ACCC Determination

Exemption in respect of

GrainCorp’s Carrington (Newcastle) Port Terminal Facility

Date: 1 October 2014

Australian Competition and Consumer Commission
23 Marcus Clarke Street, Canberra, Australian Capital Territory, 2601

Summary

Under the Competition and Consumer (Industry Code – Port Terminal Access (Bulk Wheat) Regulation 2014 (the Code), the ACCC has determined that GrainCorp Operations Ltd (GrainCorp) is an exempt service provider of port terminal services provided by means of its Carrington (Newcastle) Port Terminal Facility (Carrington facility).

The exemption means that GrainCorp will be subject to a lower level of regulation (Parts 1 and 2 of the Code only). In granting this exemption, the ACCC has had regard to the matters listed at subclause 5(3) of the Code. In sum, while the ACCC notes that GrainCorp is vertically integrated as a port terminal service provider and an exporter, it would have limited ability to exercise market power at the port given:

- Effective competition in the provision of bulk grain port terminal services at the Port of Newcastle (in particular, from the Newcastle Agri Terminal), and a competitive upstream and downstream market. This includes competing markets that exporters can sell grain to including the domestic market, and container providers both up-country and at the port.

- Excess capacity at the port and competitive pressures on GrainCorp should mean that GrainCorp has incentives to increase throughput at its Carrington facility.

As a result, it is likely that exporters of bulk wheat will have fair and transparent access to port terminal services at GrainCorp's Carrington facility. This competition at the port in bulk grain terminal services will also likely drive the more efficient operation and use of the Carrington facility in the absence of greater regulation under the Code.

The ACCC also considers that granting an exemption for GrainCorp's Carrington facility will further promote competition by placing GrainCorp on a more level playing field with competitors (such as Newcastle Agri Terminal) that are not currently subject to the Code because they are subject to a later commencement date (1 October 2015). This would be in GrainCorp's legitimate business interests as it would allow it the flexibility to better match competitor services and reduce its regulatory costs for the Carrington facility.

The ACCC's full assessment of the matters at subclause 5(3) of the Code is set out at section 5 of this document. This determination has effect as of 1 October 2014.

Contents

1. Introduction

This document forms the ACCC's written determination that GrainCorp is an exempt service provider of port terminal services provided by means of its Carrington facility and sets out the reasons for the determination. This exemption means that certain parts of the Code will not apply to GrainCorp's Carrington facility and it will therefore be subject to a lower level of regulation.

The Carrington facility is located at Berth no. 3 at Carrington at the Port of Newcastle in New South Wales. The following facilities are located at the Carrington facility – intake/receival facility, grain storage facility, weighing facility, shipping belt and ship loader.

2. Background

The Code

Following the Minister's approval of the Code and the Code being declared to be a mandatory industry code under section 51AE of the *Competition and Consumer Act 2010* (CCA), the previous regulatory framework under the *Wheat Export Marketing Act 2008* (WEMA) was repealed (discussed more below).

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

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 *Competition and Consumer Act 2010*) 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.

1 Clause 2 of the Code

All port terminal service providers are subject to the whole Code (Parts 1 to 6) unless exempted by either the Minister or the ACCC.[2] Exempt service providers are subject to Parts 1 and 2 of the Code only and are therefore subject to a lower level of regulation. Parts 1 and 2 of the Code require all port terminal service providers to:

- deal with exporters in good faith[3]
- publish a port loading statement[4]
- publish policies and procedures for managing demand for their services[5]
- make current standard terms and reference prices for each port terminal facility available to the public on their website[6]

Exempt service providers are not subject to Parts 3 to 6 of the Code which include requirements that port terminal service providers must, among other things:

- not discriminate in favour of itself or its trading business, or engage in conduct for the purpose of hindering access to port terminal facilities[7]
- 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[8]
- deal with disputes during negotiation via specified dispute resolution processes including mediation and arbitration[9]
- have, publish and comply with port loading protocols[10] including capacity allocation systems.[11] Certain capacity allocation systems must be approved by the ACCC[12]
- publish capacity and stock information details, along with key performance indicators
- retain relevant records including access agreements and variations to those agreements.

Under clause 5(2) of the Code, the ACCC can exempt service providers in relation to specified port terminal facilities (exemption determination). When making such a determination, the ACCC must have regard to a number of matters listed in subclause 5(3) of the Code. The ACCC's assessment of these matters in relation to GrainCorp's Carrington terminal is set out in detail in section 5. The Code also provides that an exemption determination can be revoked by the ACCC.[13]

As required by the Code, the ACCC will, as soon as practicable, publish on its website guidelines on the processes for making exemption determinations and revoking those determinations, including any application and public consultation processes (exemption guidelines).

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[2] Under clause 5 of the Code
3 Clause 6 of the Code
4 Clause 7 of the Code
5 Clause 8 of the Code
6 Clause 9 of the Code
7 Subclauses 10(1)and (2) of the Code
8 Subclause 11(1) of the Code
9 See clause 14 of the Code
10 See clauses 24 and 26 of the Code
[11] See subclause 25(1) of the Code
12 Subclause 25(2) of the Code
13 Subclause 5(6) of the Code

Application of the Code to GrainCorp

GrainCorp is subject to the Code. Specifically, GrainCorp is a port terminal service provider for the purposes of the Code and accordingly from 30 September 2014 the Code applies to the provision of port terminal services from all its ports in Victoria, NSW and Queensland.

If the ACCC does not exempt GrainCorp's Carrington facility, all parts of the Code would apply to services provided from that facility. The ACCC notes that the Carrington facility was exempted from most obligations under the previous 2011 undertaking (accepted under Part IIIA of the CCA). The ACCC is therefore now considering whether an exemption in respect of that facility should be granted under the Code.

