

ACCC draft determinations

Exemptions in respect of

Newcastle Agri Terminal

Qube's Newcastle Port Terminal Facility

Date: 7 May 2015



Australian Competition and Consumer Commission
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Summary

Under the Competition and Consumer (Industry Code – Port Terminal Access (Bulk Wheat)) Regulation 2014 (the Code), the ACCC has made draft determinations that Newcastle Agri Terminal (NAT) and Qube Holdings Limited (Qube) (together, the Applicants) should be exempt service providers of port terminal services provided at the Port of Newcastle, New South Wales.

In making these draft determinations, the ACCC has had regard to the matters listed at subclause 5(3) of the Code. Key considerations in support of its draft view to exempt include:

- there is effective competition in the market for bulk grain port terminal services at the Port of Newcastle (in particular, between NAT and GrainCorp, and to a lesser extent from Qube), and a competitive market upstream and downstream from port
- excess capacity at the port and competitive pressures between the different providers provides an incentive for those service providers to provide fair and transparent access in order to increase throughput through their facilities
- given that, on 1 October 2014 the ACCC determined GrainCorp to be an exempt service provider of port terminal services at Newcastle, a determination that the Applicants are exempt service providers at their Newcastle port terminal facilities, will place them on a level playing field with GrainCorp

The ACCC's complete consideration of the matters listed at subclause 5(3) is at section 5 of this document.

In making these draft determinations, the ACCC has had regard to its previous assessments of the Newcastle grain port market.¹

If the ACCC's final determination is that the Applicants are exempt service providers they will only be subject to Parts 1 and 2 of the Code from 1 October 2015. If the ACCC's final determination is that the Applicants are not exempt service providers, the Applicants will be subject to all of the Code's obligations (ie Parts 1 – 6) from 1 October 2015.

How to provide a submission on these draft determinations

- The ACCC is seeking views on draft determinations that NAT and Qube are exempt service providers of port terminal services provided at their Port of Newcastle facilities. The ACCC welcomes views on all aspects of its draft determinations.
- Information on how to provide views on these draft determinations is available in **Appendix A**.
- Submissions are due by 5.00pm EST on **29 May 2015**.

¹ ACCC, *Decision to Accept, - GrainCorp Operations Limited's Application to Vary the 2011 Port Terminal Services Access Undertaking*, 18 June 2014; ACCC Determination – Exemption in respect of GrainCorp's Carrington (Newcastle) Port Terminal Facility, 1 October 2014.

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1. Background

1.1. Regulation under the Code

The Code commenced on 30 September 2014, replacing the previous undertaking regime. Its purpose is to regulate the conduct of port terminal service providers (PTSPs) to ensure that exporters of bulk wheat have fair and transparent access to port terminal services.²

Obligations in the Code's six parts include (but are not limited to):

Part 1 – Preliminary (i.e. definitions and application of the Code)

Part 2 – General obligations of port terminal service providers and exporters (e.g. deal in good faith; publish daily loading statements, standard terms and reference prices)

Part 3 – Access to port terminal services provided by a port terminal service provider (e.g. non-discrimination and no hindering obligations, rules around the negotiation of terms of access, arbitration, and mediation)

Part 4 – Port loading protocols of port terminal service providers (e.g. capacity allocation system requirements, mechanism for varying port loading protocols)

Part 5 – Port terminal service provider to publish certain information (e.g. obligations to publish expected capacity, performance indicators, stock information)

Part 6 – Record keeping (e.g. obligations to retain access agreements, records relating to disputes about those agreements, and services required by exporters).

1.2. NAT and Qube's status as port terminal service providers under the code

The Code applies to PTSPs, which it defines as:

... the owner or operator of a port terminal facility that is used, or is to be used, to provide a port terminal service.³

A port terminal facility is defined as:

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;

² Clause 2 of the Code.

³ Clause 3 of the Code.

(f) a shipping belt.⁴

NAT owns and operates the shiploader through which it provides port terminal services at the Port of Newcastle. The ACCC considers NAT to be a PTSP under the Code.

Qube owns and operates a mobile shiploader through which it provides port terminal services at the Port of Newcastle (to date, those services have only been provided to Louis Dreyfus). The ACCC considers Qube to be a PTSP under the Code.

