, the five year term may have the effect of entrenching for a long period the particular market structure that Viterra will effectively have to determine in the case of LTC oversubscription.

The ACCC is also aware that large exporters may be placed in a position to secure additional LTC via the initial LTC allocation process greater than their own expected needs. This is because the larger an exporter's application the more likely they will be successful in securing capacity. As noted above, securing LTC will be less costly and carry less risk than auction capacity. Accordingly larger exporters can afford to take advantage of this process where they will have an advantage ahead of those seeking less overall capacity. 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.

Against this, the take-or-pay nature of the contracts may limit the incentive of larger exporters to effectively overbid for capacity. However, this will not be a significant disincentive for Glencore given its vertical integration with Viterra. The ACCC notes that Viterra has included a range of safeguards to prevent such behaviour occurring including the use of port capacity cap thresholds, transparency measures and the scope for an audit to be conducted.

The ACCC also considers that there is a potential impact from the oversubscription process that will tend to encourage exporters to only apply for premium capacity, due to the binding nature of all LTC applications. Viterra will initially allocate only capacity where there is no oversubscription, before the negotiation process and then deciding on the allocations in the case of oversubscription. This means that, under the current proposal, an exporter must risk securing the less favourable shipping slots while missing out on the oversubscribed preferable slots at the more desirable port terminals. This is because, in the case of oversubscription, it will be larger exporters who can more easily meet the requirements in clause 3.6.

This is true even if most exporters recognise that a port terminal service provider will want shipping distributed at its ports across the year and even if many exporters will seek to develop a shipping program includes a range of shipping slots across a year. This impact also tends to lead to better outcomes for larger exporters at the expense of smaller exporters.

With this risk in mind, exporters would be best placed to only apply for capacity that is likely to be oversubscribed. In this situation, Viterra would be obliged by the protocols to negotiate with an exporter and see what shipping slots would be most suitable for them, without the obligation or risk that they would only secure and be locked into the less attractive shipping slots.

Conclusion

The ACCC's significant concern with the oversubscribed capacity allocation process is that it appears to overly favour larger exporters and thereby reduce the likelihood that other exporters can secure LTC over a shorter period of time.

In conjunction with the five year term, this may exclude medium to smaller exporters from meaningfully participating in the industry for an extended period of time. Such an outcome raises issues when considering cl 25(3)(a) which requires the ACCC to have regard to whether the capacity allocation proposal is consistent with the non-discrimination provisions in cl 10 of the Code, as it is probable that Glencore will secure the maximum allowable LTC.

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

Under the current system, exporters also have the opportunity to assess their participation in the SA market on an annual basis and/or do not face the prospect of being excluded from the market for at the very worst 12 months. Under Viterra's proposal, an exporter may be excluded from shipping under a LTC agreement for five years. Their only avenue of shipping would then be subject to their ability to access STC via the FIFS system or on the secondary market.

In part the ACCC's concern on term and the related concern regarding term and the LTC large exporters obtain are addressed through the proposed system of caps on the LTC initial allocation process, which is addressed below at section 5.2.3.4.

In conclusion, the ACCC is seeking views on whether the protocols provide sufficient safeguards to ensure all exporters cannot only apply for LTC in a flexible manner, but also secure a meaningful allocation of LTC. This information will also inform the ACCC's consideration of the proposal under matter 25(3)(c).

5.2.3.3 Long term capacity allocation caps

Introduction

Under the March protocols no single exporter can acquire more than 50 per cent of LTC at any port per quarter and no more than 40 per cent per port per quarter at two premium ports (Outer Harbour and Port Lincoln) for the period January to March. There remains scope for the initial LTC allocation to exceed the 40 per cent and 50 per cent caps for a range of allocation and operational reasons.

The protocols also provide Viterra discretion to allocate oversubscribed LTC in accordance with criteria that preference the largest exporters who are able to make the largest commitments. Viterra will have discretion to allocate LTC capacity, including premium capacity, between a few large exporters, including Glencore.

In response to stakeholder concerns, in the June protocols Viterra extended the 40 per cent cap on initial LTC allocation to include the April to June quarter at Port Lincoln and Outer Harbour.

Though as set out in Chapter 2, the ACCC notes that Viterra has also scheduled a series of shutdowns across all of its ports during the Q2 period. This has reduced the amount of LTC available at this typically peak period of shipping.[117]

Submissions and analysis

The March protocols identified peak shipping period occurring across the first quarter of the year. However several submissions note that peak shipping occurs across a longer window. Noble references a "peak demand period of January to May".[118] As illustrated in chapter 4 in the case of Port Lincoln historical shipping data suggests that the peak shipping occurs between January and June, usually from February to May.

On the caps threshold level, Noble support caps on applicants within peak periods and deep sea Ports, and submits:

> Given the likely high concentration of demand within these periods, we would proposed such caps be reduced to 33% of capacity for Outer Harbour and Port Lincoln for the long term capacity made available during the peak demand period of January to May annually. As currently proposed under the framework two (2) exporters could acquire upward of 80% of the available long term stem over the period of January to March. This potential reduces competitive forces at the farm gate in the peak demand period.[119]

GPSA submitted that the 50 per cent cap is not appropriate, stating that "… the risk is only a very few exporters would be able to secure meaningful capacity.[120] GPSA also submits the 40 per cent arrangement is not appropriate and note:

> It is highly likely 80 percent of this prime capacity will be taken up by the largest incumbent organisations for the entire five years immediately, effectively reducing competitive pressures for grain from farmers for half a decade. [121]

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

- goes against the intent of the legislation;
- could mean that potentially 2 exporters could control initial capacity;
- could create/increase oligopolistic behaviour;
- could create less completion for grain and thus reduce grower returns; and
- would increase barriers to entry. [122]

Avant Agri references a cap of 30 percent or less is sufficient for initial LTC capacity, noting that exporters then have access to STC. Such arrangements will allow more exporters to commit to LTC.[123]

[117] Long Term Agreement Shipping Capacity Notice, Viterra, 12 June 2015.
[118] Noble submission in response to ACCC Issues Paper.
[119] Ibid, p.3.
[120] GPSA submission in response to ACCC Issues Paper, p.9.
[121] Ibid.
[122] Avant Agri submission in response to ACCC Issues Paper, p.10.
[123] Ibid.

It was noted in the Issues Paper that Viterra will be able to allocate LTC between a few exporters. Where there is a 50 per cent cap threshold LTC could be allocated between two exporters. It would be expected that one of these would be Glencore, Viterra's associated entity and the largest SA exporter.

In addition to Glencore, there are on average five exporters who in total export the majority of the crop each year, though the composition of the five can vary year to year. Some exporters may also focus their shipping program at certain ports, and so in aggregate may not be in the top five but still be dominant within certain catchment areas. Some export from certain ports more than others. Such exporters would best satisfy the oversubscribed capacity allocation process at clause 3.6 (g). Whereas smaller exporters and exporters who export smaller amounts will not be in a position to easily satisfy the oversubscription criteria.

As noted above, Viterra has amended the protocols to reflect the level of increased demand for shipping slots at the two key ports. At Port Lincoln and Outer Harbour from January to June, per quarter, per port, Viterra now could not allocate all the LTC between two exporters. In practice this will mean Viterra can only allocate up to 40 per cent of the LTC per quarter per port to Glencore in those quarters.

While the extension of the 40 per cent cap to the second quarter will increase the likelihood of competition between exporters upstream and downstream, there is still likely to be considerable competition for LTC at Port Lincoln and Outer Harbour. The shipping slots may still be heavily oversubscribed. This will have implications on the level of oversubscription for STC slots at these ports.

The level of overall oversubscription for LTC is difficult to quantify. However the ACCC notes that:

- On average 15 exporters participate in the SA market each year, though not all exporters participated in the auctions, and many of these exporters have exported relatively small amounts of grain.
- Many exporters have noted that their shipping programs have been constrained by the risks associated with the auction system.
- Port Lincoln and Outer Harbour are the most sought after ports to ship from, especially across the peak shipping period. It is therefore probable that as demand overall increases (as identified above) so too the likelihood that the shipping slots at these ports will be oversubscribed, at least for the most desirable time periods.

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

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.

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

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

In addition to Viterra's rationale, the ACCC acknowledges that concentrating LTC allocation strictly in accordance with the cap thresholds may not be the most desirable position for Viterra to adopt. For example, one of the key criteria Viterra will consider when allocating oversubscribed capacity is "Viterra's overarching objective of maximising the amount of long term capacity allocated and maximising the efficiency of the supply chain"[124] As noted previously some exporters concentrate their export tasks out of certain regions. To realise this objective, and to avoid potential risk of financial trouble for any given exporter, Viterra would be prudent to allocate capacity across more than just few exporters.

The ACCC also notes that the current auction system does not impose caps on the amount that a particular exporter may obtain. Accordingly, it is possible that the existing auction could allow one exporter to obtain all of the available capacity if it bids more than all other exporters. However, equally the auction allows all exporters to at least start on a nominally even footing in obtaining capacity.

Conclusion

Viterra has considerable discretion with respect to how oversubscribed LTC is allocated. In response to ACCC and stakeholder concerns, the June protocols now require Viterra to distribute the most valued capacity at Outer Harbour and Port Lincoln across the first six months of the year between at least three exporters – with two exporters being able to get up to 40% of LTC. However the cap will prevent Viterra allocating LTC at the aforementioned ports to Glencore and just one other exporter. At less popular ports, or at other times of year, Viterra can allocate capacity to just two exporters.

In practice it may be unlikely that Viterra seeks to concentrate capacity in two or three exporters. This is because it may be a commercially risky position for Viterra to adopt, and Viterra will have incentives to secure throughput and commercial relationships with a range of exporters.

Ultimately the extent of oversubscription, and the prospect of Viterra allocating strictly according to the cap thresholds, will be contingent on:

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

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

Overall, the ACCC's preliminary view is that, even taking the above factors into account, the 40 and 50 per cent caps on LTC still raise some concerns, including in relation to ensuring the capacity allocation system is consistent with cl 10 of the Code and the interests of exporters. The ACCC considers that it particularly has concerns given that an exporter with LTC can then increase its market share via other allocation processes such as the FIFS process or the secondary market. Previous long term agreements in other jurisdictions have required exporters to have a greater spread of capacity across the year, and increase the opportunity for competition between exporters upstream. There remains the significant probability that, under the protocols, large marketers, including Glencore, will cement and most likely expand their market share across five years.

[124] Viterra Submission accompanying application to vary protocols, p.10.

The ACCC recognises that an appropriate capacity allocation system must balance the interests of all stakeholders, including the infrastructure owner and dominant exporters. The ACCC must balance both these interests under s.25(3). The outcomes listed above can have a positive impact on the industry overall. For example long term agreements should allow Viterra and other large exporters the opportunity to plan and invest in SA.

The ACCC also notes that Glencore has in any case managed to achieve around 40 per cent of capacity under the auction system, and that there are no caps on the potential capacity shares of any given exporter under the auction system.

However, such outcomes as those listed above should not come at the expense of opportunities small exporters and the prospect of competition in related markets.

The ACCC notes that Viterra commenced the process of allocating LTC. As noted in Chapter 2, on 30 June 2015, Viterra announced it would effectively suspend the process. It would have been of interest to the ACCC to see how Viterra chose to exercise its discretion in relation to the LTC allocation process.

The ACCC is seeking additional views from stakeholders on whether the amended cap thresholds will address concerns of consolidation in shipping and the potential foreclosure of some exporters from the SA industry. This information will also inform the ACCC's consideration of the proposal under matter 25(3)(e) and (g).

5.2.3.4 Long term capacity payment terms

Introduction

The March protocols contain the following reference to payment terms.

> 3.9 (a) Unless the Long Term Agreement provides otherwise, Clients will be required to pay the booking fees specified in the Pricing Document at the time specified in the Pricing Document.[125]

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

Submissions and analysis

The Code does not provide a specific role for the ACCC with respect to determining price in relation to access. However in this instance, uncertainty about the timing of charging has an impact on the interests of exporters, in particular because it may affect which exporters will have the ability to apply for LTC. Certain exporters may not have the ability to pay the entirety of five years booking fees up front. It is therefore appropriate that the ACCC consider payment terms (and their ambiguity) as an access issue.

ADM query with reference to pricing:

> .. as to how Viterra will ensure costs are capped of minimised over the life of the agreement. If exporters commit to multi-year agreements in good faith and, in part, under the notion of supporting investment in infrastructure, there has to be some financial safeguard in future years for the industry participants.[126]

As included at Chapter 2, Viterra has included in the June protocols several amendments to this provision. The amendments are designed to clarify any uncertainty, and specify that all exporters will have the opportunity to provided booking fees on an annual basis, unless otherwise agreed to with Viterra.

[125] Viterra March protocols, p.17.

[126] ADM submission in response to ACCCC Issues Paper pp,.3-4.

Conclusion

The March protocols had limited details about payment terms. It would not have been clear to exporters what was required with respect to pricing. This would have been especially the case for smaller exporters, who are typically more sensitive to matters concerning price and timing of payments. In turn this may have affected how they chose to participate in the LTC allocation process and the industry overall.

The ACCC supports the amendments proposed by Viterra and seeks the views of industry on this amendment.

5.2.3.5 Amount of long term capacity available

Introduction

Under the current auction system 7 million tonnes of capacity was made available annually, with scope for additional capacity to be created. This was against the backdrop of a total annual average crop production of 7.63 million tonnes.[127]

For example, Viterra's auction catalogue for the 2014-15 shipping year made available 4,635,000 tonnes of capacity in the non-harvest auction and 2,365,000 tonnes of capacity in the harvest auction. The protocols also allowed scope for additional capacity to be created. .

The March protocols did not include any reference to how much LTC Viterra will make available. The protocols only require Viterra to identify 15 days before negotiations commence how much initial LTC will be made available.

The ACCC notes Viterra did not amend the June protocols to include a specific reference to how much LTC will be made available. Instead it published on its website, and communicated directly with exporters, the details of the amount of LTC available across the five years,. As noted in Chapter 2, Viterra has indicated it will make 5,490,000 tonnes available LTC and 2 million tonnes available STC.

Submissions and analysis

Several submissions highlighted the uncertainty regarding the amount of capacity Viterra will make available, and what the ramifications may be for the export market and competition along the supply chain generally. In addition to matters 25(3) (a) and (h), this is also relevant to the discussion on matters in clause 25(3) (e) and (g).

Australian Grain Growers (AGG) submits:

> There is no definition of total capacity or Long Term Capacity, at least in tonnage terms. Conceivably Long Term Capacity (LTC) could exceed total capacity leading to oversubscription.[128]

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

[127] GPSA submission to ESCOSA Rail Access Review.

[128] AGG submission in response to ACCC Issues Paper.

Disclosing the amount of capacity available also benefited growers, in that it provided some insight into how much export capacity Viterra would offer, how much was taken up via each auction and what residual amount of capacity would be made available via the FIFS processes. The GPSA was of the view that "the Auctioning of capacity is on currently available information the most transparent and fair mechanism for allocating port capacity."[129]

As noted above, Viterra published on its website, and communicated directly with exporters, the details about the amount of LTC it intends to make available across the five years,. Compared to the level of information at the time of the publication of the March protocols and the Issues Paper,   exporters and growers now have considerably more information about the amount of LTC to be offered.

Viterra's decision to publish LTC may accordingly alleviate some of the concerns raised with the ACCC. Now that the initial LTC is known, exporters may find greater comfort in the proposal and the prospect the Viterra can provide sufficient LTC capacity to satisfy their demands. The ACCC welcomes views on this matter.

The ACCC acknowledges that not all exporters will want a large amount of LTC. Certain exporters will only seek capacity via the STC process. That said, the ACCC considers that it was important that the amount of LTC was published to allow these exporters to gauge the likely level of STC demand.

The level of detail Viterra has provided should also provide exporters an opportunity to consider how Viterra could allocate LTC in accordance with the revised caps thresholds.

Conclusion

For the following reasons it is important for the ACCC and industry to understand how much long term capacity Viterra will make available:

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

Viterra has not provided greater certainty in the June protocols on the amount of LTC available. However its publishing the initial LTC o should address most of the concerns raised by stakeholders and the ACCC.

The ACCC is seeking stakeholder views on whether the approach to publishing the amount of initial LTC is appropriate.

5.2.3.6 Overall Conclusion on Long Term Capacity

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

Those systems included a range of measures to ensure all exporters had scope to participate in the market via entering a long term agreement and/or via access to short term

[129] GPSA submission in response to the Issues Paper, p.3.

capacity. In response to oversubscription both models had safeguards in the way that oversubscribed capacity was then allocated – prorating in the case of GrainCorp or reversion to an auction allocation in the case of CBH.

Having regard to the matters set out at cl 25(3) (a) and (h) of the Code, and considering stakeholder views, the ACCC has identified both a range of potential benefits and concerns with the Viterra long term agreement model.

Key benefits include:

- There are few LTC application parameters or prerequisites, thus more exporters have scope to apply for and potentially acquire LTC than under the current auction system.
- The five year term will provide certainty for LTC exporters, and have a range of potential positive flow on effects for growers.
- LTC agreements are less costly for exporters than the auction system.
- Greater certainty for industry as a whole, including in upstream markets. This may facilitate additional investment along the supply chain.

Key risks include:

- Viterra, in light of the considerable discretion it will have under the protocols, may entrench a less competitive market environment by allocating LTC only to a few large exporters.
- That Viterra may allocate Glencore the maximum possible LTC as allowed in the protocols, which may raise concern under the Code in relation to the non-discrimination obligation.
- That export may be consolidated, limiting competition in related markets upstream and particularly the grain acquisition market.
- That not enough information will be available to allow exporters and growers to form a considered view of the proposal and/or their likely involvement in the proposed capacity allocation systems.

Overall, with regard to the LTC allocation process, the June protocols address only in part a number of the concerns identified above.

The prospect that Viterra will allocate a significant proportion of LTC capacity from Viterra to Glencore remains a significant concern. The ACCC notes that this issue is also addressed further below in relation to the proposed independent audit function.