Previous access regime

As noted above, the Code took effect on 30 September 2014 and as a result the WEMA no longer applies. The WEMA required that exporters of bulk wheat which were vertically integrated with a port terminal operator pass an 'access test'. This access test could be passed, in part, by having an access undertaking accepted by the ACCC under Part IIIA of the CCA.[14] As a result, four port terminal service providers (including GrainCorp) were subject to ACCC-approved access undertakings before the Code came into effect. Now that the Code has come into effect, there is no legislative requirement that vertically integrated port terminal service providers have a Part IIIA undertaking accepted by the ACCC. Rather, the Code applies to all port terminal service providers (as defined by the Code).

GrainCorp's previous undertaking was accepted by the ACCC in June 2011.

On 18 June 2014, the ACCC approved a variation to the 2011 Undertaking which exempted services provided from GrainCorp's Carrington facility from most of the clauses in the Undertaking (the Newcastle variation). Having regard to the relevant matters in Part IIIA of the CCA, the ACCC decided it was appropriate to accept the Newcastle variation. In particular it considered that there was a sufficient level of competition and capacity, such that the existing level of regulation was no longer required. The decision can be found on the ACCC's website.[15] The Undertaking continued to fully apply to the other six bulk wheat terminals operated by GrainCorp in Victoria, NSW and Queensland: Fisherman Islands (Brisbane), Geelong, Gladstone, Mackay, Port Kembla and Portland.

At end July 2014, GrainCorp submitted a variation and extension application to extend the operation of its 2011 Undertaking until the earlier of 30 September 2015 or such a time as it was no longer required to have an access undertaking accepted by the ACCC, including upon the commencement of the Code.[16] On 24 September 2014, the ACCC made a decision to accept this extension variation. When the Code came into effect, the 2011 Undertaking also expired. This decision can be found on the ACCC's website at http://www.accc.gov.au/regulated-infrastructure/wheat-export/graincorp-operations-ltd-2011.

Relevant industry context

This exemption determination only relates to GrainCorp's Carrington facility at the Port of Newcastle. The ACCC notes some key industry features relevant to this exemption as follows.

14 Subsection 9(1) WEMA
15 https://www.accc.gov.au/regulated-infrastructure/wheat-export/graincorp-operations-ltd-2011/variation
16 Clause 3.2(b) Port Terminal Services Access Undertaking by GrainCorp in favour of ACCC

At the Port of Newcastle there are now three wheat export operations:

- GrainCorp's Carrington facility,
- Newcastle Agri Terminal (NAT) (owned by its management as well as CBH, Agrex and Glencore), and
- the Louis Dreyfus storage shed located at Mountain Industries' facilities at Kooragang Newcastle (the Louis Dreyfus' facility). Mountain Industries uses the elevation services provided by Qube to export grain at the port.

The ACCC notes that Mountain Industries was recently acquired by Patrick Ports and Stevedoring (Asciano). It is possible that, in the future, Mountain Industries may use the services of an alternative provider, such as Asciano, for port elevation instead of Qube.

Further background information on GrainCorp's Carrington, NAT and Louis Dreyfus' facilities is set out in Appendix A.

Wheat exported from the Port of Newcastle is primarily sourced from an area north of the Port including the Liverpool Plains and further afield from the regions surrounding Narrabri and Moree. For the purposes of this exemption determination this area is defined as the Newcastle Port Zone (NPZ).

Bulk wheat produced from the NPZ is sought by a number of competing markets within the NPZ, including feed lot operators and millers, and other domestic and international buyers. Wheat from the NPZ can also be exported in containers. Further background information on the NPZ is set out in Appendix B.

3. Consultation

The Code does not specify any requirements for the ACCC to consult on an exemption determination. However, the ACCC intends to set out its general approach to consultation and other processes in its exemption guidelines.

While the ACCC generally intends to undertake public consultation when making exemption determinations under the Code, the ACCC has decided to not undertake public consultation in relation to this exemption determination. The ACCC conducted extensive formal and informal consultation when it assessed GrainCorp's variation to its 2011 undertaking earlier this year. Submissions to this consultation process are published on the ACCC's website (http://www.accc.gov.au/regulated-infrastructure/wheat-export/graincorp-operations-ltd-2011/variation).

Given that this consultation was recent and covered issues that are similar in substance to this exemption determination, the ACCC has not undertaken any further public consultation for the purposes of its assessment.

4. Legislative framework

In making an exemption determination under the Code, the ACCC must have regard to the matters specified in subclause 5(3):

(a) the legitimate business interests of the port terminal service provider;

(b) the public interest, including the public interest in having competition in markets;

(c) the interests of exporters who may require access to port terminal services;

(d) the likelihood that exporters of bulk wheat will have fair and transparent access to port terminal services;

(e) the promotion of the economically efficient operation and use of the port terminal facility;

(f) the promotion of efficient investment in port terminal facilities;

(g) the promotion of competition in upstream and downstream markets;

(h) whether the port terminal service provider is an exporter or an associated entity of an exporter;

(i) whether there is already an exempt service provider within the grain catchment area for the port concerned;

(j) any other matters the ACCC considers relevant.

5. ACCC assessment

The ACCC's assessment of the above subclause 5(3) matters in relation to GrainCorp's Carrington terminal is set out in this section.

(a) the legitimate business interests of the port terminal service provider

When having regard to this matter, the ACCC has considered whether granting the exemption would support the legitimate business interests of a port terminal service provider. The ACCC considers that the legitimate business interests may include a consideration of:

- The ongoing commercial viability of services provided from the relevant port terminal facility.
- The likely impact of greater regulation (Parts 3 to 6 of the Code) on any investment decisions made by the port terminal service provider.
- The likely impact of the costs incurred by the service provider if it were subject to the requirements of Parts 3 to 6 of the Code, including any opportunity costs arising from having to comply with the Code.
- The likely impact of greater regulation on the service provider's ability to compete in the provision of port terminal services or other upstream and downstream markets.