Short summaries about each facility, as well as GrainCorp's facility at the Port of Newcastle, can be found in the ACCC's October 2014 decision concerning the GrainCorp facility.⁵

1.3. Exempt port terminal service providers

All port terminal service providers are subject to the entire Code (Parts 1 to 6) unless exempted by either the Minister or the ACCC.⁶

If a PTSP receives an exemption in relation to one of its port terminal facilities, it is subject to Parts 1 and 2 of the Code only (when supplying port terminal services at the specified facility). The regulation of exempt service providers is therefore more limited, and includes obligations to deal in a good faith and to publishing certain information about the way they allocate their port terminal services.

Exempt PTSPs will therefore not be subject to Parts 3 to 6 of the Code, which include non-discrimination obligations; requirements for negotiating access including recourse to mediation and arbitration; requirements about capacity allocation systems, including approval by the ACCC; further publishing obligations; and record-keeping requirements.

How a port terminal service provider becomes exempt

There are two ways that a PTSP may be determined an exempt service provider:

1. Ministerial exemption (only available to co-operatives that satisfy certain criteria), or
2. ACCC exemption.

Ministerial exemptions

Under subclause 5(1) of the Code the Minister for Agriculture may exempt a PTSP that is a co-operative if that co-operative meets certain conditions.

The ACCC has no role in relation to such exemptions.

On 17 November 2014 the Minister for Agriculture determined Co-operative Bulk Handling Limited to be an exempt service provider of port terminal services provided at their Albany, Esperance, Geraldton and Kwinana facilities.⁷

ACCC exemptions

Under subclause 5(2) of the Code the ACCC may determine that a PTSP is an exempt service provider.

⁴ *ibid.*

⁵ Australian Competition and Consumer Commission, *Determination – Exemption in respect of GrainCorp's Carrington (Newcastle) Port Terminal Facility*, 1 October 2014; Appendix A.

⁶ Exemptions are made under clause 5 of the Code

⁷ The Hon Barnaby Joyce (Minister for Agriculture), *Notice of Determination of Exemption*, 17 November 2014.

In making its assessment the ACCC must have regard to the matters set out at subclause 5(3) of the Code. The matters that the ACCC must have regard to are set out at section 4 of this document.

The ACCC's guidelines on its process for making and revoking exemption determinations are available on the ACCC's website.⁸

On 1 October 2014, the ACCC granted an exemption for GrainCorp at its bulk grain facility at the Port of Newcastle.⁹ This followed a decision in June 2014 under the previous undertaking regime to reduce the level of regulation that would apply to GrainCorp's services at that facility.¹⁰ The ACCC has had regard to its previous analysis in both of these assessments in producing these draft determinations.

2. Applications by NAT and Qube for exempt service provider status

In March 2015, Qube wrote to the ACCC seeking to be determined an exempt service provider of port terminal services at Carrington. In April 2015, NAT also wrote to the ACCC seeking an equivalent determination.

3. Consultation on these draft determinations

The ACCC's guidelines state that the ACCC will generally seek to conduct its exemption assessment and decide whether to make an exemption determination within 12 weeks. This timeframe may be extended where the ACCC:

- consults on the exemption application, and/or
- requests information from the PTSP.

The ACCC will consult on an application if it considers it reasonable and appropriate for the purposes of assessing the potential effects of the determination. Consultation may include a public consultation notice calling for written submissions, stakeholder forums, meetings with interested parties, or a combination of these.

The ACCC anticipates that the majority of its assessment processes will commence with an Issues Paper. However, in the present case the ACCC has already conducted an assessment of the competition at the Port of Newcastle/Newcastle Port Zone in its assessment of GrainCorp's Carrington Terminal.¹¹ Given this analysis, and that Qube and NAT's facilities are operating at the same port and within the same zone, the ACCC considered that it was appropriate to proceed directly to draft determinations.

The ACCC understands that there has not been any significant change in the competitive situation at Newcastle since its earlier decisions on GrainCorp's facility. The ACCC has accordingly had regard to analysis from those decisions, including descriptions of the three

⁸ Available at <http://acc.gov.au/publications/process-guidelines-for-making-revoking-exemption-determinations>.