5.2.4 Allocation of Short Term Capacity

As set out in Chapter 2, the STC allocation process is based on the existing FIFS system used to allocate residual auction system capacity. Exporters are familiar with the FIFS system, which is currently used by Viterra to allocate residual auction capacity.

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

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

- that there is broad support for First in First Served
- that the STC distribution across ports is uncertain under the March protocols, but has been partly addressed in the June protocols.
- that amount of STC may be too low overall, subject to how LTC is allocated between exporters.

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

5.2.4.1 Broad support for First in First Served

Introduction

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

Submissions and analysis

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

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

> The market is relying on the BHC being completely objective in fairly awarding export stem in over-bid months (Jan-Mar period).[130]

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

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

Conclusion

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

- allow a broad cross section of exporters, subject to their own shipping needs, the opportunity to apply for shipping slots on a nominally level playing field (although not all exporters will necessarily obtain FIFS shipping slots).
- not rely on Viterra making decisions relating to STC capacity
- likely provide a broad range of exporters some amount of STC

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

- facilitate access for a range of exporters
- represent a low barrier to entry to the STC market
- allow exporters to respond flexibly to a dynamic market within a short timeframe
- provide exporters with LTC the scope to top it up.

5.2.4.2 Distribution of STC across ports

Introduction

Viterra has allocated 500,000 tonnes per quarter, or two million tonnes annually, to STC. The March protocols indicated this amount would be allocated "reasonably" per port per quarter. The clause is outlined below:

> 3.12 Subject to clause 14.2(a)(ii), Viterra will make at least 500,000 tonnes of Short Term Capacity available in each Quarter in aggregate reasonably spread across all Port Terminals for Booking on a first-in-first-served basis.[131]

As detailed in Chapter 4, certain shipping slots at certain SA ports are valued more highly by industry than others. A shipping slot at a deep sea berth provides an exporter great scope to realise a range of efficiencies in accumulation, shipping and marketing. Equally, access to these shipping slots minimises risk relating to two port loadings (including repeated needs to pass survey and demurrage). It also avoids the inefficiencies exporters encounter when accumulating for export at a smaller port.

In the June protocols, Viterra has made a number of revisions to the relevant clauses.

> 3.12 (b) Viterra's intention is that the Short Term Capacity referred to in clause 3.12(a) will be spread across all Port Terminals broadly in line with the proportion of Capacity offered at Auction at each Port Terminal during the 2014/2015 Year. For operational reasons, this cannot precisely reflect the proportion of Capacity offered at Auction at each Port Terminal during the 2014/2015 Year. However, Viterra's intention is that it will broadly be in line with this proportion.[132]

In addition, the protocol states that:

> 3.12 (c) If in any Quarter the proportion of Short Term Capacity offered at a particular Port Terminal varies from the amount offered at that Port Terminal in the corresponding Quarter of the previous Year by more than 10%, Viterra will publish reasons for that variance on the Viterra Website.[133]

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

Submissions and analysis

Stakeholders noted the lack of clarity in the term "reasonably" in relation to the allocation of STC, as set out in the March protocols.

Australian Grain Growers (AGG) submits:

> There is a lack of certainty on how Viterra allocates 500,000 mt per quarter of STC – "spread reasonably across all port terminals". Conceivably Viterra can allocate this capacity to the

[131] Viterra March protocols.

[132] Viterra June protocols, p.18.

[133] Ibid.

> lesser, shallower ports putting STC holders in an unfavourable position. Additionally there is no certainty the 500,000 mt will be spread evenly across the quarter again putting STC holders at a disadvantage. [134]

Noble submits:

> The 500,000mt distributed under STC allocation per quarter would need to be defined in shippable parcels and included as a pro-rate spread between deep seas and outer Ports. If the 500,00mt was distributed only in the outer Ports such as Wallaroo and Thevenard this would incur additional costs on business and potentially limit the demand from a STC participant. As a result this would reduce overall number of participants competing within the South Australian grain market. It is pivotal that any STC allocation consists of both high demand deep seas Ports and out Ports proportionally.[135]

GPSA submits that it is a core issue “not knowing how much STC capacity will be available (at) any particular port at any particular time”[136] They also submit that the reference to “spread reasonably” should be clarified.[137]

As noted above Viterra has now amended the protocols in response to these concerns. Exporters will be able to consider how much STC will be available each year across the port terminals. In the June protocols Viterra has also included a transparency safeguard surrounding the amount of STC available. For example Viterra will explain why and if STC is not maintained in accordance with the proportions of 2014/2015 shipping activity, subject to a 10% threshold.

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

Conclusion

Under the March protocols, the level of transparency surrounding the amount of STC to be made available was not appropriate. The ACCC considers that the use of the term “reasonable” was ambiguous. Under the March protocols Viterra would have had complete freedom to determine where STC was available after the allocation of LTC.

The ACCC considers that the amendments contained in the June protocols, in relation to the distribution of STC, should alleviate the concerns expressed by stakeholders. While the amendment does not guarantee a particular amount of capacity to be allocated, the ACCC considers that the transparency measures should provide a level of oversight of any change from historic distribution of capacity between ports.

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

The ACCC is seeking views on the June amendment from stakeholders.

5.2.4.3 Amount of STC capacity

Introduction

Viterra submits that the nominated two million tonnes is a sufficient amount of STC to cater for the needs of small exporters and new entrants. It also notes that any residual LTC

[134] AGG submission in response to ACCC Issues Paper.

[135] Noble submission in response to ACCC Issues Paper, pp.3-4.

[136] GPSA submission in response to ACCC Issues Paper, p.10.

[137] Ibid.

becomes STC, which may mean that more than two million tonnes is actually offered in any given year.

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

Submissions and analysis

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

> STC of 500,000 mt is insufficient. Viterra's own figures bear this out with smaller exporters' market share growing from 10% in 11/12 to 24% of total exports in 14/15 to date. A continuation of this trend sees STC requirements exceeding the 500,000 mt per quarter proposed, especially in a large production year. [138]

AGG also queries the distribution of STC across the year:

> As the premium months for shipping occur in the first half of the calendar year having STC in the Jul-Sep or Oct-Dec quarters is not attractive. We see no safeguards for LTC holders having preferential treatment in the premium first half of the year putting STC holders at a disadvantage. [139]

It is the ACCC's preliminary view that Viterra's argument on the sufficiency of the proposed two million tonnes of STC does not account for the following:

- All exporters have access to STC. Many exporters may be likely to have a greater interest in shipping from SA if the auction system is removed.
- The top five exporters' shipping needs may not be met via the LTC allocation process alone, especially considering the cap thresholds do not require Viterra to allocate LTC five ways.

The ACCC believes STC oversubscription is likely, particularly for valued capacity at sought after port terminals. Viterra argues that the two million tonnes of STC will be sufficient to cater to the needs of smaller exporters outside of the top 5 exporters. However, given that the FIFS system has an inherent random element to it, it is entirely possible that the FIFS capacity may be allocated to exporters already with significant LTC agreements.

For example there will be in the order of 135 slots available in the short term allocation process. Approximately a quarter of these slots are allocated to harvest shipping – traditionally a period of limited shipping. As noted in Chapter 4, peak shipping typically occurs between January and June. Accordingly, there may be around 15 shippers vying for around 1 million tonnes in approximately 60 slots of STC in sought after months (noting planned port shutdowns). This will provide exporters with some ability to access sought after capacity on a year by year basis. However, on average they may only obtain around four slots. The ACCC also notes that not all ports may be as desirable to exporters, meaning that the number of desirable slots may be even smaller again. While some additional capacity may be added if not taken up as LTC, it is also true that any residual LTC moved across to STC is likely to be less desirable slots from which exporters have not made significant previous shipments.

[138] AGG submission in response to ACCC Issues Paper.

[139] Ibid.

The ACCC notes that all exporters are unlikely to be equally 'quick' in the FIFS process due to differences in IT systems.

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

Conclusion

The ACCC believes it remains unclear if the amount of STC capacity proposed is sufficient to cater for all exporters across the five years. That said, the ACCC notes that it is not feasible that all exporters get all of the capacity that they would ideally like to have. There is a finite level of capacity in the Viterra system. There is also evidence that many exporters should be able to obtain some capacity.

However, the ACCC believes the demand for STC will depend on how Viterra exercises its discretion allocating oversubscribed LTC. As noted above this is a key concern with the proposal. The ACCC would be concerned if Viterra, via the allocation process only seeks to accommodate a small number of large exporters in this LTC process, including Glencore. If Viterra cannot accommodate the LTC needs of a range of exporters, including smaller exporters, then STC will not just be sought after by exporters seeking to top up and/or smaller exporters unable to commit to LTC agreements. Instead, it is most likely that all exporters will participate in the FIFS process, especially for the most desirable shipping slots.

The ACCC is concerned that the nature of the long term capacity allocation process could potentially lead to a situation where there is a lot of oversubscription with respect to the allocation of STC.

However, the ACCC notes the benefits of long term arrangements and noted the level of support industry for the removal of the auction system. It is possible that additional measures may be required to provide comfort that overall across the scope of the protocols there is an appropriate balance between the interests of all exporters.

Equity concerns in relation to the allocation of shipping capacity and the potential consolidation of shipping may also affect competition in related markets, which is discussed in relation to matters 25 (3) (g) and (e)

The ACCC welcomes further feedback from industry on the equity of the proposed capacity allocation system overall and if the amount of STC is appropriate.

5.2.4.4 Conclusion on Short Term Capacity

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

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

The ACCC notes that exporter support for the FIFS process in part stems from the fact that it has elements of chance and is not decided by Viterra in the manner of the LTC oversubscription process.

The ACCC acknowledges that some concerns surrounding the STC process have been addressed in the June protocols. The protocols will now provide exporters with a sound understanding of the distribution of capacity under STC. This should assist them to frame both their LTC and/or STC applications. Furthermore the June protocols confirm that the amount of STC which will be made available has been devised with reference to past shipping activity per quarter, per port.

However, the key issue of the level of discretion the long term agreement model provides Viterra in relation to LTC may undermine the possible benefits of the rest of the capacity allocation system, including how STC may or may not be allocated.

A key remaining concern for the ACCC is that the capacity allocation system overall may allow exporters with significant LTC to obtain STC, potentially ahead of exporters who rely solely on access to STC. LTC customers can participate in the FIFS to do more than just top-up LTC shipping allocations. Exporters with sufficient LTC will also be insulated from the consequences of significant STC oversubscription. Overall, such an outcome would l be to the detriment of competition in the bulk wheat export market, and related markets. Nor would the system be in the interests of many exporters. This outcome is also relevant to matters 25(3) (g) and (e), as discussed below.

Additional measures could potentially be introduced to offset the risk that the combination of the LTC and STC capacity allocation systems may lead to the consolidation of the shipping task among a small number of large exporters. Possible measures could include:

- a decrease in the cap thresholds
- increase in STC
- application of LTC cap thresholds to include STC allocation process
- limitations on the amount of STC available to exporters who secure peak LTC shipping slots or a large proportion of total LTC
- shorter overall LTC agreements to allow the ACCC to reassess the system after 3 years.

The ACCC welcomes stakeholders’ views on the amended June protocols in relation to STC and/or possible suggestions if industry believes equity issues warrant greater consideration.

5.2.5 Non-discrimination obligation and the appointment of an Independent Auditor

Introduction

As outlined in Chapter 2, Viterra included in the March protocols an audit function in relation to its compliance with clause 10 of the code.

In providing port terminal services Viterra must adhere to non-discrimination and no hindering obligations (cl 10), Further, when considering a capacity allocation system, we need to have regard to the whether the system will operate consistently with cl 10. Under the protocols the ACCC can initiate an audit once every 12 months. The audit provision is designed to alleviate concerns that Viterra will allocate oversubscribed LTC to Glencore in a discriminatory manner.

Submissions

Avant Agri supports the idea of an independent audit, but believes that “the ACCC needs to appoint the auditor, the auditor needs to be hired by the ACCC and only responsible to the ACCC.”[140]

The GPSA notes that it assumes the audit function would be valued by exporters. However they believe this is an inadequate safeguard.[141]

Conclusion

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

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

Overall, however, the ACCC considers that the merit of the audit function will be limited if the capacity allocation proposal overall is not appropriate. The audit will consider LTC allocation against the caps and other factors which are set down in the protocols, rather than looking at the appropriateness of the protocols as such.

The priority remains for the ACCC to ensure the protocols overall are appropriate against the Code (and then complied with). Should a concern arise with respect to the non-discrimination and or hindering provisions in the Code, the ACCC is able to investigate potential concerns independent of the inclusion of an audit function.

An audit by its very nature can also only occur after the facts. It may be difficult, considering potential contractual arrangements, to undo and/or rectify issues relating to the LTC oversubscription allocation process if issues were discovered in the audit.

The ACCC believes the audit function will improve the operation of the capacity allocation overall, will be in the interests of exporters and helps to ensure that the capacity allocation system is consistent with cl 10 of the Code. It should provide industry some confidence in Viterra’s management of the LTC allocation process.

The ACCC welcomes any further views from stakeholders on the audit function.

5.2.6 Preliminary view on matters (a) and (h)

The above discussion set out the ACCC’s considerations in relation to a number of the matters to which the ACCC must have regard under cl 25(3) of the Code, and in particular subclauses 25(3)(a) and (h) (the (a) and (h) matters). The ACCC’s key findings on the (a) and (h) matters encompass a range of issues.

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

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

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

Many stakeholders expressed support for the long term agreement proposal, though for many certain key details were of concern. Support for the proposal was most evident from large exporters. Such support was likely provided because:

- The proposal will favour larger exporters over a period of five years.
- Large exporters in Australia tend to also have an interest in port terminals operations and support the introduction of long term agreements generally.

The ACCC also recognises that some of the key concerns expressed by stakeholders and discussed in the decision have now been addressed by the June protocols.

Compared with the auction system, the proposed LTC process has the potential to enable more exporters to access capacity in accordance with their shipping plans. The ACCC notes that a number of exporters have indicated that they would not be prepared to participate in any further auction processes, given the types of premiums paid in previous auctions. Given this, the June protocols may be a desirable change. The ACCC is seeking further views from industry about the revised protocols and the possible implications for shipping from SA, provided the level of discretion the proposal will provide Viterra.

However, the ACCC notes the concerns of growers and some exporters about the level of discretion the LTC proposal will provide Viterra. Under the protocols, Viterra has the potential to allocate LTC in a manner that will limit the availability of capacity for exporters and not occur in a fair and non-discriminatory way. Its decisions relating to LTC may also affect the number of exporters who can participate in the FIFS market. Overall, these decisions can lead to the reduction of competition in related markets including grain acquisition.

The ACCC's preliminary view is that the proposed capacity allocation system, incorporating both STC and LTC allocation process, could provide greater scope for all exporters to compete in the SA export market in the SA export market. This view is underpinned by the certainty of access the LTC process can provide for exporters across a meaningful duration.

There are however significant risks associated with allowing Viterra the significant level of discretion for the allocation of oversubscribed long term capacity provided for in the protocols. In particular, the ACCC has identified concerns about the term of the agreement, the caps on capacity for particular exporters, and the access to STC for exporters who are not successful in the LTC process. The ACCC notes that it is unclear exactly will what take place under the protocols, as it depends on uncertain factors such as the amount of capacity sought by exporters and the exercise by Viterra of its discretion. However, the ACCC considers that there are significant risks that it should take into account in this decision.

The ACCC overall considers that Viterra's proposed long term agreements raise significant concerns under clauses 25(3)(a) and (h). It is seeking views from industry on the June protocols and whether the following issues are real ones that should be of concern for the ACCC:

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

The decision making process has also been complicated by Viterra's decision to effectively suspend the long term capacity allocation process. A greater level of information about the level of oversubscription in particular could have provided greater clarity about the nature of the protocols. Given the level of exporter support for the long term agreements Viterra could have allocated capacity thereby demonstrating a level of comfort among exporters, and demonstrating to growers that the level of competition for bulk wheat will not be consolidated under the proposed regime.

The ACCC is seeking views from industry as to the extent of the risks it has identified and the level of detriment such risks may have on exporters and growers.

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

5.3.1 Transparency measures

Introduction

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

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

Transparency measures can also offset the information asymmetry held by a port terminal operator, and with it scope for discrimination. This is particularly relevant in relation to the Viterra proposal, which will allow Viterra to undertake concurrent LTC negotiations with multiple exporters for a scare resource at certain times of the year, at certain ports.

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

Submissions and analysis

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

- the aggregate demand for capacity received during the application process for long term capacity;
- the outcome of any long term capacity allocations on a per slot and per port terminal basis;
- details of any special conditions applying to that short term capacity;
- the outcome of allocations of short term capacity, and any short term capacity that remains available for booking; and
- any available additional capacity (short term or long term) that becomes available for booking.[142]

[142] Viterra submission accompanying application to vary protocols, p.19.

Many exporters noted in submissions that the March protocols did not include sufficient detail concerning long or short term capacity. This was discussed in greater detail above in section 5.2.

More broadly, ADM submits that there:

> also has to be some means by which the efficiency of ports can be measured i.e Viterra's own performance against LTAs and their commitment to increasing capacity and loading vessels efficiency.[143]

GPSA submits:

> The Glencore/Viterra Application is not prescriptive enough to give clients and consumer enough knowledge to make well informed decisions, there are many unknowns, leading to many questions.[144]

Furthermore in relation to the LTC process, GPSA argues:

> These allocation principles are subjective, lack transparency and favour a reduction in competition.[145]

As outlined in Chapter 2, Viterra has now made a number of amendments to the March protocols. These amendments will provide additional transparency surrounding the allocation of capacity. The following additional information will now be available to stakeholders:

- The amount of initial LTC available.
- The amount of STC available.
- Clarification on pricing.

This is in addition to a range of existing transparency measures and reporting obligations as outlined by Viterra above.

Conclusion

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

The March protocols did not include sufficient information relating to the allocation capacity. This would have led to uncertainty among exporters and affected their applications for capacity. Glencore would also have had a significant advantage if information relating to available capacity was withheld from other exporters.