The ACCC notes that GrainCorp's storage and logistics division (including exports) reported revenue of around $280 million for the first half of 2013/2014 which is $105 million lower than the preceding period.[17] GrainCorp has explained that its performance was because of a below average carry-in and a smaller crop in northern regions due to the drought causing lower grain receivals, as well as increased demand from domestic end-users, which has

17 GrainCorp Ltd, Appendix 4D for the half year ended 31 March 2014, at link http://www.graincorp.com.au/investors-and-media/presentation-and-events/results-releases (viewed 16/09/2014)

limited the amount of grain available for export.[18] While this does not suggest that the Carrington facility is not commercially viable, granting this exemption would support the further operation of the Carrington facility in a period of difficult trade by reducing regulatory costs for the facility.

The ACCC considers that granting the exemption would allow GrainCorp to compete more vigorously in providing port terminal services and in upstream and downstream markets. The ACCC notes that the higher level of regulation (Parts 3 to 6) under the Code could restrict how GrainCorp operates compared with other exporters at the Port of Newcastle, in particular the NAT facility. The Code contains operational and commercial requirements including:

- the offer of standard terms and reference prices before entering negotiations with an exporter about the terms of an access agreement[19]
- restrictions around the capacity allocation system that applies to the port terminal facility. Namely, the port terminal service provider must seek ACCC approval for a system which purports to allocate capacity more than 6 months after the allocation.[20] The provider must also comply with the capacity allocation system[21]
- an obligation to not discriminate in favour of itself[22]

In contrast, GrainCorp's competitors will not be immediately subject to the Code and will not have to comply with the above requirements. They will have greater scope to differentiate services and respond flexibly to the demands of the market - for example, by varying capacity allocation rules for commercial considerations. In particular, NAT may be able to be more responsive to emerging situations concerning wheat availability, shipping opportunities and other changes. The ACCC considers that granting an exemption would be in GrainCorp's legitimate business interest as it would allow GrainCorp to match or better its competitors' services. This would improve competition for port terminal services at the Port of Newcastle and also indirectly promote greater competition in upstream and downstream markets (discussed more below regarding subclause 5(3)(g)).

(b) the public interest, including the public interest in having competition in markets

When having regard to this matter, the ACCC will consider whether the public interest is best served by subjecting the port operator to a lower level of regulation under the Code. Public interest includes an interest in ensuring that the exemption will promote competition in upstream and downstream markets. More broadly, the ACCC also considers that public interest includes the following matters and the ACCC may address these matters in exemption assessments:

- economic and regional development, including employment and investment growth
- the interests of consumers generally or as a class of consumers
- the competitiveness of Australian businesses
- the efficient allocation of resources

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18 GrainCorp Ltd, News release, Solid performance from processing businesses underpins half year result, 15 May 2014, at link http://www.graincorp.com.au/investors-and-media/presentation-and-events/results-releases (viewed 16/09/2014)
19 Subclause 11(6) Code
20 Clause 25(2)(a) Code
21 See clause 26 of the Code
22 Subclause 10(1) Code

In relation to this exemption assessment, the ACCC discusses competition in upstream and downstream markets as it relates to subclause 5(3)(g) below. In sum, the ACCC considers that the state of competition in the market for bulk wheat exports at the Port of Newcastle and upstream and downstream markets supports the granting of an exemption and this would be consistent with a public interest in promoting competition.

(c) the interests of exporters who may require access to port terminal services

The ACCC generally considers that granting an exemption will not be against the interests of exporters requiring access to port terminal services if they can still compete in the grain export market on their relative merits. Competition on its merits would be hindered if terms and conditions of access favour one or more exporters over others, thereby distorting the competitive process.[23] The ACCC will also consider the bargaining power of exporters and whether exporters have a viable alternative to export through the relevant port terminal facility.

As discussed below in assessing subclause 5(3)(h), GrainCorp is vertically integrated across bulk grain export and port terminal services. As a result, it may have the incentive to favour its own trading arm against the interests of competing exporters.

As discussed below in relation to subsection 5(3)(g), the ACCC considers that competition in bulk wheat export operations at Newcastle would constrain GrainCorp from favouring its trading arm after the exemption is granted. The ACCC also considers that exporters will be able to obtain access to GrainCorp's Carrington facility or alternatives to that facility where a requirement to offer to enter into or negotiate terms of an access agreement does not apply.[24] The ACCC notes:

- Specifically, GrainCorp's major customer, Cargill, has significant volumes in the NPZ which suggests that it would be in a good position to negotiate access to GrainCorp's Carrington facility. In the alternative, it could negotiate access to the NAT.
- Further, of the remaining exporters using the GrainCorp Carrington facility, Glencore and Olam/Queensland Cotton as shareholders of NAT are more likely to seek access from NAT going forward.
- Submissions (e.g. NSW Farmers) on the Newcastle variation of the 2011 Undertaking expressed concerns that smaller exporters may not be able to obtain access. Consistent with the ACCC's decision on the Newcastle variation, the ACCC continues to consider that the increased total capacity at the Port of Newcastle (including the capacity brought on by NAT and the Louis Dreyfus facility) will provide new opportunities for smaller exporters. This significant excess capacity suggests that there would be incentive for GrainCorp to increase throughput rather than foreclose access, and accordingly smaller exporters should be able to gain access if the exemption is granted.[25]
- Smaller exporters could also bypass the bulk wheat terminal operators by replicating Louis Dreyfus' arrangement by entering into an arrangement either by themselves or with another firm for storage, and then acquiring port elevation services from a company such as Qube.