⁹ ACCC, Determination – Exemption in respect of GrainCorp's Carrington (Newcastle) Port Terminal Facility, 1 October 2014; available at: <http://www.acc.gov.au/regulated-infrastructure/wheat-export/graincorp-newcastle-exemption/determination>.

¹⁰ ACCC, Decision to accept – GrainCorp Operations Limited's Application to Vary the 2011 Port Terminal Services Access Undertaking, 18 June 2014.

¹¹ ACCC, Determination – Exemption in respect of GrainCorp's Carrington (Newcastle) Port Terminal Facility, 1 October 2014.

port facility operators and the Newcastle Port Zone.¹² However, consultation on these determinations will give parties the opportunity to raise any relevant issues.

4. Matters that the ACCC must have regard to

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.

While these matters are distinct matters and the relevance of each matter will be assessed individually, the ACCC considers that certain matters concern similar subject matter and raise similar considerations. Where appropriate, the ACCC's analysis of these matters may be grouped together.

¹² *ibid*; Appendix A and B.

5. ACCC's preliminary views

The ACCC's preliminary views on the applications by NAT and Qube, having regard to the matters listed in subclause 5(3) of the Code, are set out in this section.

Where the matters deal with similar issues, the ACCC has grouped the considerations together in its assessment.

5.1. The legitimate business interests of the port terminal service providers (subclause 5(3)(a))

The ACCC considers that having regard to the legitimate business interests of a service provider may include a consideration of how an exemption will impact investment decisions and competitiveness, the ongoing commercial viability of the facility, and the likely costs associated with complying with the Code.

Being determined exempt service providers will put both of the Applicants on a level regulatory playing field with GrainCorp. GrainCorp was determined an exempt service provider at Newcastle on 1 October 2014.

If either or both of the Applicants are not determined an exempt service provider, the relevant party or parties will be required to:

- comply with Code obligations that stipulate how they provide access to their services, the terms on which those services will be provided, and how access-related disputes will be resolved, and
- pay the costs associated with that compliance.

In the event that either or both of the Applicants are not determined to be exempt service providers, the ACCC considers that they would be at a competitive disadvantage to the exempt PTSP/s, due to the higher level of regulation under the Code. The exempt PTSP/s 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 reasons (as discussed below at 5.6). This may allow them to be more responsive to customers' needs than any non-exempt PTSP.

The ACCC's draft view is that exempt provider status will increase the Applicants' competitiveness against GrainCorp at the Port of Newcastle. The ACCC considers that being on a level playing field would lead to greater competition with GrainCorp and is in the legitimate business interests of the Applicants. Increased competition should also lead to more efficient investment decisions (as discussed further below at 5.4).

PTSPs incur certain costs in order to comply with the Code. The ACCC considers that being determined exempt service providers will reduce the Applicant's costs of compliance. A reduction in the costs associated with complying with the Code will often be in the legitimate business interests of the Applicants. However, the costs of compliance are not of themselves a reason for granting an exemption – as regulation may in some cases be necessary or appropriate for the market conditions. The ACCC also notes that the amount of compliance costs may be difficult to quantify in many cases, particularly where a company has not previously been regulated.

Nevertheless the ACCC considers that a reduction in costs of regulation and an increase in its ability to compete will typically improve the financial viability of a business. The ACCC

considers improved commercial viability is in the legitimate business interests of the Applicants.

The ACCC's draft view is that a reduction in regulation would be in the interests of each of the Applicants, particularly given GrainCorp's exempt status at the same port. The ACCC has reached this draft view because it considers that a determination of exempt service provider status would result in:

- the Applicants having an increased ability to compete with GrainCorp on equal terms, and
- a reduction in the costs of regulation and a consequential increase in commercial viability for the Applicants.

Accordingly, the ACCC considers that exemption is in the legitimate business interests of the Applicants.

5.2. The public interest, including the interest in having competition in markets (subclause 5(3)(b)), and the promotion of competition in upstream and downstream markets (subclause 5(3)(g))

The ACCC considers that matters concerning the public interest, including the interest in having competition in markets, and the promotion in competition in upstream and downstream markets raise similar considerations. As such, the matters listed at subclauses 5(3)(b) and (g) of the Code, will be discussed together in this section.