Appropriately, the June protocols now include a range of measures that will ensure exporters have a good understanding of the amount of STC available and how it is allocated. The June protocols also remove any uncertainty relating to payment terms.

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

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[143] ADM submission in response to ACCC Issues Paper, p.3.

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

[145] Ibid p.9.

It is also a concern that the LTC oversubscription allocation process is not transparent. Viterra will have a significant information advantage as it negotiates individually with exporters. While flexibility in developing exporter's shipping programs is a benefit of the proposal, it is of concern that Viterra will be able to make different and potentially inconsistent offers to all other exporters who will be at an information disadvantage.

5.3.2 Preliminary view on matter (b)

It is the ACCC's preliminary view that the June protocols will provide exporters sufficient information about the capacity of the port terminal facilities, and about the broad process for allocation of LTC and STC. The ACCC is less assured that the transparency measures relating to the allocation of oversubscribed LTC are sufficient. In part it appears that exporters may be disadvantaged in the course of the allocation process.

However, industry has not yet had the opportunity to consider the proposed amendments. The ACCC seeks to confirm if the June protocols will allow exporters the opportunity to plan their export activities and successfully negotiate with Viterra to acquire desirable port terminal capacity, following the process outlined above in Chapter 2.3.3.

The ACCC also notes that Viterra commenced a process to allocate LTC. However Viterra has suspended this process. Viterra's decision to undertake the process would have provided industry the opportunity to confirm, if in practice, the reporting obligations and transparency measures included in relation to the LTC process were sufficient.

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

5.4.1 Arrangements relating to flexibility and transferability of shipping slots

Introduction

The June protocols carryover existing arrangements from the current capacity allocation system relating to flexibility and transferability of shipping slots. It also extends these provisions to allocated LTC. On this matter no additional changes were made to the protocols between March and June.

Viterra submits:

> Exporters will continue to be able to trade and move slots freely, as they can under the current Protocols. The existence of this liquid secondary market will significantly ameliorate any adverse impacts that may arise in connection with the initial allocation of capacity.[146]

Viterra also submits that:

> …there is a clear ability for clients to acquire slots at the times they need, even if they do not acquire those slots at the time of initial allocation. The existence of this liquid secondary market will further facilitate the efficient operation of the proposed long term and short term capacity allocation system.[147]

Submissions and analysis

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

[147] Ibid, p.13

Few exporters indicated concern with the carryover of these related provisions.

Several exporters did raise concerns with the potential flexibility of LTC arrangements when supply was not available.

CBH submits:

> We believe Viterra should report on forecast and actual weekly accumulations into Port and in the event of consistent accumulation slippage by the BHC (that will have a material impact on future planned shipments) a method to roll back or hand back LTA capacity should be considered. Again, this will ensure port efficiency is maximized, minimise unnecessary costs and ensure the accuracy of investment signals.[148]

ADM also propose scope for capacity to be returned where supply is affected:

> … but there has to be some mechanism in an LTA that allows clients for forfeit a portion of the capacity in season's where the capacity offered cannot be physically executed. If forfeiture of capacity in a drought year is not possible, the cost of forfeiture should be waived.[149]

On the processes surrounding rebate for forfeited capacity and section eight of the current port loading protocols, ADM submits:

> ADM object to such a clause. If another client makes a new booking that assumes the forfeited capacity there is no material impact Viterra and the booking fee should be rebated in full. There can be no justification for keeping a portion of that rebate if there is no lost opportunity cost.[150]

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

The ACCC notes that the protocols allow exporters to apply for shorter terms, across any number of ports or otherwise. An exporter could in theory apply for as little as one shipping slot at a single port for two years. As such, the LTC process may provide exporters certainty about future shipping not currently possible under the auction system. This may be of particular benefit to smaller exporters, who at the moment only access capacity via the existing FIFS system. However, as explored further below, a smaller exporter may have limited opportunities to secure LTC at more desired ports or time periods.

Foremost, the ACCC is concerned in relation to LTC that the LTC oversubscription allocation process may undermine the flexibility of the allocation of LTC overall. While Viterra notes that it has set few restrictions or thresholds around how an exporter applies for LTC, the ACCC notes that to compete to secure LTC in practice, applicants must devise applications that most satisfy the oversubscription capacity allocation factors, or seek to obtain less sought after capacity at less attractive time periods or ports. In particular, exporters who can make the largest commitments to shipping will have their applications considered ahead of any other applications in the case of oversubscription.

As outlined in Chapter 3 exporters have also raised concerns with how the auction system has affected the scope for flexibility in the bulk export market and the potential to trade in the grain acquisition market.

[148] CBH submission in response to ACCC Issues Paper, p.3.

[149] ADM submission in response to ACCC Issues Paper, p.4

[150] Ibid p.3.

Conclusion

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

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

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

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

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

5.4.2 Preliminary view on matter (c)

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

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

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

5.5.1 Arrangements that will ensure capacity is used during times of peak use.

Introduction

The June Protocols (unchanged from the March protocols on this issue) include a number of mechanisms to facilitate the allocation of capacity of port terminal services during times of peak use, through:

- Making five years of LTC available.
- Making STC available through FIFS on an annual basis.

- Providing for surrendered capacity to be made available to the market (subject to Viterra's discretion).
- Allowing Viterra to develop additional capacity.
- The provision for transfers to support secondary trading.

As outlined in Chapter 4, there has been significant demand for capacity during the peak shipping period, especially at the Port Lincoln and Port Adelaide Outer Harbour.

Submissions and analysis

Viterra submits the following factor is addressed because:

> The Protocols provide an open, transparent, fair and non-discriminatory opportunity for clients to acquire capacity across all periods, including periods of peak use;
>
> The Protocols do not include any requirements that could operate as disincentives to acquire capacity during peak periods (e.g. auction premiums or restrictions on use);
>
> The commercial negotiation process to facilitate the initial allocation of long term allocation process will further assist in ensuring that clients have access to capacity across a range of port terminals and periods. Viterra anticipates that this process will further assist in "spreading the peak" across a range of slots;
>
> If capacity is not sold as long term capacity, it will remain available for booking as short term capacity on a first-in-first-served basis when the shipping stem opens for the relevant year. This will further reduce any risk of capacity not being utilised, particularly during periods of peak demand.[151]

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

Conclusion

Firstly, based on existing demand levels it is likely that capacity at Viterra's port terminal facilities will not be unused during peak times. As outlined in Chapter 4 there have been on average 15 exporters operating from SA. Several ports are typically at or near capacity across the peak shipping period, and already cannot accommodate the existing level of demand, even given the current concerns surrounding the auction system.

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

5.5.2 Preliminary view on matter (d)

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

[151] Viterra submission accompanying application to vary protocols, p.20.

5.6. Matter (f) the business interests of the port terminal service provider; and matter (i) the economically efficient operation and use of, and investment in port terminal facilities

5.6.1 The benefits of long term agreements for Viterra

Introduction

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

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

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

Submissions

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

- Increase certainty about long term activity at the port
- Provide greater certainty to build long term relationships with clients
- Aid supply chain planning
- Promote investment in infrastructure at port and along the supply chain.
- Likely lead to increased certainty and increased access to capacity at its ports, including premium capacity.
- Remove risk associated with uncertainty surrounding the operation of the auction, including for Glencore as an exporter and associated entity of Viterra.[152]

Viterra also submits:

> As an infrastructure owner, [Confidential] it is clearly in Viterra's interests to obtain greater certainty about the use of that infrastructure. This, in turn, will facilitate further efficient decisions about investment in, and expansion of, the export supply chain for the benefit of Viterra, exporters, growers and the South Australian economy.[153]

Conclusion

The ACCC considers that the proposal will clearly benefit Viterra. It will provide Viterra greater certainty regarding throughput at its ports and along its upstream supply chain.

[152] Viterra submission accompanying application to vary protocols, p.4
[153] Ibid.

Viterra can also have greater confidence to explore investment opportunities at the port, and also upstream in related markets.

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

In contrast, the existing auction mechanism only allows Viterra visibility of its export task for the upcoming season. Given that the auction has not operated as intended, Viterra has faced a higher level of uncertainty than if the auction functioned as envisaged. Adopting a LTA based system, without any auction mechanism, would resolve much of this uncertainty.

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

5.6.2 Preliminary view on matter (f) and (i)

The ACCC's preliminary view is that approving the proposed variation would be in Viterra's legitimate business interests.

5.7. Matter (g) the public interest, including the public interest in having competition in markets; and matter (e) the potential effects that the capacity allocation system has on upstream and downstream markets

5.7.1 Overview

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

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

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

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

Relevant upstream and downstream markets in SA are the:

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

5.7.1.1 Grain acquisition market

Introduction

To understand the effect of the proposal on the grain acquisition market, it is important to consider the current level of competition for SA grain under the existing auction system. Based on the ACCC's analysis of the grain acquisition market set out at Chapter 4, it appears that:

- Growers have decreased production risk and increased supply overall, subject to periods of drought.[154]
- On average 15 exporters annually export grain for export from SA growers. However, around three to five exporters export most of the grain task.
- There are other companies and organisations that acquire and accumulate grain, but do not directly access port terminal services.
- As noted in Chapter 4 there is limited domestic demand for grain in SA. The industry is export oriented. SA growers do not have the benefit of access to a large number of domestic consumers, nor does the sector significantly constrain the export market.

Many exporters query their ongoing involvement in the SA grain export market and consequently the SA grain acquisition market. Many have found themselves overcommitted in previous auctions and may be unable to participate again. Several exporters have indicated in their submissions that they will not participate again the auction system (although they may participate through any FIFS process). [155] Others expressed this sentiment in meetings with the ACCC. Yet, despite this sentiment, the ACCC notes there are many exporters operating in the Australian bulk wheat export industry and it appears unlikely that there will be a lack of demand overall for SA grain.

Submissions and analysis

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

> a) Viterra considers that the Protocols provide an open, transparent, flexible, efficient and non-discriminatory opportunity for clients to acquire access to its port terminal services;
>
> (b) This is consistent with the objective of promoting the competitiveness of South Australian grain and the ability for grain exporters to compete with Glencore and each other in relation to the global sales of South Australian grain.[156]

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

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

[155] ADM submission in response to ACCC Issues Paper.

[156] Viterra submission accompanying application to vary protocols , p.20.

> Creating an environment to support increased opportunities for investment in the South Australian grain industry (arising from greater investment certainty, a reduction financial risks for exporters, the "freeing up" of industry funds, and the spreading of production risk), is a matter of significant public interest.[157]

The GPSA submits that:

> The Glencore/Viterra Application for a capacity allocation system introducing long term agreements (LTA'S) is fundamentally anticompetitive and proposes no cost mitigation or reduction to consumers. [158]

Furthermore it argues that:

> There is no benefit to the consumer (farmers) in changing from the auction system to the Glencore/Viterra Application.

The GPSA considers that the nature of the oversubscription process for LTA capacity will lead to a negative effect in the upstream grain acquisition market:

> The Glencore/Viterra Application likely reduces competition for South Australian famer's grain through;
>
> - Favouring incumbents
> - Favouring larger organisations
> - Discouraging new entrants
> - Discouraging smaller regionalised firms.[159]

Avant Agri believes the long term agreements "... will provide long term, increased commercial certainty and reduce risk margins. This will hopefully reflect in higher and/or less volatile prices to growers."[160]

Viterra also submits that, with long term agreements in place, exporters will develop long term relationships with growers. However, Viterra has provided no evidence to support this claim and the GPSA contends this is not a likely outcome.

Conclusion

It is the ACCC's preliminary view that it is difficult to ascertain the effect the introduction of the protocols will have on competition in the grain acquisition market. There is a mixture of potential positive and negative effects on competition that may result from either accepting or not accepting the proposal.

Not accepting proposal

If the proposal is not approved, the following might occur if capacity is allocated under the existing auction system:

- No exporters participate in the auction; all capacity is made available FIFS.

[157] Ibid, p.21.
[158] GPSA submission p.3.
[159] Ibid
[160] Avant Agri submission in response to ACCC Issues Paper, p.6.

- Few exporters participate in the auction. These exporters may be able to secure a greater share of capacity overall than previously obtained in previous, more competitive auctions, and for a lower premium than previously achieved via auction. If there is residual capacity it would carry over into the FIFS allocation process.

In either case, exporters who secure capacity may make it available to the rest of the market via the secondary market.

The implication for the grain acquisition market in these scenarios is probably unchanged from the current market, unless one or few exporters acquire the majority of the auction capacity. Should this occur, it is unlikely there will be vigorous competition for grain, and certain exporters may exit the SA market.

The ACCC notes that the GPSA supports the retention of the auction system for a range of reasons, particularly it submits that growers have benefited through the high prices exporters have been willing to pay, so as not to default on their shipping commitments and risk their auction rebates. The ACCC notes that such a situation may not be sustainable across a longer term, as it suggests that exporters may not be making money on certain trades and could, in the longer term, exit the market.

<u>Accepting proposal</u>

If the proposal is accepted and long term agreements are introduced, one or more of the following could ensue:

- At least two exporters at four of the SA ports per quarter, and at least three exporters at Port Lincoln and Outer Harbour for the first six months of each year, will be able to use LTC to support activities in the grain acquisition market. It is probable that Glencore will secure significant LTC.

- Potentially, many exporters will compete for the two million tonnes of STC available annually.

- If additional LTC or STC is made available, potentially some exporters will access this additional capacity.

- Exporters may be able to acquire capacity in the secondary market.

- Exporters could develop alternate SA bulk wheat export pathways, as discussed in Chapter 4, particularly if there were unable to acquire significant capacity from Viterra

The broad spectrum of possible outcomes as outlined above has made it especially difficult for the ACCC to predict likely outcomes in the grain acquisition market. The ACCC considers that the uncertainty surrounding the possible outcomes of the proposal is a result of considerable discretion Viterra has given itself. If the proposal is approved, Viterra by virtue of its discretion with respect to the allocation of LTC can affect the level of competition in the grain acquisition market. For example Viterra could either allocate LTC between only a few exporters, or potentially could allocate LTC between a broad spread of exporters.

In the first of these scenarios, the ACCC considers that competition in the grain acquisition market would be reduced if the proposal resulted in a small number of exporters with LTC competing for grain. In particular, the ACCC considers that fewer small and medium exporters, and less opportunity for new entrants, will lead to less vigorous competition for grain overall in the grain acquisition market. That said, it is also foreseeable that, given the take or pay nature of LTAs, that at times where production is low, there will be heightened competition among exporters with LTC for farmers grain under LTAs.

However, even under this scenario there would still be a range of exporters accessing STC. However they may have less ability to realise the efficiencies arising from long term agreement for large amounts of capacity.

If Viterra allocates LTC between more than a few exporters, who would then compete for grain in the upstream market, there is the potential for increased competition, and benefits for growers, in the grain acquisition market from the introduction of long term agreements. Viterra may do this in order to obtain long term commitments for throughput across its ports. In this scenario, Viterra could as a result of increased certainty decrease prices over time, improve services, develop infrastructure at the port and upstream.

There would also be competition resulting from exporters who compete for the 2 million tonnes of STC on an annual basis. These could increase the prospect that competition in the grain acquisition market is sustained and/or increased.

Viterra is currently allocating LTC between exporters, subject to receiving ACCC approval of the proposal overall. However, as noted in Chapter 2 Viterra has effectively suspended this process. The ACCC is concerned that this has meant industry has not been able to see the level of oversubscription and observe the effect of the protocols in practice.

The ACCC invites feedback from exporters, growers and other stakeholders on the progress of this process, including any concerns with respect to the extension of the initial capacity allocation period.

5.7.1.2 Upcountry storage and handling services market

Introduction

As outlined in Chapter 4, Viterra has a strong and dominant presence in storage and handling services across SA. Viterra has a broad network of storage facilities across SA, and several sites in Victoria. There are few competing operators in the market.

Submission and Analysis

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

> In South Australia, Viterra's grain storage and handling network provides the vital link between growers and consumers, utilising significant infrastructure across grain receival, storage, quality control, logistics and ship loading.[161]

Viterra also notes that:

> We manage our upcountry grain storage and port terminal network as an integrated supply chain to best meet the requirements of our grower and commercial customers.[162]

The GPSA submission outlines a range of concerns the proposal raises in relation to upcountry storage and handling services, in addition to the related logistics market. The GPSA notes in previous member surveys:

> Competition in storage and handling is the number one concern for grain producers (consumer) in South Australia and their preference deserves at least the same weighting as the client.[163]

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

[162] Ibid.

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

The GPSA submission also highlights the findings of the South Australian Parliaments Select Committee on the Grain Handling Industry September 2012 report, including a recommendation that:

> The State Government authorise the Essential Services Commission of South Australia (ESCOSA) to undertake a review of the entire grain supply chain with the objective of establishing arrangements that provide the basis for pricing of an access to grain storage and bulk handling facilities (including up-country services) that are consistent with the requirements of a competitive and deregulated wheat export market). [164]

As noted earlier in the chapter, the GPSA submits that in light of the identified concerns surrounding the up-country markets a decision relating to long term capacity should be postponed. The GPSA argues:

> GPSA is of the strong opinion this review would provide a substantive platform for the entire grain supply chain to move forward on rather than the current piece meal approach. [165]

As set out in Chapter 4, the existing footprint Viterra has in SA will make it difficult for new entrants to enter the upcountry storage and handling market, under either the current auction system or the proposed long term capacity system. Existing sites are close to growers across the state. There is sufficient storage capacity across SA and Viterra can also develop additional capacity with limited forewarning. The SA Government also recently announced a range of funding commitments to improve access to Viterra upcountry storage sites.[166]

Furthermore, there appear few obvious port catchment areas that could sustain a single port operation and have access to sufficient upcountry storage and transport services across the longer term. As discussed in Chapter 4, there is a greater need in SA to source grain from across the state to offset production risk, rather than concentrate on one specific port catchment area. Several port catchment areas are isolated and or dislocated from other port terminal services either by distance and/or lack of connecting rail services (in the case of Thevenard and Port Lincoln).

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

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

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

- Exporters contemplate their own investment upcountry in SA knowing they have long term shipping plans for up to five years.