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23 Ibid.
24 See subclause 11(6) of the Code
25 ACCC, Decision to Accept GrainCorp Operations Limited's Application to Vary the 2011 Port Terminal Services Access Undertaking, 18 June 2014, pp 42-44

In view of the above, the ACCC considers that granting the exemption would not be detrimental to the interests of exporters requiring access to GrainCorp's Carrington facility. This is a factor in support of the exemption.

(d) the likelihood that exporters of bulk wheat will have fair and transparent access to port terminal services

This matter is related to the above matter under subclause 5(3)(c) of the Code. The ACCC considers that this matter requires it to consider whether exporters of bulk wheat will be likely to have fair and transparent access to port terminal services if the exemption is granted. That is, whether the port terminal service provider will have the incentive and ability to favour itself on price and non-price dimensions if an exemption is granted. If exempt, the port terminal service provider will not be required to not discriminate under the Code.

The ACCC notes that, if exempt, GrainCorp could, being vertically integrated (see discussion of subclause 5(3)(h) below), favour the shipping and logistics needs of GrainCorp Trading ahead of other exporters, especially during the key shipping post-harvest period.

However, the ACCC considers that competition in bulk wheat export operations at the port will effectively constrain GrainCorp's ability to favour its trading arm in a way that disadvantages competing wheat marketers (competition is discussed more below regarding subclause 5(3)(g)). Accordingly, the ACCC considers that there is a strong likelihood that wheat exporters will have fair and transparent access to the Carrington facility if an exemption is granted.

(e) the promotion of the economically efficient operation and use of the port terminal facility

In assessing this matter, the ACCC will consider whether:

- competition among port terminal service providers will drive efficient operation and use of the port terminal facility
- a requirement to comply with the whole code would result in less uptake of the port terminal service than would otherwise be efficient.

The ACCC considers that the development of competition at the Newcastle Port and competition in upstream and downstream markets (see subclause (g) below) will drive efficient operation and use of a port terminal facility in the absence of full regulation under the Code.

The ACCC also notes that subjecting GrainCorp's Carrington facility to a higher level of regulation under the code when its port competitors are currently not regulated has the potential to distort the efficient use of GrainCorp's services. For example, if GrainCorp does not supply services from the Carrington facility because of higher regulatory requirements where it would otherwise be efficient, then this may result in less efficient uptake of the service. The ACCC considers that the above factors support the exemption determination.

(f) the promotion of efficient investment in port terminal facilities

The ACCC will generally take into account the effect of the exemption determination on efficient investment in port terminal facilities when considering this matter. In this regard, the ACCC notes that in some circumstances undue regulation can provide a disincentive for efficient investment in a specific port terminal facility.

In relation to GrainCorp's Carrington facility, the exemption would create a more level playing field by subjecting GrainCorp's facility to less regulation under the Code where its competitors are currently subject to none. This might incentivise GrainCorp to undertake efficient investment in the Carrington facility as it will not be subject to significantly greater regulation than its competitors in respect of those investments.

An exemption under the Code would also be consistent with the exemption of the facility under the previous 2011 Undertaking. The ACCC considers that this regulatory consistency creates certainty for GrainCorp to make efficient investments in the Carrington facility, and also provides certainty for other industry participants making related investment decisions.

(g) the promotion of competition in upstream and downstream markets

When assessing this matter, the ACCC considers that the following factors would support granting an exemption:

- If there is a sufficient degree of competition in the provision of port terminal services or bulk wheat export operations then the full application of the Code might not be required to promote competition in upstream and downstream markets.
- If reducing regulation would allow the port terminal service provider to better compete in upstream or downstream markets, then this would also be a factor that promotes competition in those markets. This factor overlaps with the ACCC's consideration of legitimate business interest (subclause 5(3)(a) above).
- If there is sufficient competition in upstream and downstream markets this may also provide a constraint on an exercise of market power in the provision of port terminal services.

Level of competition in bulk wheat export operations at the Port of Newcastle

Reflecting its decision on the Newcastle variation to GrainCorp's 2011 Undertaking, the ACCC considers that the presence of competition (particularly from the NAT) at the Port of Newcastle, will sufficiently protect competition for bulk export from Newcastle and limit any exercise of market power at GrainCorp's Carrington facility. In particular, the ACCC notes:

- The NAT appears comparable to GrainCorp's Newcastle facility and has operational advantages such as better rail access (designed to facilitate rail receival due to its balloon loop facility) and the ability to service larger vessels. Despite the drought, NAT finalised its first major shipment of 28,000 tonnes of durum wheat for the Australian Durum Company earlier this year.[26] This exemplifies some level of competition between GrainCorp's Carrington facility and the NAT as both could have provided services for that shipment. NAT's recent entry may also demonstrate that barriers to entry (and expansion) are not high and that there is a credible threat of new entry/expansion which could provide an additional constraint on GrainCorp.

- While the Louis Dreyfus facility is unlikely to provide a significant and direct constraint on GrainCorp's facility because of its small scale and because it is not currently open to other exporters, the development of the facility by joint venture with Mountain Industries demonstrates that operators can establish alternatives to large scale port terminals. The ACCC notes that joint ventures where the customer (exporter) contributes to capital

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26 First grain shipment for Newcastle Agri Terminal, Newcastle Agri Terminal, 22 February 2014, at link http://www.naterminal.com.au/index.php/latest-news/51-media-release-first-grain-shipment-for-newcastle-agri-terminal (viewed 9 September 2014).

investment and/or commitment to long term contracts with storage providers such as Mountain Industries is not uncommon.

The ACCC also notes that the total capacity for wheat export from the three current facilities continues to exceed the typical annual exports from Newcastle, including at the peak period from December to May. This tends to suggest that the current port terminal service providers will compete vigorously for volume throughput, and that large exporters such as Cargill will have strong bargaining power against GrainCorp (discussed further above regarding subclause 5(3)(c) interests of exporters).