The ACCC's assessment of whether the Applicants should be determined exempt service providers must consider whether there is enough competition in the market to provide incentives for port terminal service providers to provide fair and transparent access to port terminal services (discussed further below at 5.3).

5.2.1. What is the public interest?

The ACCC considers that the public interest includes the promotion of competition in upstream and downstream markets. The ACCC considers that other matters relevant to the public interest may include:

- the interests of consumers, generally or as a class of consumers
- the competitiveness of Australian businesses
- the efficient allocation of resources.

These and other matters may be considered by the ACCC depending on the particular circumstances of the relevant application. In particular, the ACCC will consider the effect of making an exemption on the market for grain export, and the ability of a range of grain exporters to compete for purchasing growers' grain in order to sell to overseas markets.

5.2.2. Is it in the public interest (including the public interest in having completion in markets) and will it promote competition in upstream and downstream markets to determine NAT and Qube exempt service providers?

The ACCC considers that the key consideration in having regard to subclauses 5(3)(b) and 5(3)(g) assessing whether determining that either or both of the Applicants to be exempt service providers will promote competition in markets (including but not limited to the market

for grain export). The ACCC considers that the following issues when having regard to the subclause 5(3)(b) and 5(3)(g) matters:

- if there is a sufficient degree of competition in the market for bulk wheat export port terminal services, 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 interests (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

The ACCC considers that the level of competition in bulk wheat export port terminal services at the Port of Newcastle is relevant to the public interest.

As detailed in the ACCC's Final Decision on GrainCorp's application to vary its 2011 undertaking, and the Final Determination on GrainCorp's status as an exempt service provider at Carrington, there are currently three providers of bulk wheat port terminal services at the Port of Newcastle:

- GrainCorp,
- NAT, and
- Qube.

Both GrainCorp and NAT operate ship loaders as well as associated infrastructure such as an intake facility, storage, and weighing and testing. Qube operates a ship loader only, and has to date only provided services to Louis Dreyfus, which operates a grain storage shed.

The presence of NAT and Qube in the market has increased the amount of available capacity at the Port of Newcastle, including during the peak shipping period from December to May. The current level of capacity available at the Port of Newcastle (in the order of 4mt in total across all three facilities) is greater than the historic annual exports from the port (an average of 1.1mt, and a peak of 1.8mt).¹³ This excess capacity has been more pronounced in recent years of drought where the amount of exported grain has been low.¹⁴

In relation to the competition on each of NAT and Qube, the ACCC notes that:

- NAT appears to be constrained by the similar-specification GrainCorp facility (and vice versa). NAT has operational advantages such as better rail access due to its balloon loop facility and ability to service larger vessels, but also certain limitations (such as a smaller storage capacity). The ACCC considers that both facilities have a demonstrated ability to export large shipments of bulk wheat – while NAT has only a small number of shipments with its first shipment in February 2014, GrainCorp has a long history of shipments from its Newcastle terminal. Accordingly, were NAT to increase price or otherwise attempt to exert market power, export from the GrainCorp facility would provide a viable alternative for exporters.

¹³ ACCC, 18 June 2014, p. 37.

¹⁴ *ibid.*

- In relation to the Qube facility, the ACCC notes that this consists of a shiploader only, without the attached storage and receival infrastructure of either NAT's or GrainCorp's facility. Qube has to date been providing bulk grain shiploader services to Louis Dreyfus, who operates a storage facility in joint venture with Mountain Industries. The ACCC considers that the Qube facility will be constrained by the full service offerings of GrainCorp and NAT.
- In relation to the competitive constraint placed by Qube on NAT, the ACCC considers that the Qube facility is unlikely to provide a significant direct constraint on NAT (or GrainCorp), due to the more limited service offering it provides. However the export by Louis Dreyfus using its storage shed and the Qube shiploader does demonstrate the potential for exporters to establish alternatives to large scale export terminals.
- More broadly, the ACCC also notes that the relatively recent entry of NAT and Qube into bulk export from Newcastle in competition with the established GrainCorp does demonstrate that there is a credible threat of competitive entry that may provide a further competitive constraint on all facilities.