Conclusion

Viterra currently faces limited competition upstream from other site operators across most parts of SA. The ACCC considers that Viterra is already in a position to leverage market power from its upcountry networks into its port terminals. Viterra currently faces limited

[164] Ibid, p.5.
[165] Ibid.
[166] "A Modern Transport System for Agriculture – A New Partnership Approach" , SA Government , March 2015.

competition in the provision of storage and handling with only Cargill providing some constraint at some specific locations.

Given the extent of Viterra's dominance in this market there is already limited prospect of new entrants and/or credible competition for Viterra in the storage and handling market under the current port terminal services arrangements. The introduction of the protocols would not significantly alter the level of competition in this market.

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

> (d) the effectiveness of, and level of competition existing under, current arrangements for the transport, storage and distribution of wheat in contributing to a sustainable supply chain from farm gate to export load port.[167]

5.7.1.3 Transport and logistics market

Introduction

Viterra can provide clients (growers or exporters) with a bundled storage, logistics and transport service across its network. Discussed in greater detail at Chapter 4, Export Select bundles logistics with transport (road and/or rail services) and also incorporates a rebate. Typically, exporters in SA do not arrange rail transport themselves.

Submissions and analysis

As noted in Chapter 4, a range of stakeholders submitted to the ESCOSA review into SA rail access on the difficulty associated with negotiating access to the SA rail network.

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

> We also have concerns with the de-linking of Export Select from the proposal.
>
> Viterra is in a dominant if not monopoly position over access to up-country stock and rail freight to port. Conceivably an LTC or STC holder could be hindered by Viterra in getting stock into position to load at port. Thus, potentially forfeiting a slot, which Viterra could take advantage of themselves, or incurring substantial cost delays.[168]

The GPSA submission highlights, as noted above and earlier in the decision, concerns with the operation of the supply chain overall, including rail. The submission queries the operation of Export Select and notes:

> …. proposed efficiency gains were to be passed on to the trade by lower charges, however the pricing regime has seen increases in grain logistics and transport costs.[169]

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

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

[167] Competition and Consumer (Industry Code—Port Terminal Access (Bulk Wheat)) Regulation 2014.
[168] AGG submission in response to ACCC Issues Paper.
[169] GPSA submission in response to ACCC Issues Paper, p.4.

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

The ACCC considers there is scope for competition in above rail transport services and competition between road and rail to emerge across SA. This was recently confirmed in ESCOSA's draft report into the state's rail access regime. [170] This is discussed in greater detail in Chapter 4 of this decision. In part, this is because the relatively shorter distances to port in SA promotes road transport as a viable alternative to rail. [171]

A range of additional investment and funding issues which undermine the efficiency of rail appear to make road a preferable means for Viterra and exporters to transport grain across SA. [172] This is discounting any externalities, for example road safety, road congestions and road maintenance issues. Substitutability is likely to remain as the challenges for rail are unlikely to be resolved, for example the effect of underutilisation of intrastate railways may further contribute to their decline and undermine its ongoing competitiveness:

> This underinvestment can limit the capacity and performance of railways which may increase the competiveness of road transport, leading to further reductions in demand for rail.[173]

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

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

> Our investment in the rail network, supported by road, will underpin the efficiency of the whole supply chain, providing certainty for our growers, exporters and the state. Rail is critical to providing the capacity to move the SA crop each year.[174]

Viterra also notes in the press release that:

> Viterra is very focused on finding ways to improve the use of rail infrastructure and manage the movement of grain stocks. Those efficiencies are already being realised, with a record amount of grain being moved by rail during March 2015. [175]

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

However production in SA continues to rise and rail should retain a competitive advantage of moving high volumes over longer distances. As ESCOSA outlines "railways have significant economies of scale compared to road transport. This provides railway operators with market power."[176]

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

[171] Ibid.

[172] Ibid.

[173] Ibid p.18.

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

[175] Ibid.

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

Conclusion

A range of factors affect the state of competition in the grain transport market. These challenges exist today and are likely to be ongoing. The ACCC notes that the market as presently composed does not have a high level of competition and therefore any further entrenchment of this may not be likely to be in the best interest of the bulk grain export market, or related markets over the longer term.

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

Alternatively exporters who secure LTC may pursue their own transport services and this could provide new opportunities in the related transport markets. Exporters who do not secure any LTC at all may well develop alternate export supply chains including new transport arrangements. However, both of these scenarios seem unlikely on any significant scale.

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

5.2.7 Preliminary view on matters (e) and (g)

The ACCC's preliminary view is that at present there is a reasonably competitive grain acquisition market in South Australia. As set out in Chapter 4, the market is dominated by several larger exporters, including Viterra's trading arm Glencore. However, there are a range of exporters and other non-exporting grain accumulation organisations that compete for grain from growers and from other traders.

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

As highlighted above the potential exists that long term agreements will lead to a decline in the level of competition within the grain acquisition market. As set out in section 5.2, this risk in particular stems from the potential for LTC to be allocated to a small number of larger exporters at the expense of existing competing exporters. However the contrary is also possible. This uncertainty is a product of the considerable discretion the protocols allow Viterra with respect to allocating LTC. The ACCC is seeking views on the risk that competition for growers' grain will decrease if long term agreements are introduced.

The ACCC's preliminary view is that there is already limited competition across the upstream supply chain in SA. The approval of the June protocols will provide Viterra the opportunity to exercise market power arising from its vertically integrated operations (although it already has an incentive and ability to do so in its upcountry operations).

In light of the introduction of the protocols, Viterra's position in the storage, handling and transport markets is likely to be maintained. Large exporters may enter into long term agreements for these three services to match their shipping plans, which may limit the scope for new entrants to compete in these two markets. The ACCC notes that there may be limited likelihood of extensive competition either with or without the LTAs.

5.8. Matter (j) any other matters the ACCC considers relevant

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

As outlined in Chapter 3, the auction system has not operated as originally envisaged and it does not appear to readily allocate capacity to those exporters who want it the most. As identified by exporters in the course of the Viterra review, certain changes could be made to the auction system although Viterra has opted not to do this and it is not in any case clear that they would resolve existing issues. Consequently exporters have expressed ongoing concern with the operation of the auction.

Several exporters have not participated in the auction system because of these identified limitations. They may however have shipped using FIFS residual capacity or via other secondary processes. Several exporters in submissions and in discussion with the ACCC have indicated they are unlikely to participate in any future auctions.

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

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

6. ACCC's draft decision

Following the above assessment of subclause 25(3) matters, the ACCC is of the view that the decision on whether to approve Viterra's proposed long term arrangements is a finely balanced one. The ACCC considers that it is presented with a choice between a LTC system that has some potential flaws, or an auction system that has limited support among access seekers and has not effectively allocated capacity to date.

The ACCC notes that Viterra has made several changes to its proposed allocation system, both since the March protocols, and since Viterra's original proposal in September 2014 under the previous undertaking regime. The ACCC considers that these changes have addressed a number of the concerns of the ACCC and industry about the proposal.

However, at this time, the ACCC does not consider that it should accept the proposal as currently presented by Viterra. This draft decision provides industry an opportunity to provide submissions on the ACCC's approach.

LTC proposal

The ACCC considers that there are benefits to long term agreements. The Viterra protocols have the potential to allocate capacity in a way that balances the interests of all stakeholders and facilitates competition in the grain acquisition and other markets. Long term agreements also provide greater certainty for investment at the port terminals and along the supply chain, both for the infrastructure owner and potentially from other stakeholders.

However, the ACCC has several concerns about the potential for the long term arrangements to raise concerns, considering the matters in subclause 25(3) of the Code. In particular, the ACCC considers that the proposal raises concerns about:

- whether the proposed system will operate efficiently, fairly and consistent with non-discrimination obligations
- the interests of exporters wanting access to Viterra's ports
- the potential effect on competition in the upstream grain acquisition market.

In particular, the ACCC notes that the proposed protocols would allow an outcome where only a few exporters could secure substantial and meaningful capacity. The LTC allocation process is designed to best cater to the applications of large exporters, who can most likely satisfy the criteria relating to the oversubscribed capacity allocation process. Under the proposal, Viterra's trading arm Glencore is most likely to be allocated premium LTC ahead of most other exporters in the market.

The ACCC considers that a long term agreement system should support the shipping activity of large exporters. However, under the proposed system, the ACCC considers that there must also be recourse for other exporters and new entrants to access capacity.

Viterra's contention is that two million tonnes is sufficient for non-LTC exporters and new entrants. The two million tonnes of STC, which can be obtained on a FIFS basis, has been determined by Viterra on the assumption that the capacity needs of the top five exporters will be met via the LTC allocation process.

However, the ACCC considers that this may not necessarily be sufficient because all exporters, in accordance with the protocols, can apply for this capacity. The potential for some significant exporters to miss out on an allocation of premium LTC could force them to take up capacity from the annual STC allocation process, and make it harder for other exporters and potential new entrants to access STC.

Such outcomes as discussed above would potentially negatively affect competition upstream in the grain acquisition market, and potentially negatively affect the prices paid to South Australian farmers for their grain.

That said, the ACCC notes that Viterra will have incentives to provide LTC to a range of exporters. Furthermore, if all parties have equal access to the FIFS process, there should be an opportunity for exporters to obtain some STC on an annual basis under Viterra's proposed protocols. That is not to say that access to STC could not be improved for parties who do not obtain significant LTC. As noted in Chapter 5, this could include methods such as increasing the amount of STC, or providing some form of priority access to STC for a round of the FIFS process for exporters who do not have LTC.

Under the proposal, the prospect of competition emerging in the related storage, handling and transportation markets may be limited. Exporters who enter long term agreements for port capacity may enter related agreements with Viterra for services upcountry. However, given Viterra is already dominant in transport, storage and handling under the existing system, the ACCC does not consider that there will be significant change in the competition in these upcountry markets.

Auction system

The ACCC considers that, while it could be improved, the current auction mechanism is not operating as intended. In particular, the auction was designed to ensure that capacity went to those exporters who most valued it, through the mechanism of auction premiums.

In practice, the auction has failed to allocate a significant amount of capacity (with at best about half of total capacity being allocated at auction) and instead much of the capacity has been allocated in the subsequent FIFS process.

The biggest concern from exporters was that the auction has tied up very large amounts of capital in auction premiums for significant periods of time (for example, around $125m in total premiums for 2014-15). The ACCC received representations from exporters that having this level of capital unavailable for eighteen months, and at risk until the capacity was executed, had significant resourcing implications. In addition, the duration of the auction and its failure to close in a timely manner has been a concern.

A number of exporters submitted that these issues with the auction meant that they would not participate in future auction processes in SA. Accordingly, the ACCC is concerned that continued auctions would lead to further market consolidation.

The ACCC observes too that the auctions have not prevented significant market positions being taken by a small number of exporters, including Glencore. Furthermore, other exporters have not had ready access to premium capacity, with the required auction premiums perhaps most assisting the largest companies with biggest financial resources.

Overall decision

On balance, the ACCC has reached the draft view that it is not appropriate to accept Viterra's proposed capacity allocation system

The ACCC notes that the concept of a LTA has broad support amongst exporter stakeholders and considers that there are potential benefits in the LTA proposed by Viterra if the protocols allocate capacity in a way that balances the interests of all stakeholders and facilitates competition in the grain acquisition and other markets.

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

Against this, the ACCC considers that there are some significant issues with the proposed LTA system. In particular, the ACCC is concerned about the fact that the system would appear to allow a small number of large exporters to have an advantaged position in the allocation of long term capacity. Those same exporters can then equally participate in the FIFS process with all other exporters. Given the relative balance between the amounts of long term and short term capacity, the ACCC is concerned about the access of all exporters to access port capacity, and hence to compete in the upstream grain acquisition market.

The ACCC is also concerned that the five year term of the proposed system will run the risk of effectively locking in a market structure dominated by the largest exporters for a significant period of time which could have implications for the ability of all exporters to grow or new exporters to enter the market. Finally, the ACCC has concerns about the ability of all exporters to have adequate access to short term capacity – including exporters who will be unable or unwilling to obtain long term capacity.

Overall, the ACCC considers at this time that on balance it is not appropriate to accept the proposal in its present form.

The ACCC is seeking views on this draft decision. The ACCC will consider its final decision in light of the feedback it receives from stakeholders to this draft decision, including views on the further amendments put forward by Viterra on 12 June. The ACCC also notes that it may accept an amended proposal from Viterra that adequately addresses the concerns raised by the ACCC in this draft decision.

Appendix A: Port capacity charts

Series 1: Share of exports annually and during peak periods.

Charts A1 to A6 below and charts 4.5 and 4.6 at chapter 4 in the decision document, show on a port by port basis the share of total exports over the whole year compared with just the peak period (February to May).

As outlined in this decision document, there does not appear to be a significant difference between share of exports during peak periods compared with the year as a whole. This can in part be attributed to the auction process which incentivises exporters to use capacity at non-peak periods.

Though a large portion of the capacity was allocated through the FIFS process, the data below suggests that, with the exception of Port Adelaide Inner Harbour, exporters other than Glencore have been able to access similar levels of capacity during peak periods.

The ACCC also notes that data for Adelaide Outer Harbour and Adelaide Inner Harbour should be considered in conjunction with each other. In 2014, the ACCC consented to allow Viterra to move bookings between the Outer Harbour and Inner Harbour Port Terminals to increase the efficiency of both port terminals.

As outlined in the 2013 draft decision document:

> Viterra proposes to insert a new clause 7(g) into the PLPs to allow the movement of bookings between Inner Harbour and Outer Harbor. The new clause 7(g) reads:
>
> Notwithstanding any other provision of these Protocols, Viterra Operations may at any time, with the Client's consent, move a Booking for a Slot at Outer Harbor to a Slot in respect of the same half month period at Inner Harbour (or vice versa), if it facilitates the efficiency of operations at either or both of Outer Harbor and Inner Harbour and Viterra Operations takes reasonable steps to minimise the impact on other Clients at those Port Terminals.[177]

Viterra also submitted regarding the purpose of the new clause:

> The purpose of the change is to facilitate the operational efficiency of both Port Terminals (and reflect the reality that, in practice, they are best managed operationally as a single Port Terminal).[178]

The following charts have been developed using Australian Crop Forecasters data and data provided by Viterra.

[177] Draft Decision Viterra Operations Limited Application to Extend and Vary 2011 Port Terminal Services Access Undertaking, p.28.

[178] Ibid.

Chart A1 Port Lincoln annual and peak (February to May) exports by exporter

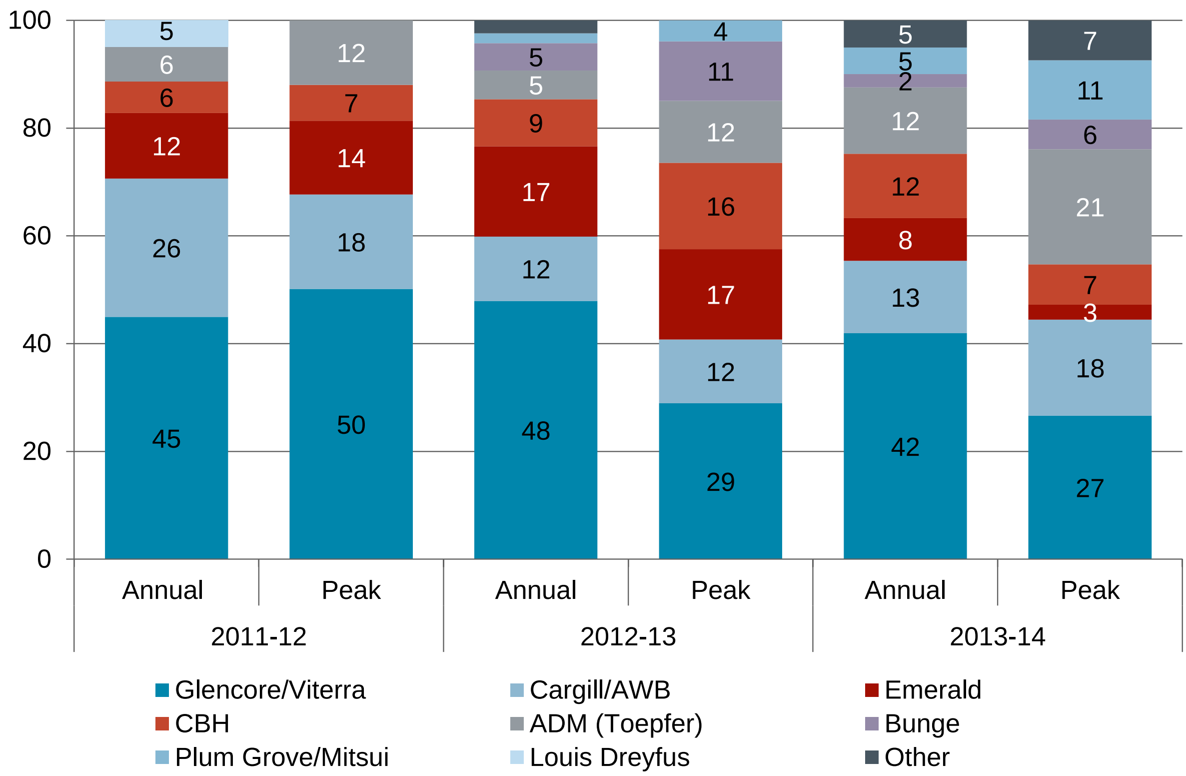


Chart A2 Port Adelaide Outer Harbour annual and peak (February to May) exports by exporter