Competition in upstream and downstream markets

The geographic region upstream from the port, the NPZ, is the most likely source of wheat for GrainCorp's Carrington facility and other competing facilities at the Port of Newcastle.

The ACCC's view is that the state of competition in upstream markets is an additional and significant constraint on an exercise of market power at the Carrington facility by GrainCorp. Specifically, the ACCC notes:

- Export through the Newcastle port, including through GrainCorp's facility, is not the sole destination or even the preferred destination for wheat grown in the NPZ. Growers have a range of marketing options and can supply the domestic milling sector, feed lot operators, container packers and bulk-wheat export markets. The domestic market's ability to pay a higher price than the export market and incur less transportation costs makes it an attractive option over exportation. The domestic market also typically has the first call on wheat. These alternatives would constrain an exercise of market power by GrainCorp at its Newcastle facility.

- The presence of container packing facilities at the competing ports at Newcastle operated by the NAT and Louis Dreyfus, and along the NPZ supply chain (operated by Glencore, Cargill and Louis Dreyfus) suggest growers have an alternative (albeit smaller) option to the domestic market and bulk wheat export.

- Growers' options for marketing their wheat have increased as additional grain traders enter the NPZ market for up-country storage and handling. These include Cargill Australia Limited (Cargill), Viterra Operations Limited (Viterra), and Louis Dreyfus. The strength of GrainCorp's position in the upstream market for storage and handling is likely to weaken.

- GrainCorp continues to implement Project Regeneration. Started in 2014, this project has the purpose of delivering operational efficiencies and reducing costs by: (1) rationalising its upcountry network to reduce costs (2) creating clusters for operations (3) offering "ExportDirect" which will bundle transport and handling export grain and allow GrainCorp to move grain from the most cost-effective site and (4) upgrades to load railing capacity.[27] The project reflects a need to compete and general market competitiveness for growers' wheat and other grains.

In view of the above, GrainCorp's influence on upstream markets is generally offset by the domestic market, competing storage including on farm storage, and the container trade across the entire supply chain. The presence of a number of grain traders at both port and up-country suggests it will be less likely that any one grain trader or port operator will dictate

27 See http://www.graincorp.com.au/regeneration

trade along the supply chain. The ACCC considers that these factors support granting the exemption.

(h) whether the port terminal service provider is an exporter or an associated entity of an exporter

Regarding this matter, the ACCC will generally consider the degree to which the port terminal service provider is vertically integrated into grain exportation. This will inform the extent to which the service provider would have the incentive to favour its own trading arm over competing exporters it supplies. The ACCC will take this vertical integration into account when considering other subclause 5(3) matters (discussed above) to the extent to which vertical integration:

- creates the incentive to favour its own trading arm against the interest of exporters (subclause 5(3)(c))
- would make it less likely that exporters will have fair and transparent access to port terminal services (subclause 5(3)(d))
- would impact the promotion of competition in upstream and downstream markets (subclause 5(3)(g)).

GrainCorp Storage and Handling operates its Newcastle facility making it a port terminal service provider. GrainCorp Storage and Handling is an associated entity of GrainCorp Trading which as GrainCorp's marketing arm, buys and sells wheat, barley, sorghum and canola and exports to international customers making it an exporter under the Code. GrainCorp is therefore vertically integrated for the purposes of the Code.

As discussed in detail above, while GrainCorp's vertical integration may create some incentive to favour its own trading arm, competition in the provision of port terminal services at Carrington and in upstream and downstream markets would undermine its ability to do so.

(i) whether there is already an exempt service provider within the grain catchment area for the port concerned

The ACCC generally considers that, where there is already an exempt service provider within the grain catchment area, or where the Code does not otherwise apply to a service provider in the catchment area, then this would be one factor to consider in support of an exemption. Generally it is not optimal to have different regulatory arrangements in place for operators co-located at one port as it potentially creates distortions for competition and efficiency across the industry. However, the ACCC will consider this matter on a case by case basis, taking into account the full extent of competitive constraint operating on each facility.

The ACCC considers that the relevant grain catchment area is the NPZ. In relation to the NPZ, the other port operations – NAT and Louis Dreyfus' arrangement – are not exempt. However, they are not subject to the code because the code, if applicable, would only apply to them from 1 October 2015. Specifically, subclause 4(6) provides that the Code does not apply to services from a facility if before 30 September 2014, the port terminal service provider was providing services and there was no applicable undertaking accepted by the ACCC.

The ACCC considers that this supports granting an exemption to GrainCorp for its Newcastle facility. While the exemption would still mean that services from GrainCorp's

Newcastle facility would be subject to Parts 1 and 2 of the Code when NAT and other service providers would not be subject to the Code at all, it would create a more level playing field than if the exemption was not granted.

In its application to vary its 2011 Undertaking, GrainCorp submitted that being subject to more regulation at its Newcastle facility places it at a disadvantage when competing with competitors such as NAT. This has been considered above in relation to the legitimate business interests of service providers and the promotion of competition in upstream and downstream markets (subclause 5(3)(a) and subclause 5(3)(g)).

The ACCC may, at a later date, consider making an exemption under the Code for the NAT and any other port terminal service providers. These service providers can make inquiries to the ACCC in relation to the Code.

The ACCC does not consider that there are any other matters relevant to its assessment.

6. ACCC determination

Given the above assessment of subclause 5(3) matters, the ACCC has determined that GrainCorp is an exempt service provider of port terminal services provided by means of its Carrington facility.

This determination takes effect on 1 October 2014. GrainCorp must, within 10 business days of this determination being made, advise the public of this determination on its website.

As noted above, the ACCC may, in the future, consider whether service providers that compete with GrainCorp's Carrington facility should be granted an exemption (if they are subject to the Code). The ACCC may re-examine this exemption determination at that time and consider whether it should be revoked, having regard to the subclause 5(3) matters and other relevant matters including:

- the operation and effect of this exemption from when it applies (1 October 2014) to the time of that assessment, and
- the potential impact of concurrent exemptions for competing service providers.