The ACCC also notes that the total capacity for wheat export from the three open access facilities at the Port of Newcastle continues to exceed the typical annual exports, including during the peak period from December to May.¹⁵ The ACCC therefore considers that the presence of competitors at the Port of Newcastle will provide incentives for each of the PTSPs to provide fair and transparent access.

As discussed at section 5.1, however, while NAT, Qube and GrainCorp compete in the market for port terminal services at the Port of Newcastle, GrainCorp's services will be subject to less regulation (if exemptions are not granted to NAT and Qube).

In summary, the ACCC's draft view is that it considers that exemption will place the Applicants on a level playing field with GrainCorp, and support the ACCC determining that the Applicants should be exempt service providers at the port of Newcastle, because::

- it will mean that NAT and Qube will have the same level of flexibility as GrainCorp in terms of the way they can provide access to customers (service competitiveness), and
- it will allow NAT and Qube to be more flexible in tailoring pricing solutions for different clients, and will reduce their Code compliance costs, making them more likely to be able to compete with GrainCorp on price (price competitiveness).

The ACCC considers that placing competitors on a level regulatory playing field is likely to increase the extent of competition in the market and is therefore in the public interest.

Competition in upstream and downstream markets

The ACCC notes that its consideration of upstream and downstream markets is in the context of considering the appropriate approach to take to exempt status for bulk port services provided at the Port of Newcastle.

As outlined in the ACCC's decisions on GrainCorp's Carrington facilities, bulk wheat for export from Newcastle is typically sourced from Northern NSW.¹⁶ This area is referred to as the NPZ.

Within the NPZ, there are a number of markets competing for bulk wheat, including:

- the bulk export market

¹⁵ ACCC June 2014 decision, page 35-7 and 61-4.

¹⁶ ACCC June 2014 decision, Appendix B.

- the container export market
- the domestic market, including mills and feedlots.

Accordingly, the bulk wheat export market is not the sole destination for wheat grown in the NPZ, nor is it necessarily the preferred destination, particularly in times of drought. This means that PTSPs at the Port of Newcastle not only compete against one another in the market for port terminal services, they also compete with upstream market service providers.

It is also relevant to consider the effect of competition in upcountry storage and handling, and transportation services, on the level of competition at port.

A grower of wheat in the NPZ has a number of potential buyers. The grower may choose to sell to a bulk wheat exporter (in which case, PTSPs including GrainCorp, NAT and Qube will potentially compete for that owner's business), or sell to the domestic market or container export markets. Options in the domestic market include the domestic milling sector, feed lot operators and container packers. The ACCC notes that:

- Generally speaking the domestic market is able to pay a higher price than the export market and incur lower transactions costs, making it an attractive option for wheat growers. The domestic market typically has the first call on wheat, making it a significant competitor to bulk export by the PTSPs, particularly in drought affected years/regions. However, the domestic market typically requires a fixed amount of grain, meaning that it is necessary to consider what may happen to exportable surplus.
- Container packing facilities along the NPZ supply chain (operated by Glencore, Cargill and Louis Dreyfus) provide another alternative to the domestic and bulk wheat export markets (in addition to the container facilities already operated by NAT). This will allow parties to bypass bulk export facilities for a certain proportion of grain exports.
- Generally, 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, Viterra, and Louis Dreyfus. This increases the countervailing power of these users. However, neither NAT nor Qube operate an upcountry network, and accordingly are unlikely to be able to exercise significant power for that reason.

The ACCC considers there appears to be significant competition in the upstream market for bulk wheat. In particular, the ability of NAT or Qube to exert market power is limited by the domestic market and container export as alternative destinations for grain. Furthermore, the presence of upcountry facilities owned by a range of entities means that there are generally a larger range of options for farmers to sell grain. GrainCorp, as an exempt port operator with an upcountry network in the NPZ, is also limited by these same alternatives.