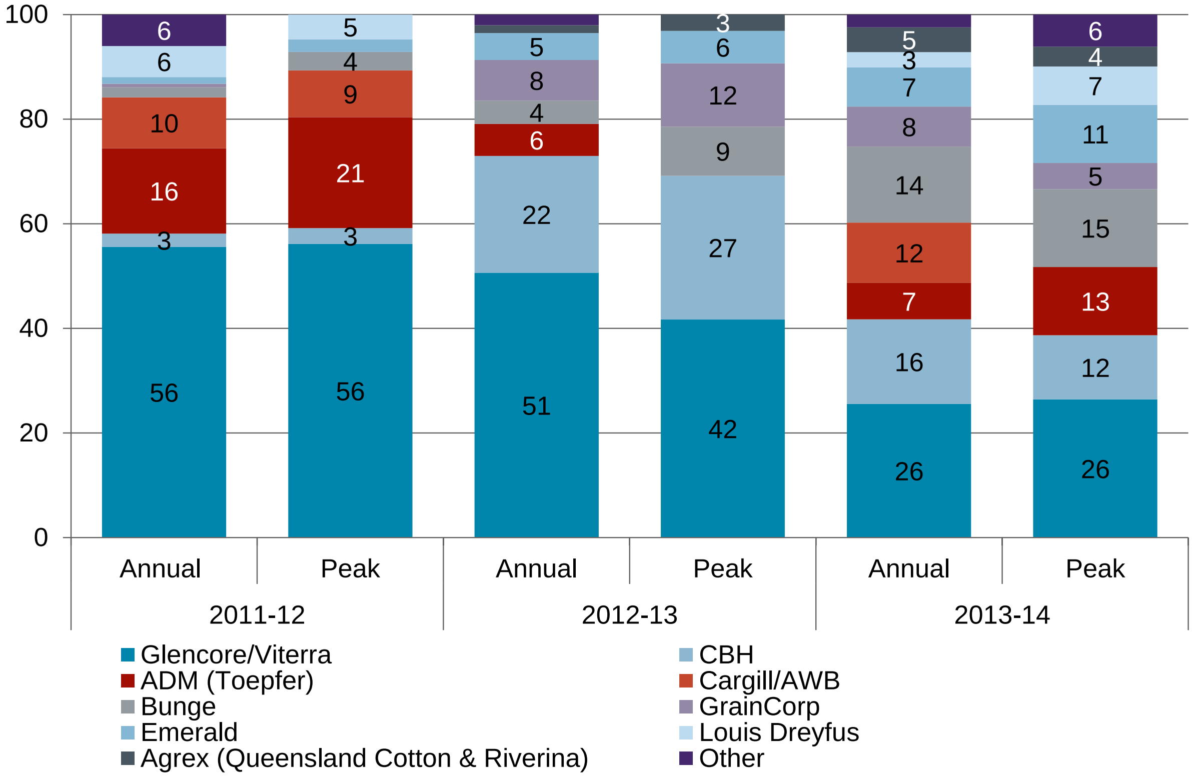


Chart A3 Port Adelaide Inner Harbour annual and peak (February to May) exports by exporter

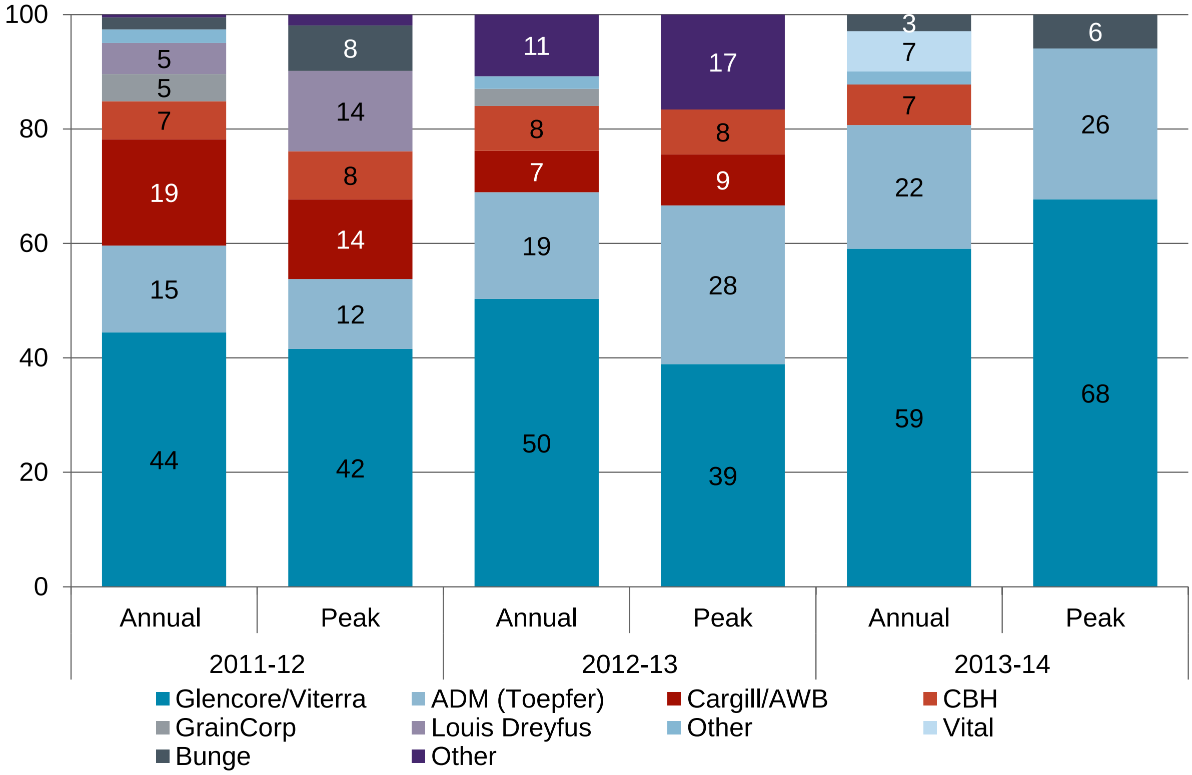


Chart A4 Port Giles annual and peak (February to May) exports by exporter

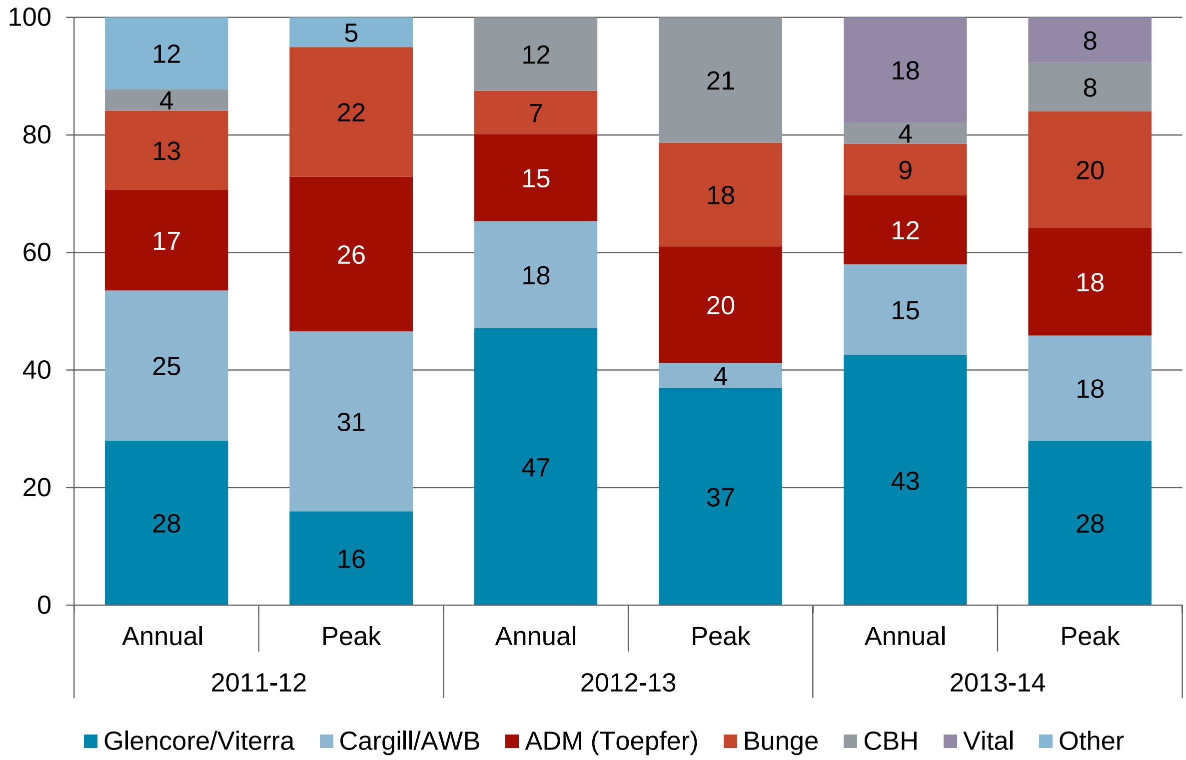


Chart A5 Thevenard annual and peak (February to May) exports by exporter

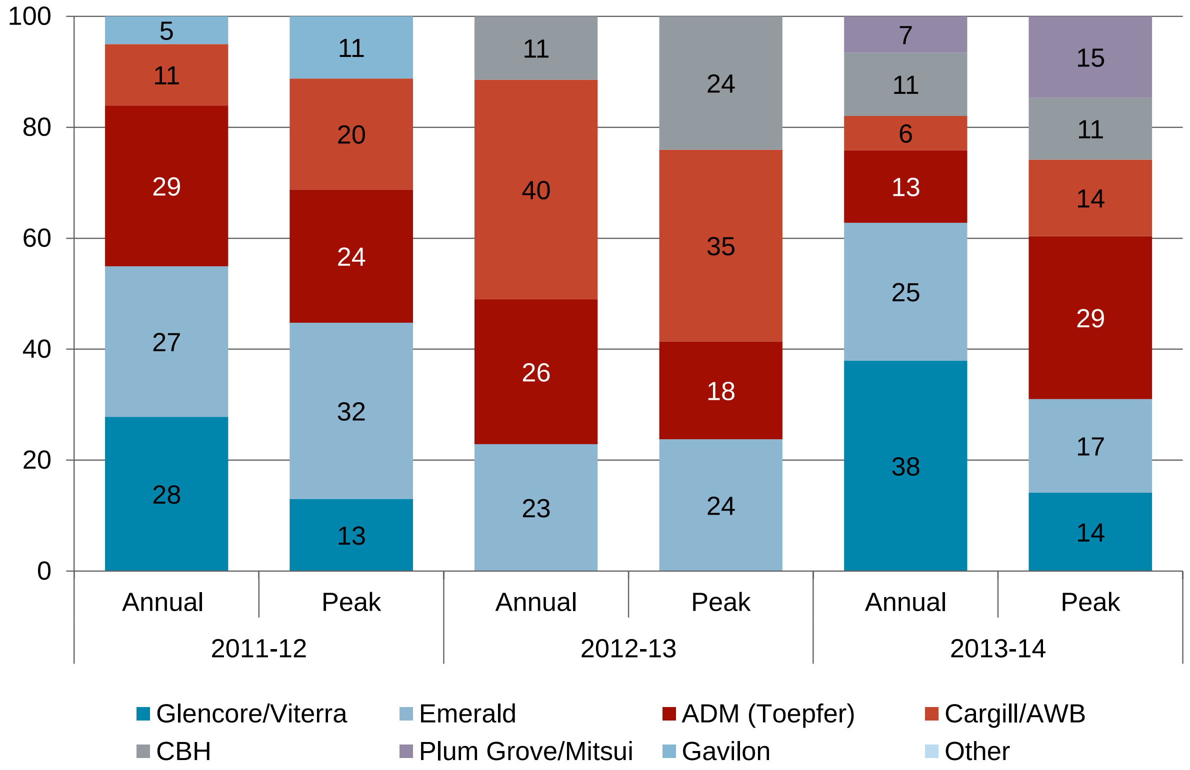
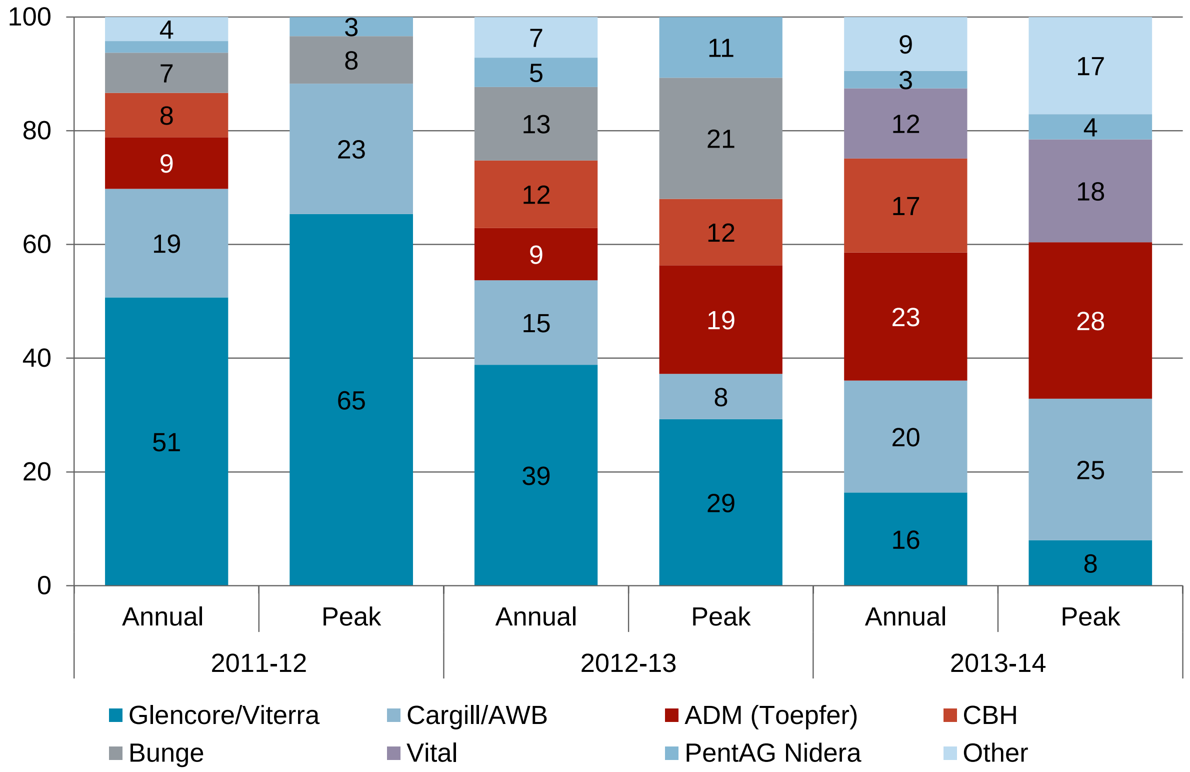


Chart A6 Wallaroo annual and peak (February to May) exports by exporter



Series 2: Total monthly exports by port 2011-12 to 2013-14

Charts A7 to A13 below and chart 4.4 at chapter 4 in the decision document show, on a port by port basis, total monthly exports for 2011-12 to 2013-14.

As outlined in chapter 4, shipping broadly follows a pattern of peak and non peak cycles. However this effect may less obvious at some ports due to the influence of the auction rebate which incentivises exporters to use capacity at non-peak periods.

As noted above Viterra also has discretion with respect to managing the export task between the two Adelaide ports.

The following charts have been developed using Australian Crop Forecasters data and data provided by Viterra.