Appendix A: Market for bulk wheat exports at the Port of Newcastle

GrainCorp's Carrington facility

Facilities and services

The GrainCorp Newcastle facility is located at Berth no.3 at Carrington at the Port of Newcastle. The facility manages a range of grains including wheat, barley, oats and canola. The facility has an intake/receival, grain storage, and weighing facilities, a shipping belt and a ship loader. Within the NPZ, GrainCorp also has 25 country silos and also transport arrangements for rail and road. GrainCorp's Carrington customers have the opportunity to utilise this network when planning accumulation strategies, managing risk and servicing clients.

Under the previous access regime a number of third party exporters have used GrainCorp's port facilities for shipping bulk wheat. Though, predominately the facility has been used by GrainCorp Trading, Cargill and, until recently, Viterra/Glencore.[28]

GrainCorp has operated a first-in-first served capacity allocation model since 2009. Since 2013 it has operated a long term capacity allocation model for some of Carrington's port capacity.[29] However the ACCC understands that in relation to Carrington, only GrainCorp Trading has taken this option up.

Shipping activity

Since 2010/2011 to 2013/14, GrainCorp Trading has been the largest exporter of bulk wheat from Carrington, exporting a total of 1,628,688 tonnes over the four years. This amounts to 43 per cent of total bulk wheat exports from the port. This is followed by Cargill who has exported a total of 1,079,131 tonnes over the same period, amounting to 29 per cent of total bulk wheat exports at the port. Cargill and GrainCorp Trading's shipping activity has been relatively consistent over the four years, taking into account the drought.

Glencore and Queensland Cotton are the next largest historical shippers from the port, with their activity amounting to 8 per cent and 5 per cent respectively of total bulk wheat shipped over the four years. Glencore's shipping program has been highly variable, moving from 31,000 tonnes in 2010/2011, up to 174, 526 tonnes in 2011/2012 and then declined to 60,000 tonnes in the following year. Glencore has made one shipment of 20,000 tonnes in 2013/14. Both of these exporters, being investors in the NAT, could be expected to reduce their level of shipping from GrainCorp's Newcastle facility in future years.

Available capacity at Carrington has not been fully used across the year or in peak times. This information is contained in the total grain elevation capacity table on GrainCorp's website at http://www.graincorp.com.au/storage-and-logistics/ports-and-shipping/shipping#stem.

The current drought conditions and competing interests for wheat from within the NPZ have led to less wheat moving to export at the Port of Newcastle, including at Carrington.

28 ACCC Continuous Disclosure Rules monitoring data
2012-2014.
29 GrainCorp Long Term Agreement Capacity Allocations 1 October 2013 – 30 September 2016, http://www.graincorp.com.au/storage-and-logistics/ports-and-shipping/ (viewed 17/03/2014).

As of 9 September 2014, limited capacity has been allocated for the next twelve months at Carrington and spare capacity is available for the each of the next 12 months.

Newcastle Agri Terminal

Facilities and services

NAT has access to Dyke No.2 berth at the Port of Newcastle. It also has access to existing rail infrastructure at the Port. The facility can manage a range of products including wheat, barley, oats and canola. Its facilities include approximately 60,000 tonnes of storage and offer weighing and testing of grain for classification on receival. The terminal can also provide fumigation services. The ship loading facilities will be able to load up to Panamax size[30] vessels at a rate of 2000 tonnes per hour.[31]

Cooperative Bulk Handling (CBH), Glencore (which operates Viterra) and Olam (which operates Queensland Cotton) are key investors in the NAT facility.

At this stage NAT has not disclosed to the public details pertaining to its operating framework, capacity allocation model or access terms. It is possible these arrangements and documents have not yet been finalised.

Shipping

Despite the drought, NAT has recently finalised its first major shipment of 28,000 tonnes of durum wheat for the Australian Durum Company.[32]

Louis Dreyfus Mountain Industries joint venture

Facilities and services

Louis Dreyfus has a joint venture with Mountain Industries that provides storage and handling services for Louis Dreyfus at Kooragang Newcastle, with port elevation provided by Qube at Berth 3 Kooragang. Mountain Industries was recently acquired by Patrick Ports and Stevedoring (Asciano) which might mean that in the future Mountain will acquire port elevation from Asciano subsidiaries. Nonetheless, Mountain Industries together with Asciano will provide an alternative to GrainCorp's Carrington facility. Qube also remains as an alternative bulk rail linehaul provider.

The Mountain Industries storage facility was opened in November 2011 and primarily handles wheat (a separate part of the facility handles fertiliser). The site handles approximately 25,000 tonnes of grain storage. Louis Dreyfus brings grain into Newcastle by rail from up-country and can deliver by road to the facility. It uses containers which can move between rail and road. These dual purpose containers are more efficient than manually transferring grain between rail wagons and trucks. Louis Dreyfus is the facility's only user for grain. Grain is then trucked between the storage shed and the Qube Ports and Bulk elevator service.

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30 Panamax size represents the largest acceptable size to transit the Panama Canal; lengths are restricted to a maximum of 275 m, and widths to slightly more than 32 m. The average size of such a ship is about 65,000 deadweight tonnage.
31 Independent agricultural export terminal approved for Newcastle and regional New South Wales, Newcastle Agri Terminal, 30 March 2012, http://www.naterminal.com.au/index.php/latest-news/32-exciting-new-agricultural-development-approved-for-newcastle-and-regional-new-south-wales, (viewed 16/09/2014).
32 First grain shipment for Newcastle Agri Terminal, Newcastle Agri Terminal, 22 February 2014, http://www.naterminal.com.au/index.php/latest-news/51-media-release-first-grain-shipment-for-newcastle-agri-terminal (viewed 9 September 2014).