Considering the impact that granting an exemption may have on competition in the relevant upstream and downstream markets, to the extent that placing direct competitors such as NAT, Qube and GrainCorp on a level regulatory playing field increases competition, the ACCC considers that it may improve the terms (including price) on which wheat farmers can sell grain to the domestic market, container market or bulk export. To the extent that selling wheat to the bulk export market becomes more attractive, the ACCC considers this will promote competition in the upstream market for farmers' grain.

5.2.3. Preliminary view

The ACCC's preliminary view is that:

- NAT and Qube both face competition from GrainCorp's facility, and each other,

- the potential destinations for upstream wheat competes with the market for bulk port terminal services at the Port of Newcastle, and increasing competition at port may lead to better prices for wheat growers, further increasing competition in the upstream market, and
- competition in markets is improved by placing competitors on an even regulatory playing field, and an exemption for NAT and Qube will place them on an even regulatory playing field with a direct competitor, GrainCorp.

Accordingly, the ACCC's preliminary view is that, having regard to subclauses 5(3)(b) and 5(3)(g) of the Code, the competition and public interest factors discussed above support the ACCC granting an exemption to the Applicants. In particular, the ACCC considers there is significant competition in the market for port terminal services at the Port of Newcastle, and the fact that this market is also constrained by various competing markets upstream from the Port support granting an exemption.

5.3. The interests of exporters who may require access to port terminal services (subclause 5(3)(c)) and the likelihood that exporters of bulk wheat will have fair and transparent access to port terminal services (subclause 5(3)(d))

The ACCC considers that an exporter's key interest when seeking access to port terminal services is their ability to secure fair and transparent access to those services. The ACCC therefore considers that its consideration of subclauses 5(3)(c) and 5(3)(d) of the Code will raise similar matters and should be conducted jointly.

The ACCC considers that its key consideration in having regard to these matters is whether exporters are likely to receive fair and transparent access to services provided by NAT and Qube if NAT and Qube are exempt from complying with the majority of the Code.

5.3.1. Competition faced by the Applicants/likelihood of providing fair and transparent access under reduced regulation

As discussed above in section 5.2, the ACCC considers that the Applicants operate in a reasonably competitive environment which provides them with the incentive to provide fair and transparent access. The ACCC's assessment is based on the following:

- the high availability of capacity at the Port of Newcastle (high supply)
- the demand for GrainCorp's services at the Port of Newcastle has been historically lower than supply
- the presence of NAT and Qube has added to the amount of services available
- the amount of wheat produced and/or brought into the NPZ is unlikely to rise significantly or affect the balance between supply and demand.

Furthermore, the ACCC notes the following about the three service providers at the Newcastle port:

- GrainCorp, as a vertically integrated port operator that also has exporting operations, is likely to have incentive to favour its own trading arm over other exporters. However, this incentive may be limited by the fact that it has a large amount of capacity on offer that has not been fully utilised, particularly in recent years.

- NAT has ownership interests from three exporters (CBH, Glencore and Agrex) as well as its management, none of which have a controlling stake. The ACCC considers that this diverse shareholding is likely to encourage use by a variety of exporters. The ACCC notes that NAT investors have not shipped grain from the terminal to date, with all four shipments being executed by third party exporters. The ACCC considers that NAT should continue to have an incentive to offer capacity to such exporters.
- Qube only operates a shiploader and is not vertically integrated into grain export. The ACCC therefore considers that Qube should have an incentive to offer capacity in order to obtain custom. The shiploader is also used for other commodities than grain. To date, Qube has only exported grain for Louis Dreyfus.

As noted above, the ACCC understands that the total annual available bulk shiploader capacity available across the Newcastle port zone is in the order of 4m tonnes, with GrainCorp being the largest port operator with a potential capacity of 2.5m tonnes, NAT having around 1.5m tonnes, and Qube potentially being used for around 0.3m tonnes.

While there is a significant amount of annual capacity offered, the amount that exporters will compete for may be less than that total amount for the following reasons:

- GrainCorp offers the majority of the available capacity. Over the last 4 harvest years, 43% of that capacity has been acquired by GrainCorp's own trading division.¹⁷ GrainCorp is now an exempt service provider of services at Carrington and may allocate a greater amount capacity to its trading division.
- Qube does not currently provide access to exporters other than Louis Dreyfus.