Chart A7 Port Lincoln – total monthly exports, 2011-12 to 2013-14

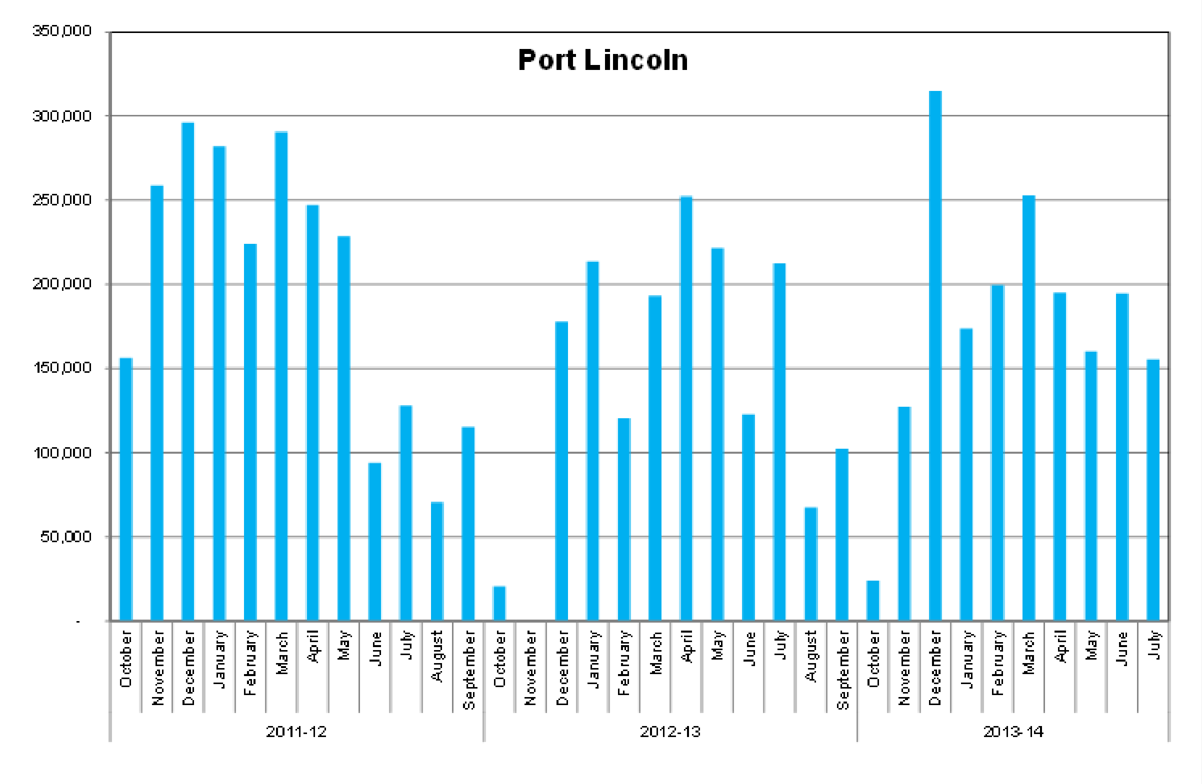


Chart A8 Port Adelaide – Outer Harbour total monthly exports, 2011-12 to 2013-14

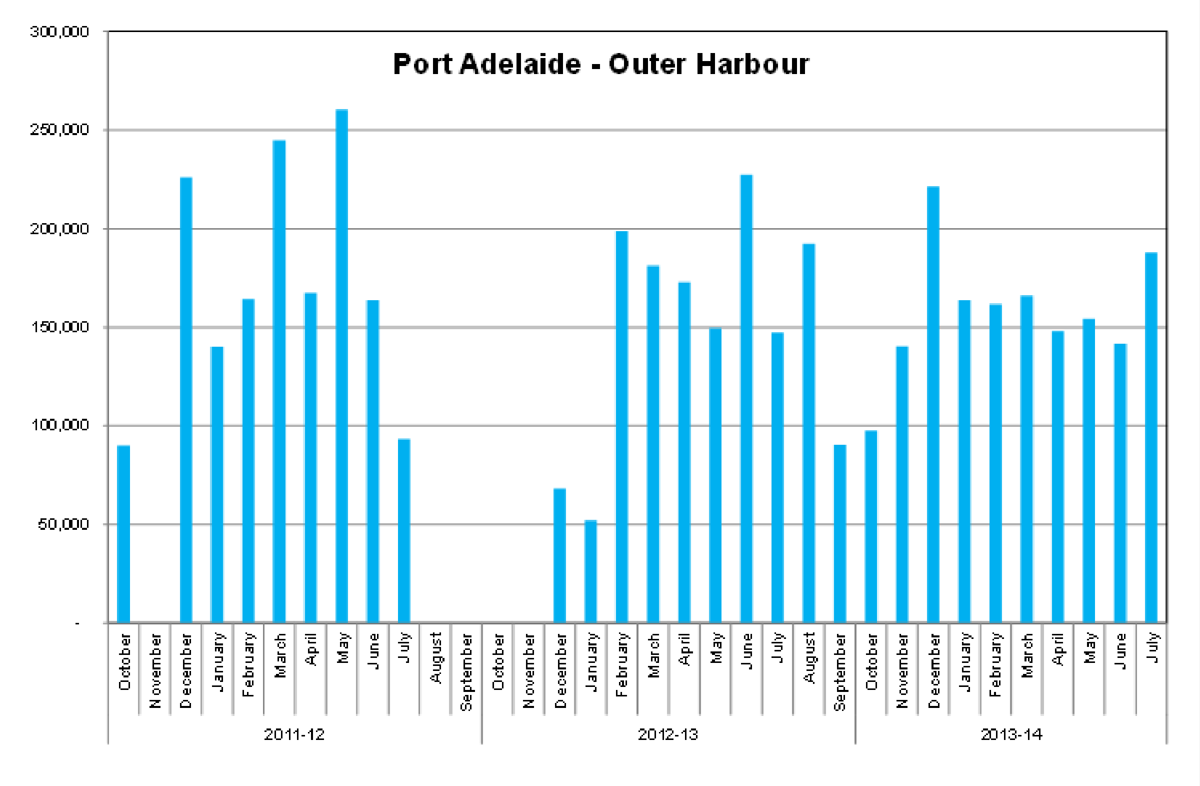


Chart A9 Port Adelaide – Inner Harbour total monthly exports, 2011-12 to 2013-14

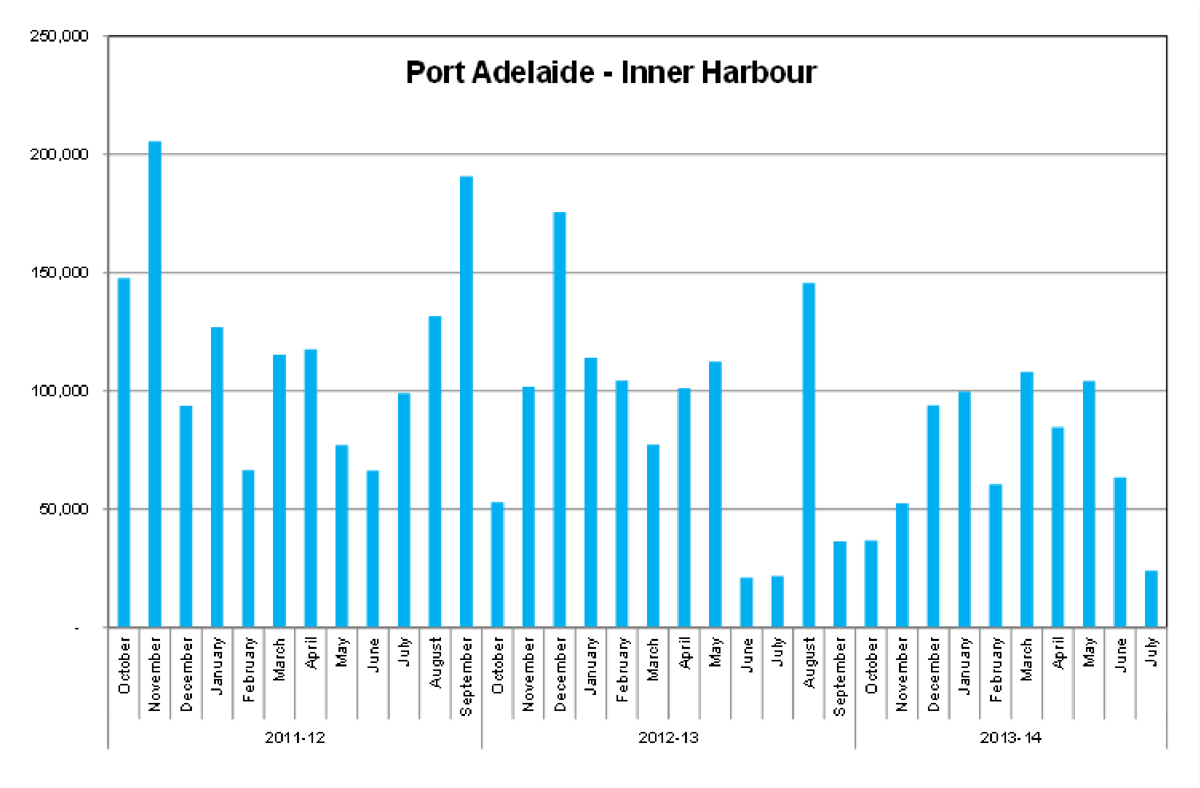


Chart A10 Port Adelaide - total monthly exports, 2011-12 to 2013-14

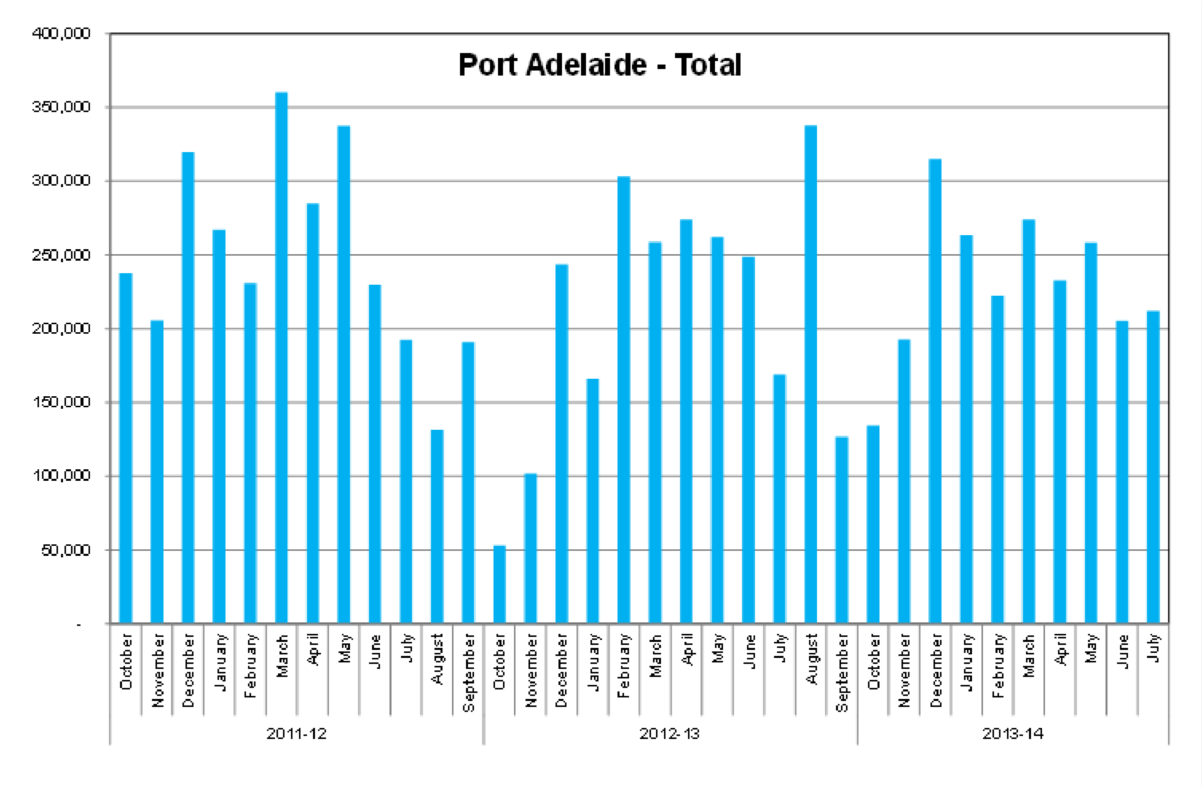


Chart A11 Port Giles – total monthly exports, 2011-12 to 2013-14

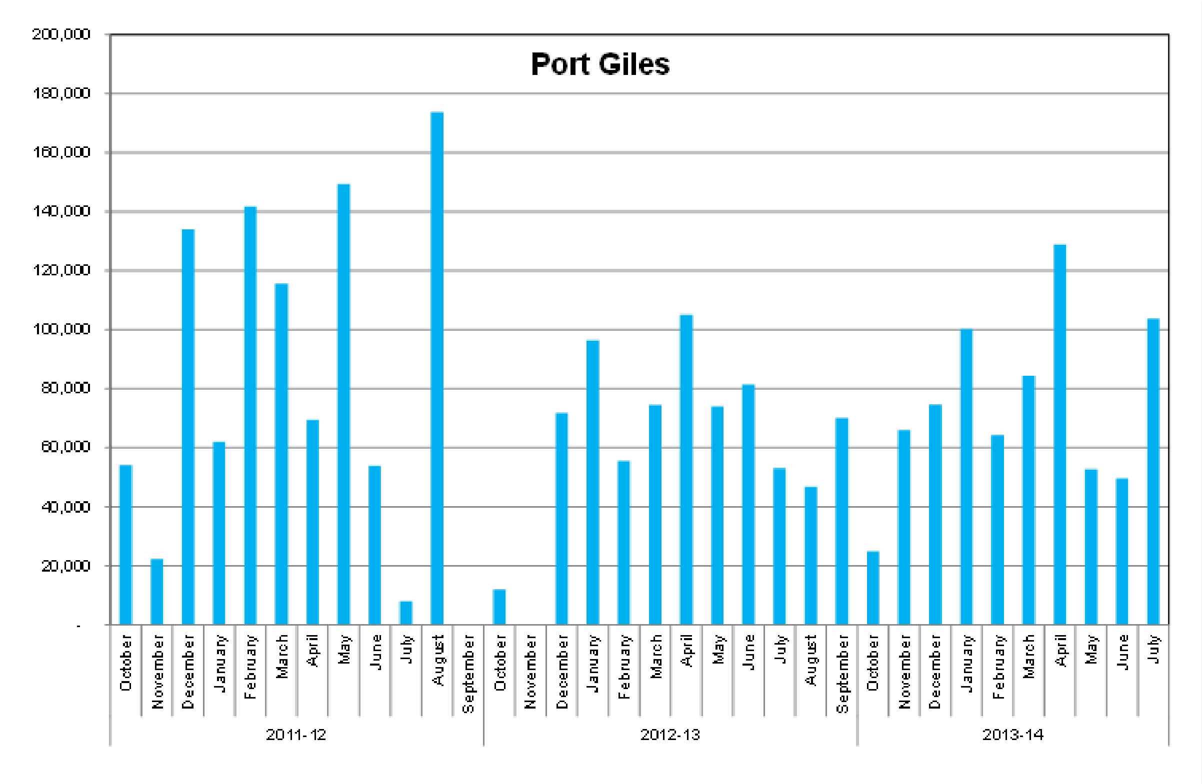


Chart A12 Thevenard total monthly exports, 2011-12 to 2013-14

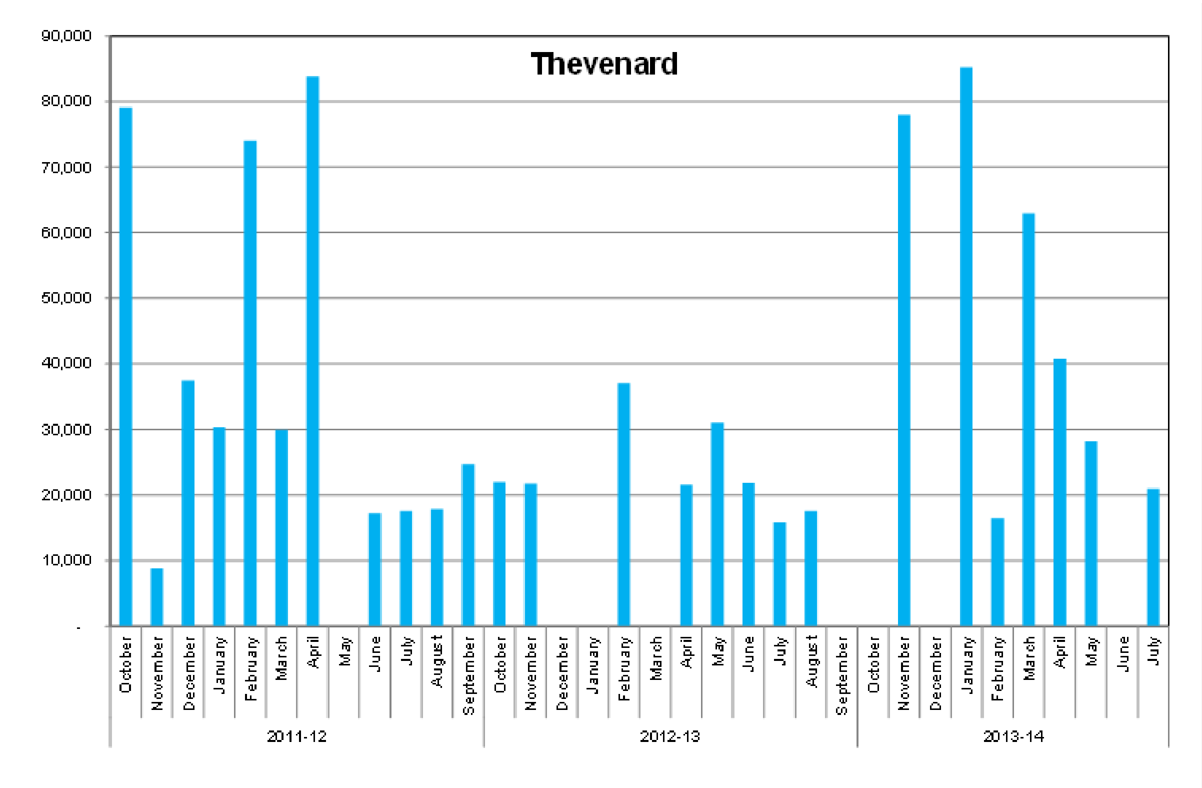
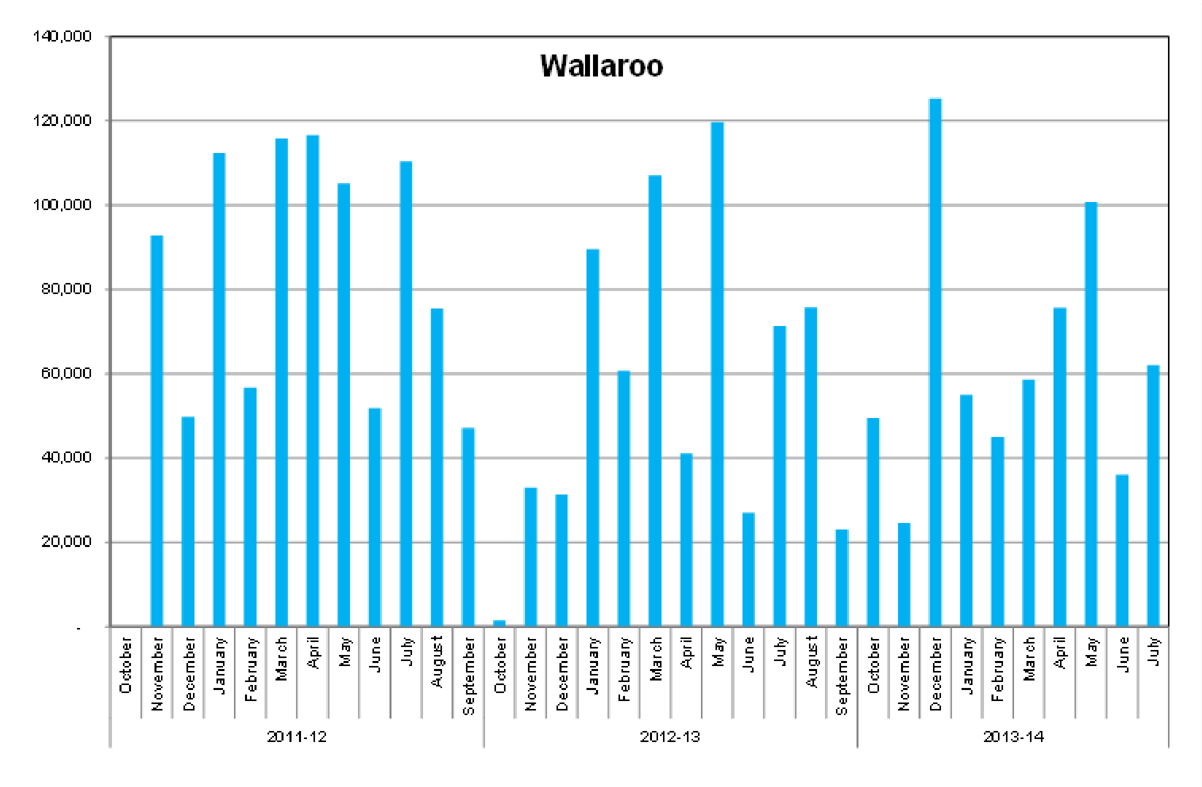


Chart A13 Wallaroo total monthly exports, 2011-12 to 2013-14



Series 3: Indicative long and short term capacity allocations.