Appendix B: Northern NSW bulk wheat market overview

Newcastle Port Zone (NPZ) Overview

The NPZ encompasses the geographic region of Northern NSW, including the larger towns of Narrabri and Moree. Within the NPZ, wheat grown closer to Newcastle on the Liverpool Plains (250-350km from Newcastle) tends to move by road into the domestic market; as growers can secure a higher price for their wheat while paying less for transportation. Wheat grown further afield within the NPZ relies on rail transportation to cover the long distance between storage and port.

The table below from GrainCorp's accompanying submission to its Application to Vary its 2011 Undertaking outlines a number of key indicators concerning Northern NSW wheat production and export. It is compiled from data from 2004 to 2013, including information from the two years of drought in 2007 and 2008.

Volume Metrics - Northern NSW

	AVG (Million tonnes)
Grain Production	2.94
Winter share	77%
GNC Receivals	**1.95**
Est non GNC receivals	0.98
GNC Country Share	66%
GNC Bulk Exports	**1.08**
Rail Share	92%
Est Domestic & Containers	1.85
Est Bulk Export Share	37%

Source: GrainCorp supporting submission, p. 7.

ABARES recent forecast acknowledges the impact of reduced rainfall on declining production levels across Northern New South Wales.[33]

At the GrainCorp Annual General Meeting in February 2014, Chairman Don Taylor noted:

> *The drought conditions that have prevailed in northern NSW and Queensland had a big impact on growers and their crops – substantially reducing the volumes coming into our network. Coupled with an export program that is heavily skewed to the first months of this financial year, much of our country network will stand almost empty for the second half of our financial year.*

Since 2011 several bulk wheat exporters have shipped from GrainCorp's Carrington Port. In light of multiple and relatively recent periods of drought, the amount of grain accumulated from the NPZ has been widely variable. During the limited supply in drought years, increasing demand from the domestic market and accordingly higher prices mean there is limited wheat available for export. Additionally, the presence of grain traders in the NPZ is increasing as many exporters explore options to operate up-country storage and handling facilities.

33 ABARES Agricultural Commodities Report, March Quarter 2014.

Wheat production

In the 2011/12 financial year, domestic demand on the East Coast accounted for 25% of total demand, and for around 35% of total demand in NSW. This compares to numbers in the order of approximately 10% in SA and WA.[34] GrainCorp submits that this is higher again in Northern NSW, where 63 per cent of grain production, amounting to two million tonnes is consigned into the domestic and container markets. As noted by GrainCorp domestic end users situated in or near the zone include Manildra Grain, Allied Mills and Weston Milling. Feedlots also acquire significant quantities of wheat and other grains, particularly during periods of drought.

The AEGIC report into bulk grain supply chains reports the finding of ABARES 2013 Australian Crop Report, including that:

> *Of the 35 MMT of grain produced annually, about 10–11 MMT is consumed domestically, leaving about 25 MMT available for export. Most of the domestic consumption (see Figure 4) occurs in eastern Australia. Annual grain production in NSW, Vic and Qld has averaged 19.5 MMT/yr during the past 10 years, with approximately 50% of production available for export.*[35]

Container market

The container market has expanded as a competitor for bulk wheat across Eastern Australia. In 2013 it was reported at a Grain Trade Australia forum that 'non- domestically consumed wheat in containers accounted for 11% of all wheat exports or 2,232, 000 tonnes, the majority of which is shipped from the East Coast.[36] GrainCorp estimates that the container export market has the capacity to account for approximately 2.5mmt of grain.[37]

Container packer services in the NPZ are offered by Glencore, Cargill and Louis Dreyfus. There are also a number of smaller packers in the NPZ, including Namoi Cotton at Wee Waa. At the Port of Newcastle, NAT and Louis Dreyfus offer container packing services.

GrainCorp does not operate container packing facilities in the NPZ.

Up-country storage and handling facilities

Within the NPZ are a range of up-country storage and handling facilities. These are mostly located around Narrabri and Moree, but also along the rail corridors throughout the region, including at Beanbri and Bellata. Within the NPZ, GrainCorp reports it has 25 country silos including at Moree, Narrabri and Wee Waa.

More broadly, GrainCorp owns and operates an extensive network of upcountry facilities, including a network of over 70 storage sites situated on branch and main rail lines. However, these figures need to be considered in light of the fact that GrainCorp has indicated it has plans to rationalise its up-country storage and handling network through Project Regeneration.

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34 Wheat Exports Australia, Report for growers 2011-12, December 2012, p. 10.
35 AEGIC, The cost of Australia's bulk grain export supply chains - An information paper, January 2014, p. 9.
36 Grain Trade Australia Export Container Forum May 2013, http://www.graintrade.org.au/sites/default/files/file/Export%20Container%20Forum/Conference%20Forum%20Flyer%2016%20April13%20V2.pdf (viewed 16/09/2014).
37 GrainCorp HY14 Report, p. 27.

Also operating across the Eastern seaboard is Cargill's wholly owned subsidiary Grain Flow. Within the NPZ it has two sites at Beanbri and Bellata and a broader network across NSW. As noted above Cargill also offers container packing facilities. Cargill's network also carries wheat for the domestic market, given its joint venture with GrainCorp in Allied Mills.

A number of the bulk wheat exporters have also expanded their operations into up country storage and handling facilities in the NPZ. Louis Dreyfus has two facilities at Narrabri and Moree, while Viterra has a container packaging facility at Narrabri. The facility has capacity to process 11,000 containers, a large storage area with a combination of shed, bunker and silo storage. Containers are delivered to Botany with rail siding on site.[38]

Additionally, for some growers, on-farm storage is a potential alternative to bulk handling and storage facilities and networks, although they may likely need to use bulk handling facilities at some stage. A grower may use on-farm storage as an interim measure before making a decision to sell grain. On-farm storage also provides an option for growers to by-pass the bulk storage and handling networks, particularly when they:

- are selling to a domestic end-user
- have a niche product for export which cannot be co-mingled with the more generic bulk wheat varieties; and/or
- are accumulating for container exporting.