The ACCC considers that the amount of contestable port capacity in real terms may be the more relevant consideration when considering an exporters likelihood of securing fair and transparent access. However, while the amount of contestable capacity is less than the total amount of capacity offered annually, the ACCC considers that it exceeds likely demand in the foreseeable future.

Against the above capacity figures, the ACCC understands that the historical demand for capacity at the Port of Newcastle has been lower than the available amount. On average, around 1.1m tonnes of grain have been exported from the GrainCorp facility on an annual basis.

Furthermore, for the 2014-15 season, GrainCorp's facility is expected to export around 539,000 in total.¹⁸ Four shipments totaling slightly over 100,000 tonnes have also been made from the NAT facility over the last year. Accordingly, it does not appear that the demand for the 2014-15 season will be in excess of the average possible exports from Newcastle.

The ACCC notes therefore that the historical and recent demand for capacity at the Port of Newcastle falls well short of what is now available, although this has been affected by the recent low production in the NPZ. The ACCC notes that grain production in northern NSW has been estimated at just under 3m tonnes, with slightly over 1m tonnes being exported on average.¹⁹ While production may fluctuate from year to year, particularly in line with weather, there does not seem to be any significant trend upwards in the overall production in the NPZ, meaning that it is unlikely that the overall export capacity of around 4m tonnes would be needed soon.

¹⁷ ACCC June 2014 decision, page 61.

¹⁸ Australian Crop Forecasters, *ACF Shipping Stem & Market Share Report*, 22 Apr 2015.

¹⁹ GrainCorp, supporting submission, November 2013, p. 7.

As such, taking average production over the last five years, even anticipating a record month, the ACCC considers that production will continue to fall well short of the available amount of port terminal services. The ACCC also notes that the domestic and shipping container markets are also potential destinations for wheat.

5.3.2. ACCC preliminary view

The ACCC's preliminary view is that:

- Supply of port terminal services at Port of Newcastle will likely be much greater than demand in the foreseeable future.
- Historical yields suggest that wheat produced in the NPZ and the fact that growers can sell that wheat to the other markets mean that the demand for port terminal services at the Port of Newcastle is unlikely to rise significantly
- NAT and Qube will be providing services when there is significant competition, providing both parties with the incentive to provide fair and transparent access
- Neither party is vertically integrated, thus increasing their incentive to provide access to third party exporters.

Accordingly, having had regard to subclauses 5(3)(c) and 5(3)(d) of the Code, the ACCC's preliminary view is that the Applicants being determined exempt service providers will not adversely impact on exporters ability to secure fair and transparent access to the Applicants services.

5.4. The promotion of economically efficient operation and use of the port terminal facility (subclause 5(3)(e)) and the promotion of efficient investment in port terminal facilities (subclause 5(3)(f))

The ACCC considers that promoting the economically efficient operation and use of a facility will likely promote the efficient investment in those facilities. The ACCC therefore considers that these matters are related and will set out its preliminary views on both matters in this section.

5.4.1. Promoting efficient operation and use of the Applicants' facilities

The ACCC considers that a key consideration when having regard to the matters under subclauses 5(3)(e) and 5(3)(f) is what impact a determination to exempt the Applicants will have on the efficient operation and use of, and investment in, their respective port terminal facilities. The ACCC also considers that competition will be a key driver of the efficient operation and use of a facility in the absence of regulation.

As noted, the ACCC considers that there is evidence of competition in the provision of bulk wheat port terminal services in the Newcastle port and NPZ.

The ACCC also considers that, in the specific context of the Port of Newcastle, a decision to not determine the Applicants as exempt service providers may impact on the efficient operation and use of the Applicants facilities in the following ways:

- the Applicants will be required to pay the cost of compliance with the entire Code, which the Applicants may pass through to customers by way of access charges, making them potentially less price competitive with GrainCorp.

- the Applicants will have to provide access in accordance with the Code's obligations, and will therefore be unable to tailor access arrangements to the needs of individual customers in the same way as GrainCorp can, such as by offering more flexible arrangements for access outside of a mandated access system.

If the Applicants are not determined exempt service providers, they are therefore unlikely to be able to offer as attractive terms as GrainCorp, or be as flexible in their use of the facility. Given capacity for port terminal services is surplus to demand, this may have a significant impact on the Applicants' ability to attract business, meaning less utilisation of the port terminal facility.