In charts A14 to A25 below and charts 4.7 and 4.8 at chapter 4 in the decision document the ACCC has considered historical SA shipping data against the framework of the LTC allocation process.

The ACCC has compared the historic shipping patterns for Viterra's facilities to the total amounts of port capacity proposed by Viterra to be available for LTC and STC.

Key observations from the shipping data are that:

- Considering the baseline (or minimum capacity) of STC and LTC available for exporters under the Viterra proposal, the data indicates that, over the past four years, there are many occasions where capacity constraints would exist across a number of ports. This occurs even in years where there is a smaller than average harvest.
- Exporters have demonstrated an ongoing interest in shipping from the premium shipping ports of Port Lincoln and the Port of Adelaide (Outer and Inner Harbour).
- Capacity constraints can be observed at all six ports during the peak shipping period.

The long term capacity scenario considers a situation where Glencore acquires the maximum long term capacity available, as provided for in the June protocols.

The short term capacity scenario is intended as a guide only. It is not possible to determine who will receive capacity via the FIFS system. The charts provide an overview of the of the likely overall level of demand for STC, should Viterra allocate long term capacity as provided for in accordance with protocols and as set out in long term capacity scenario charts. Each column should be viewed in aggregate. If the column as a whole exceeds the indicated short term capacity market it is likely that some or all of the various exporter types will miss out on capacity for that particular port and time period. Given the uncertainty surrounding any FIFS outcome, exporter groups below the line will not receive capacity ahead of those above the line.

The data should also be considered taking into account the historic effect of the auction system and the rebate structure. As noted in the decision, the auction system rebate structure has likely led to shipping being spread more evenly across the calendar year, with typical peak shipping periods less defined. It is likely that, without the auction system, peaks and non-peak shipping periods will be more clearly differentiated.

As also noted above, data relating to Port Adelaide Outer Harbour and Port Adelaide Inner Harbour should be considered in conjunction.

The following charts have been developed using Australian Crop Forecasters data and data provided by Viterra.

Chart A14 Port Lincoln: Indicative long term capacity - Viterra and other larger exporters' shipments, within and above LTA capacity limits

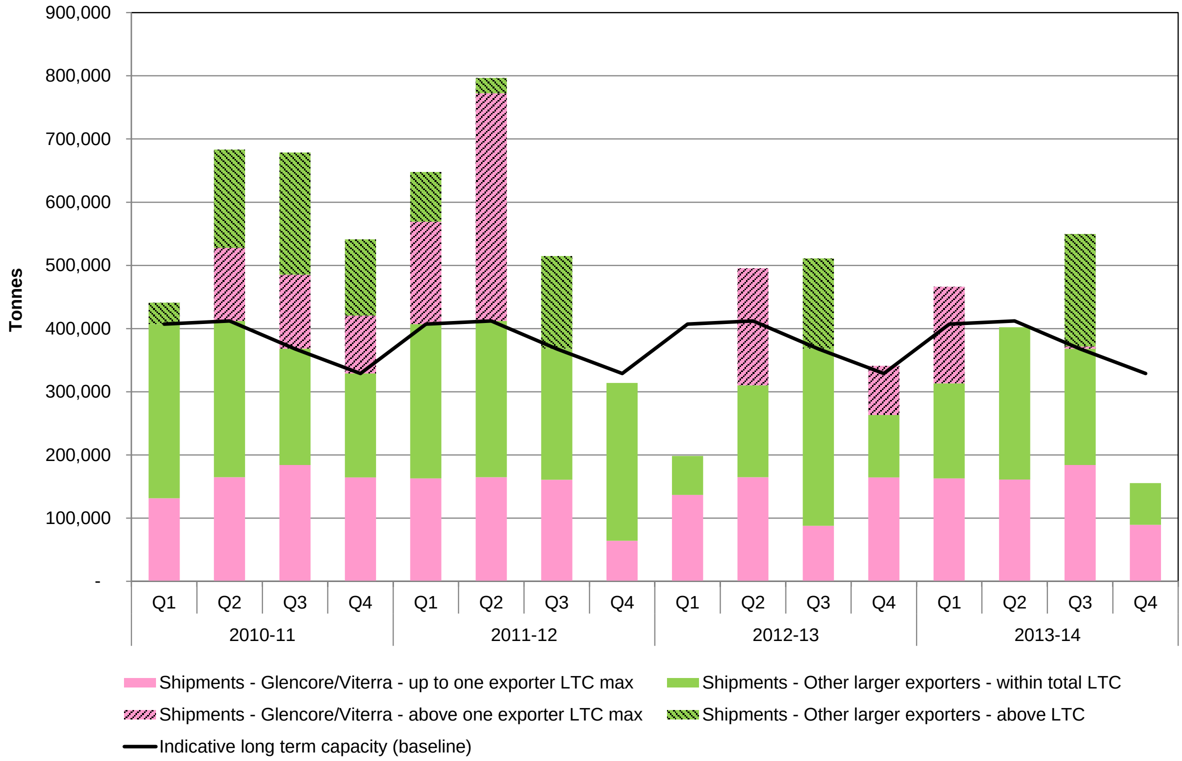


Chart A15: Port Lincoln: Indicative short term capacity - Smaller exporters' shipments and larger exporters' shipments above LTA capacity limits

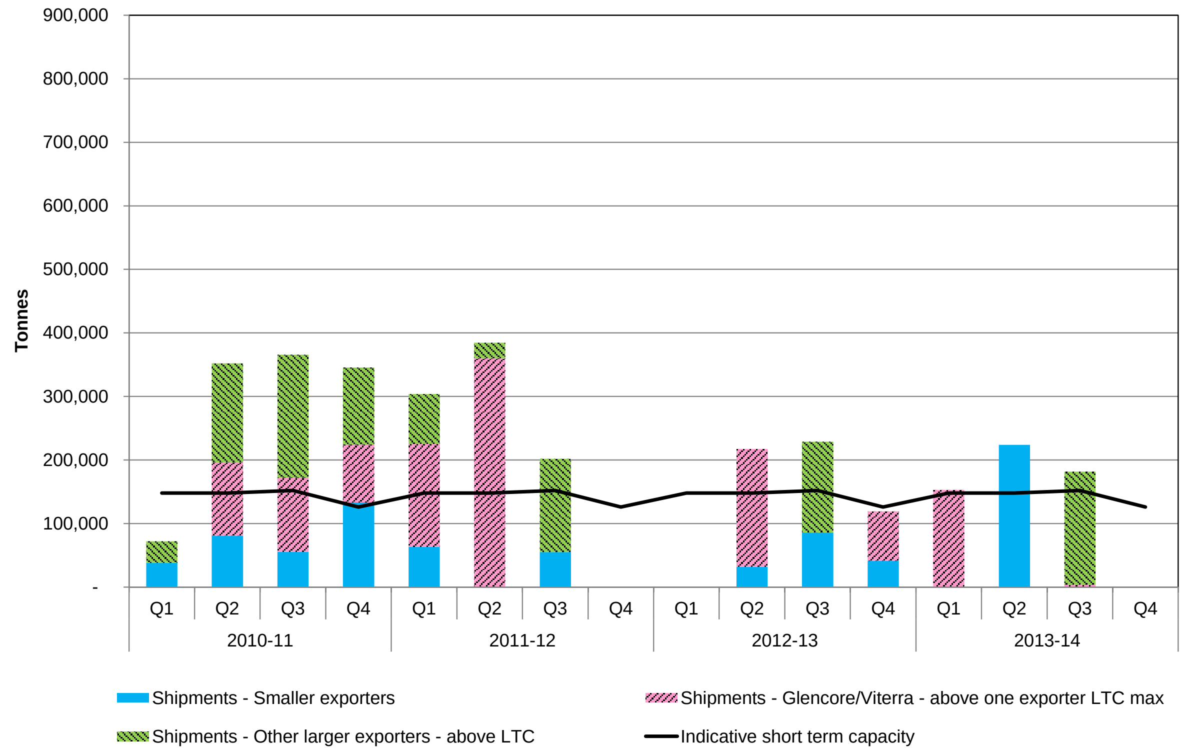


Chart A16 Adelaide Outer Harbour indicative long term capacity - Viterra and other exporters' shipments, within and above LTA capacity limits

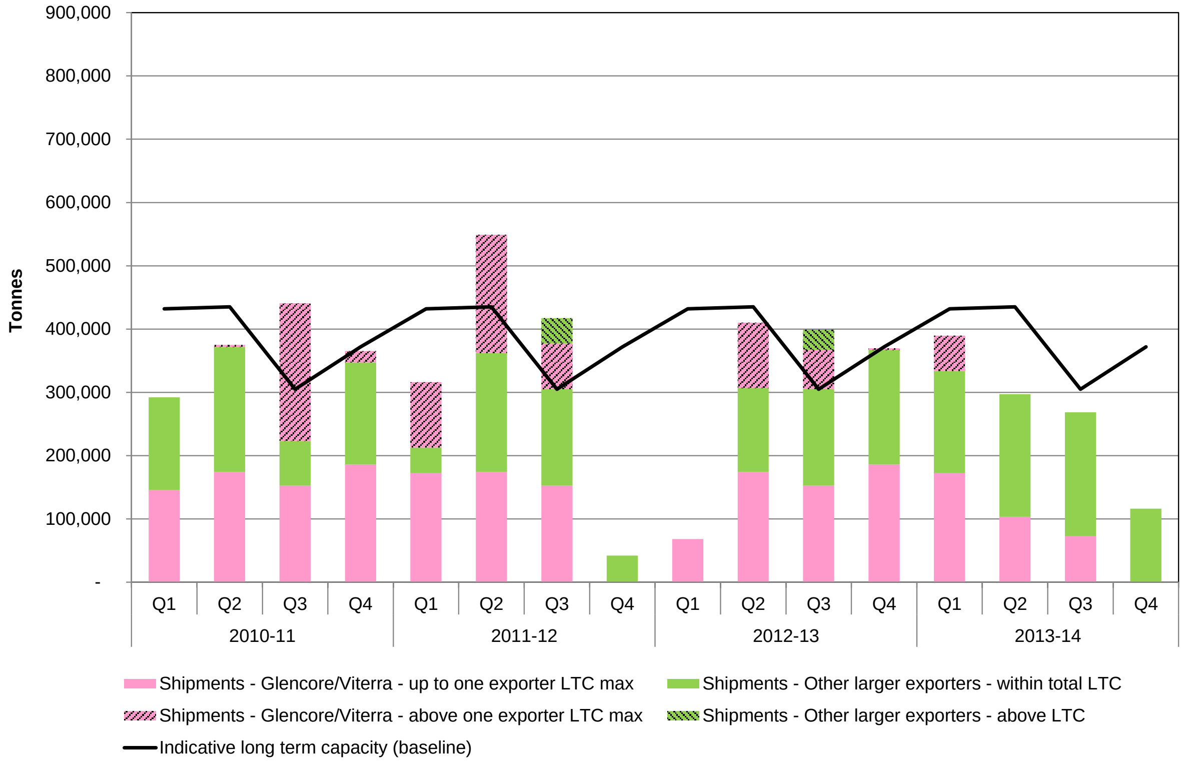


Chart A17 Adelaide Outer Harbour indicative short term capacity - Smaller exporters' shipments and larger exporters' shipments above LTA capacity limits

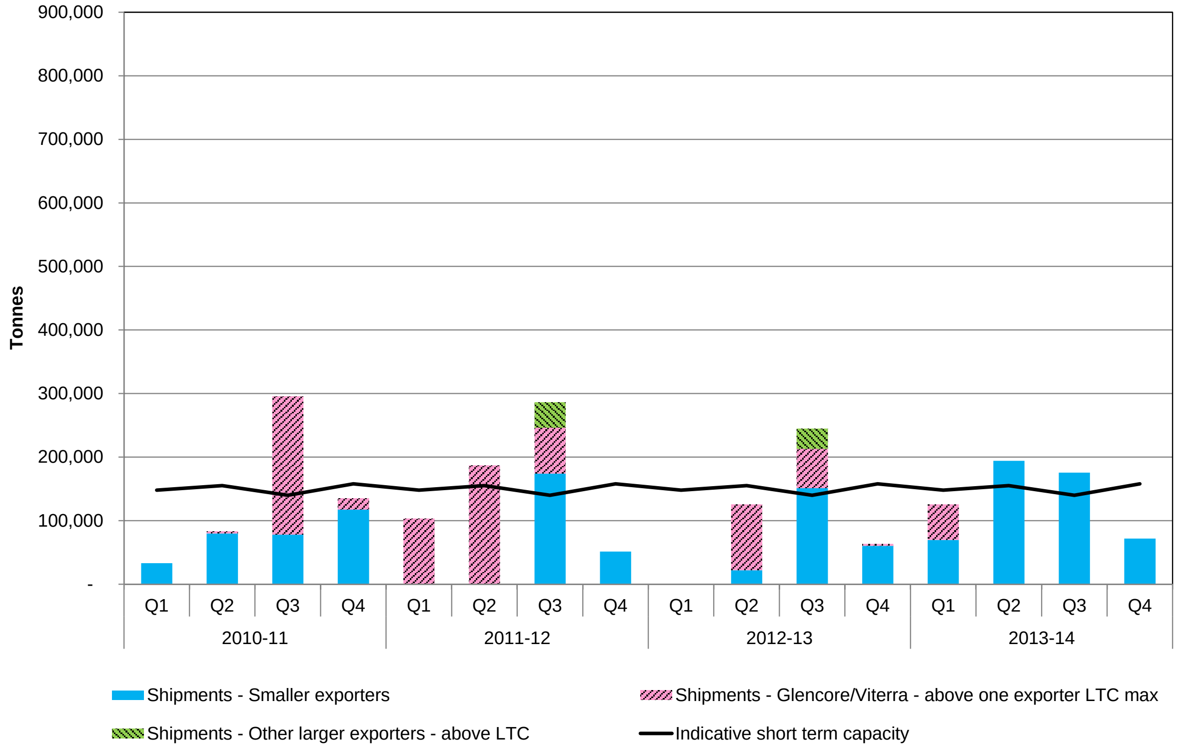


Chart A18 Adelaide Inner Harbour indicative long term capacity - Viterra and other exporters' shipments, within and above LTA capacity limits

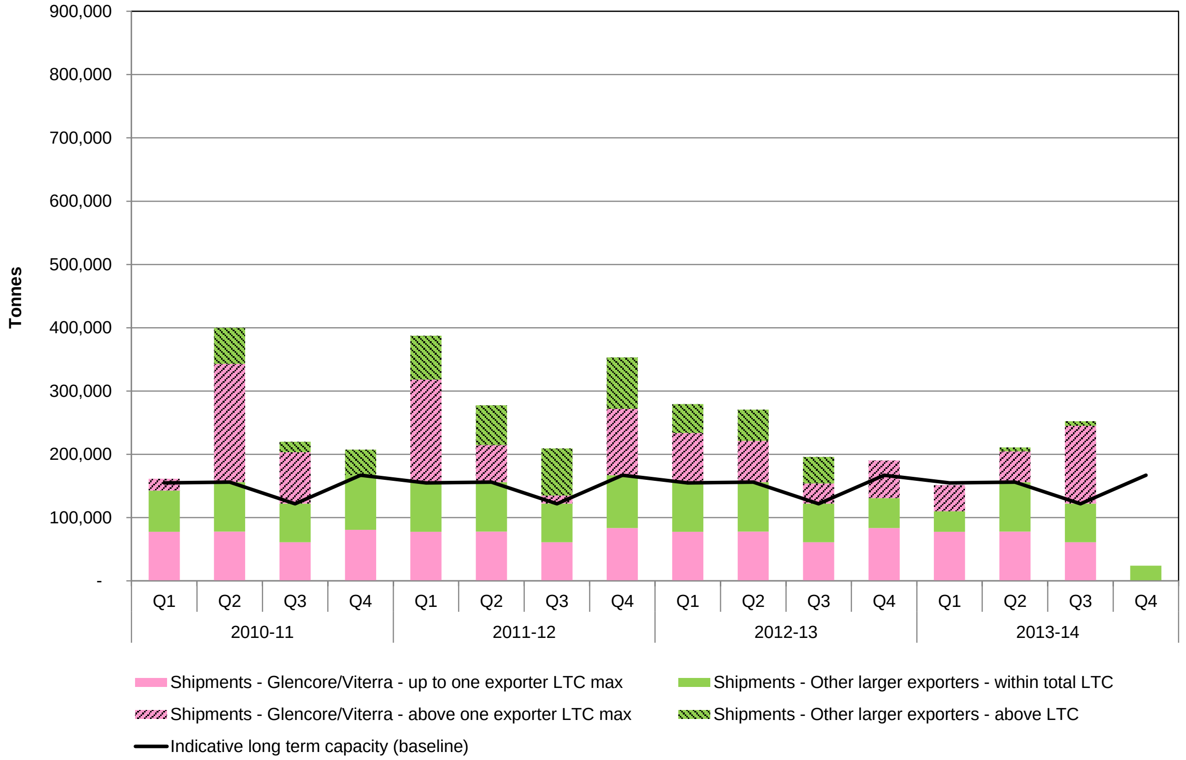


Chart A19 Adelaide Inner Harbour indicative short term capacity - Smaller exporters' shipments and larger exporters' shipments above LTA capacity limits