The Productivity Commission considered on farm storage in the course of its inquiry intoheat export marketing arrangements in July 2010. It noted:

> *On-farm storage capacity also makes up a relatively greater proportion of the total storage in the eastern states than in Western Australian and South Australia which rely more heavily on bulk handlers for grain storage.*[39]

AEGIC noted that an Australian Bureau of Statistics (ABS) farm survey showed that at June 2010:

> *the on-farm grain storage capacity in Australia was over 14.3 MMT. On-farm storage capacity in WA alone was 2.35 MMT and was forecast to grow to 4.2 MMT by 2012, or about 35% of average annual production. By comparison, industry sources estimate on farm storage capacity across the eastern seaboard (NSW, Vic, Qld) totals around 11 MMT or about 60% of average annual grain production.*[40]

Historically the majority of grain destined for bulk export has found its way into GrainCorp's bulk storage and handling network within the NPZ. This then allows the grain to be sent by rail to the Port of Newcastle, including GrainCorp's Carrington port terminal or to domestic end-users like the millers Allied Mills (Tamworth and Sydney), Manildra (Gunnedah and Nowra) and Weston Milling (Sydney).

Rail access

Rail transportation is particularly relevant for growers located further from port in the NPZ. Given the distances involved, it is unlikely to be cost efficient to use road transport to move wheat to port. Road transport is a viable alternative for some growers fulfilling contracts with

38 Packaging and Processing, Viterra, http://www.viterra.com.au/packing-and-processing , (viewed 16/09/2014).
39 Productivity Commission Inquiry Report, Wheat Export Marketing Arrangements, 1 July 2010, p. 68.
40 AEGIC, The cost of Australia's bulk grain export supply chains - An information paper, January 2014, p. 14.

domestic end-users within the NPZ or those located closer to end-users within the Liverpool Plains.

The rail network in the NPZ is varied, and operates under a number of access regimes. Within the NPZ, the ARTC operated rail lines run from the Queensland border at Boggabilla, to Moree and Narrabri then through Gunnedah, Werris Creek, Muswellbrook to Newcastle. The ARTC rail lines are accessed via an open access arrangement operated by the ARTC, overseen by the ACCC.

The more remote Country Regional Network (CRN) runs over a number of branch lines from Moree to Weemelah and from Narrabri through Burren to Walgett and Merrywinebone. Many GrainCorp storage facilities are located along these lines. The arrangements for the network are as follows:

> *Up until 1 July 2012 the CRN was owned by the Country Rail Infrastructure Authority (CRIA) at which time CRIA functions and its assets and liabilities transferred to TfNSW. Since January 2012, the CRN has been operated and maintained under contract by John Holland Rail. As TfNSW's agent, John Holland is also the first point of contact with third party operators in relation to access to the network, which is covered by the NSW RAU and the terms and conditions of the CRN standard access agreement. However access agreements are between operators and TfNSW – on terms approved by TfNSW.*[41]

At the port end of the rail network, GrainCorp's Carrington facility has rail and road receival facilities on site. Pacific National and Aurizon are the primary rail operators operating in the zone.

GrainCorp's rail arrangements at port are less efficient than those at the NAT facility, though more efficient than the arrangement at the Louis Dreyfus storage facility. The NAT's rail receival facilities include a passing balloon loop which allows a train discharging wheat to efficiently continue through the site. This arrangement compares favourably to the rail arrangements in place at Carrington which requires a train to be broken into several segments before it can be moved through the rail receival facilities.

While NAT did not initially plan truck facilities, all three bulk wheat export operations have truck receival facilities. In addition to providing port terminal services, NAT states that it will provide supply chain services:

> *We exist to provide better grain supply chain solutions for exporters and to increase farm gate returns for growers. NAT has a clear focus on facilitating efficient supply chain operations and is not involved in grain marketing.*[42]

As outlined above, the Louis Dreyfus operation at the Port of Newcastle utilises rail and road facilities. It employs specialised containers which can transfer between train and truck. Louis Dreyfus moves the wheat by road from the storage shed to the Qube elevator at Kooragang 3 Berth, a distance of several kilometres. The Louis Dreyfus and the Mountain Industries websites outline the receival facilities:

> *Louis Dreyfus operate rail assets direct to port facilities in Newcastle from up country sites to maximise efficiencies and directly supply quality high protein grains to international markets and end users.*

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41 Review of NSW Rail Access Regime - Issue Paper, Transport for NSW, p. 8.
42 About, Newcastle Agri Terminal, http://www.naterminal.com.au/index.php/about, (viewed 16/09/2014).

The ACCC understands that bulk grain exporters operating in the NPZ also have access to rail resources to move their grain from the NPZ to port. Some own rolling stock, while others enter third party take or pay type arrangements for the various rail lines using the aforementioned rail providers such as Pacific National. In its submission to the Senate Rural and Regional Affairs and Transport References Committee into Ownership Arrangements in Grain Handling, GrainCorp reported it spends $40 million annually in take-or-pay rail capacity.

AEGIC observed that production volatility affects freight rates in that 'the uncertain freight volume makes planning more difficult and risky, which is reflected in higher freight rates.[43] The ACCC acknowledges, in light of the variability of production and competing interests for both wheat and rail resources from the domestic market, it is difficult for smaller operators to access rail and accumulate wheat from the NPZ.

43 AEGIC, The cost of Australia's bulk grain export supply chains An information paper , January 2014, p 18