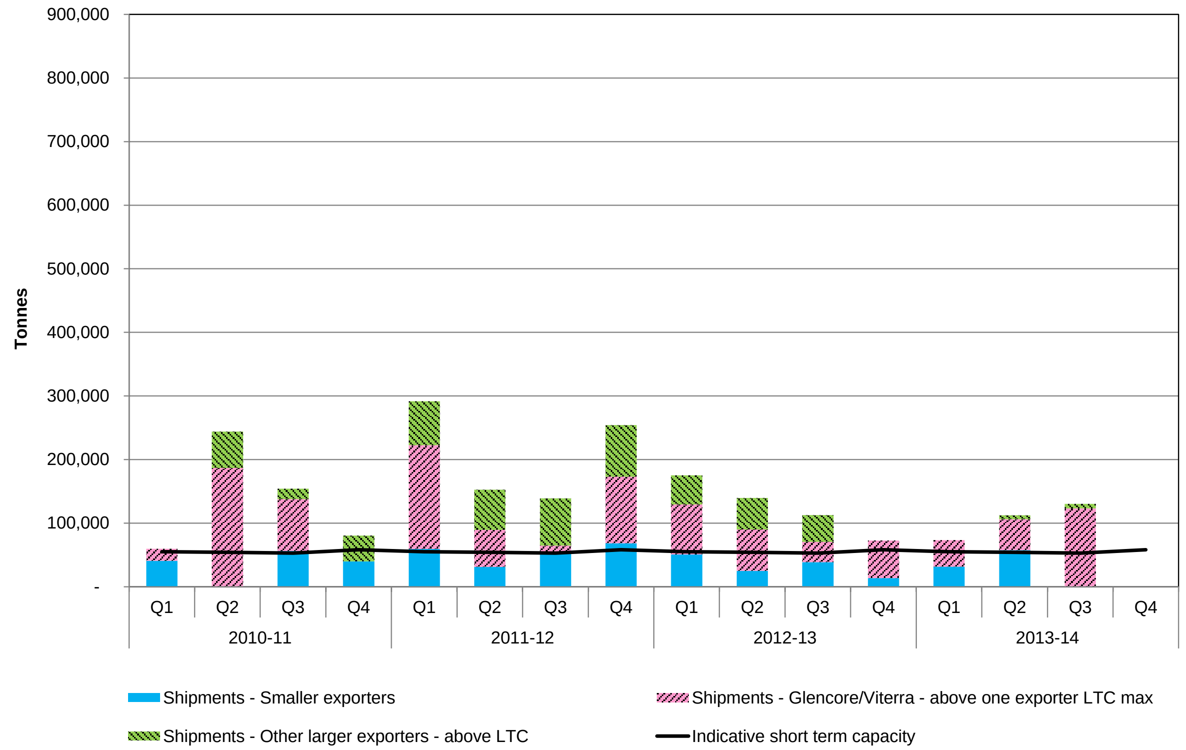


Chart A20 Port Giles indicative long term capacity - Viterra and other exporters' shipments, within and above LTA capacity limits

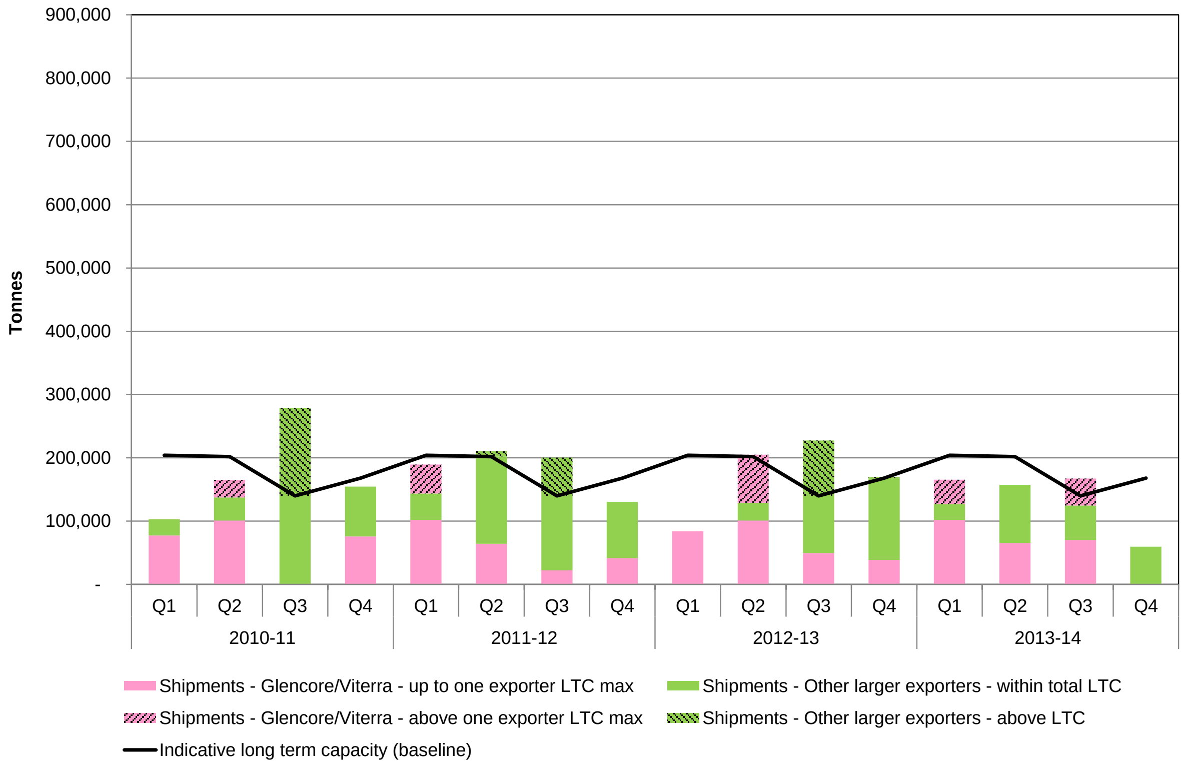


Chart A21 Port Giles indicative short term capacity - Smaller exporters' shipments and larger exporters' shipments above LTA capacity limits

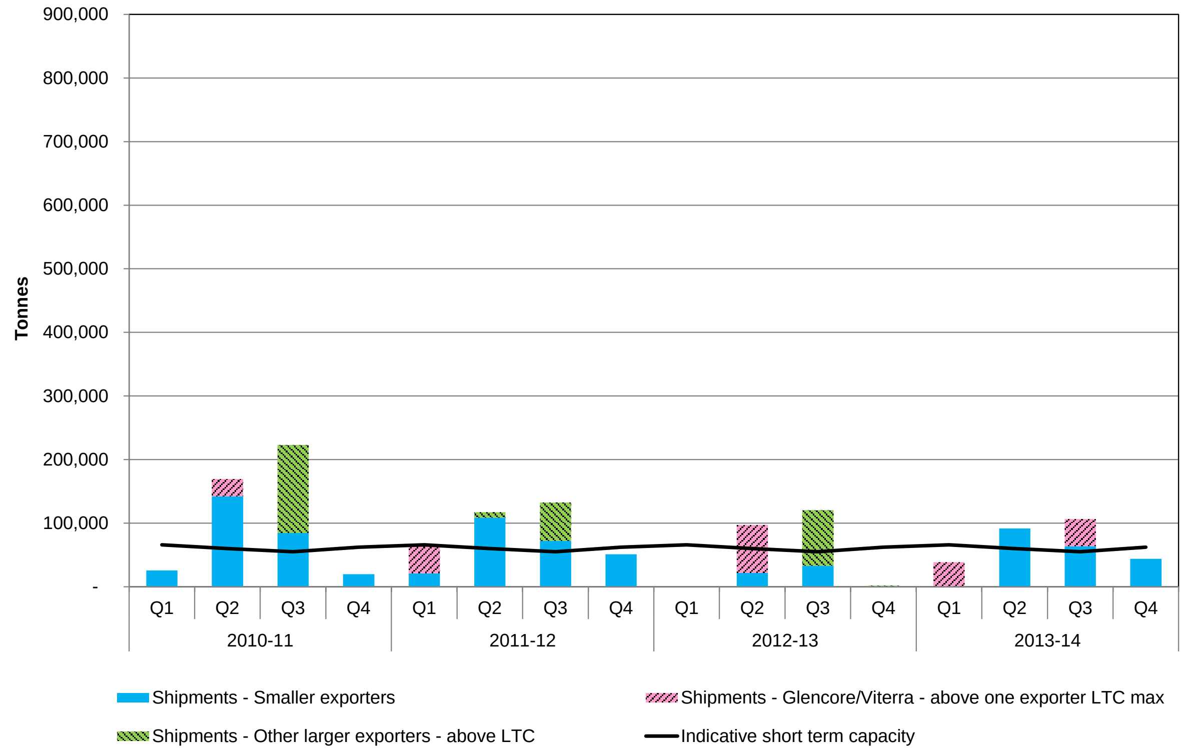


Chart A22 Thevenard indicative long term capacity - Viterra and other larger exporters' shipments, within and above LTA capacity limits

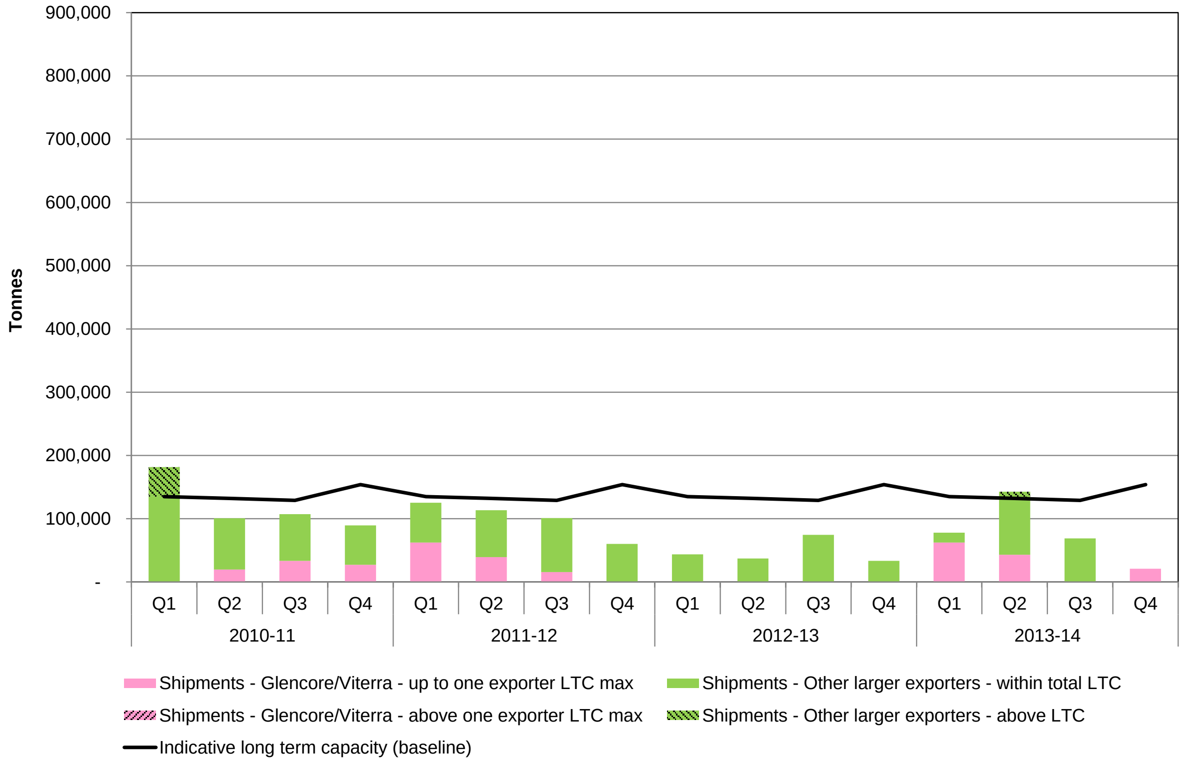


Chart A23 Thevenard indicative short term capacity - Smaller exporters' shipments and larger exporters' shipments above LTA capacity limits

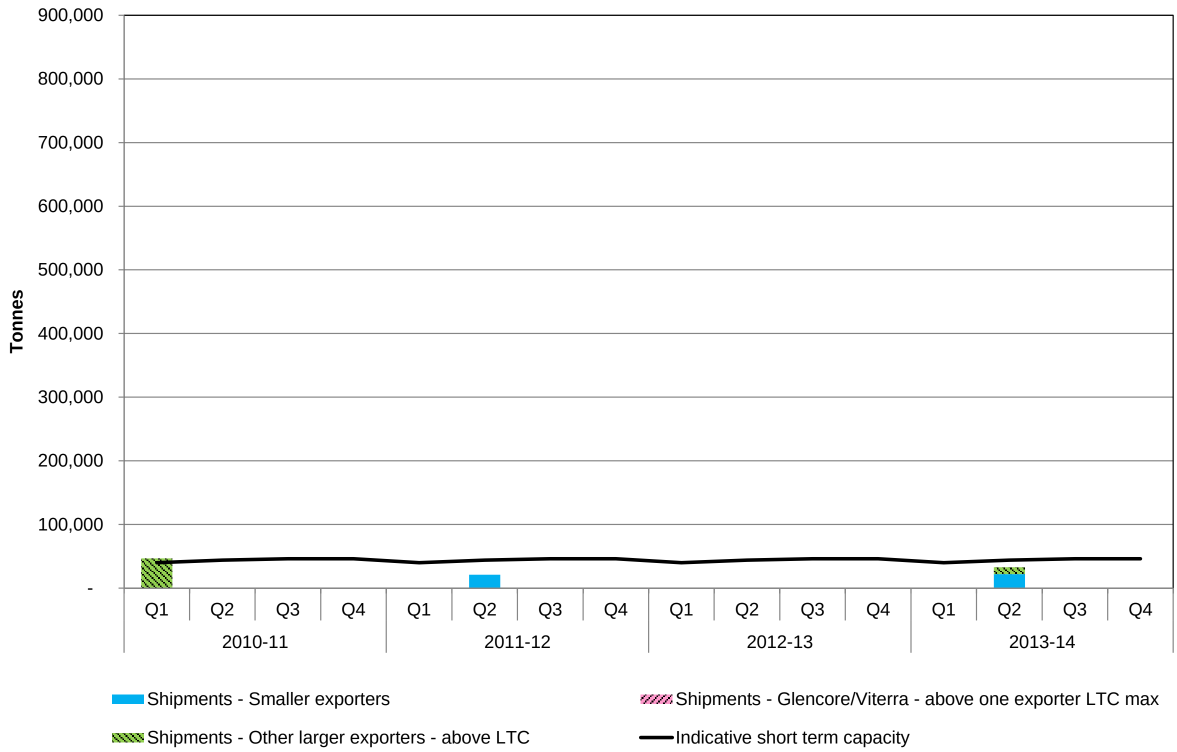


Chart A24 Wallaroo indicative long term capacity - Viterra and other exporters' shipments, within and above LTA capacity limits

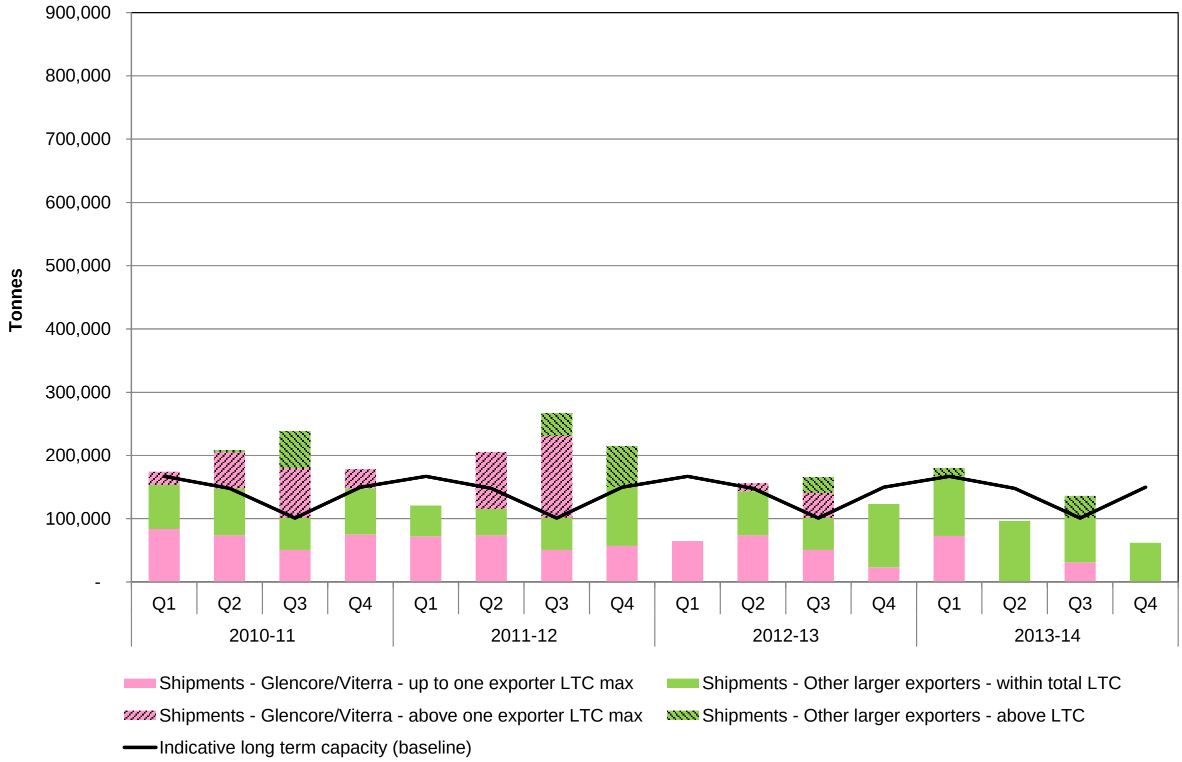


Chart A25 Wallaroo indicative short term capacity - Smaller exporters' shipments and larger exporters' shipments above LTA capacity limits