The ACCC therefore considers that increasing the Applicants' competitiveness is likely to improve utilisation and that greater utilisation represents an improvement in the economically efficient use of the Applicants facilities.

5.4.2. Promoting efficient investment in the Applicants port terminal facilities

The ACCC considers that a PTSP is more likely to invest in facilities that are competitive or that have the potential to become competitive. Also, unnecessary regulation can provide a disincentive for efficient investment in a specific facility.

In the event that the Applicants are not determined to be exempt service providers they will be required to provide their services with greater restrictions, and with greater compliance costs, than GrainCorp. The ACCC considers this would put the Applicants at a competitive disadvantage which is unlikely to be addressed by investment.

The ACCC considers that the Applicants being determined exempt service providers may provide the Applicants with a greater incentive to invest. By being placed on a level regulatory playing field with GrainCorp, the Applicants may consider that investment may provide them with a competitive edge.

5.4.3. ACCC preliminary view

The ACCC's preliminary view is that the Applicants being determined exempt service providers will promote the efficient operation and use of, as well as investment in, the facilities through which they provide port terminal services by:

- reducing the costs associated with operating the facilities (reducing Code compliance costs)
- increasing the likelihood that their facilities will be used efficiently (removing Code restrictions on how port capacity is allocated)
- increasing the chance that facilities will be utilised (reduction in costs and an increase in flexibility will likely make the Applicants' services more attractive)
- increasing the likelihood that the Applicants will invest in their facilities (services that are competitive on price and able to accommodate customer needs will likely lead to higher utilization, investment may be required to maintain or improve current level of service).

Accordingly, the ACCC considers that the matters considered in having regard to subclauses 5(3)(e) and 5(3)(f) support the draft position that the Applicants be determined exempt service providers.

5.5. Whether the port terminal service provider is an exporter or an associated entity of an exporter (subclause 5(3)(h))

A consideration of subclause 5(3)(h) will involve an assessment of whether a PTSP would have the incentive to favour its trading business over other parties when deciding who to provide access to.

Neither NAT or Qube are vertically integrated providers of port terminal services (although NAT does have exporter shareholders, and Qube has provided port terminal services to Louis Dreyfus to date). The ACCC therefore does not consider that subclause 5(3)(h) is relevant to the assessment of whether it is appropriate to determine the Applicants as exempt service providers.

5.6. Whether there is already an exempt service provider within the grain catchment area for the port concerned (subclause 5(3)(i))

The ACCC generally considers that, where there is already an exempt service provider within the same port zone, or where the Code does not otherwise apply to a service provider in the port zone, 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 facing operators at each facility.

On 1 October 2014 the ACCC determined that GrainCorp to be an exempt service provider in relation to services provided at its Newcastle port terminal facility. As noted above, the ACCC considers that the Applicants both provide services in the same grain catchment area as GrainCorp does at its Newcastle facility.

The ACCC considers that the presence of three service providers in the one area or zone supports a determination of the Applicants as exempt service providers.

In its application to vary its 2011 Undertaking, GrainCorp submitted that being subject to more regulation at its Carrington facility placed it at a competitive disadvantage to its competitors. The ACCC considers equally that the Applicants would be disadvantaged if they were subject to greater regulation than GrainCorp.

Having regard to subclause 5.6(3)(i), the ACCC's preliminary view is that GrainCorp's presence as an exempt service provider in the same zone as the Applicants is a factor in support of the Applicants being determined exempt.

6. ACCC draft determinations

The ACCC's draft determinations, having regard to the matters listed at subclause 5(3) of the Code as discussed above, are that NAT and Qube should be determined exempt service providers of port terminal services provided by means of their Port of Newcastle facilities.

The ACCC invites responses to the the views expressed in this document and general comments on the merits of NAT and/or Qube being determined exempt service providers. The comments will be considered by the ACCC prior to making its final determinations.

Appendix A: How to make a submission

Please address submissions to:

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

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

Due date for submissions

Submissions must be received before 5:00pm (AEDST), 29 May 2015.

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 Application to vary 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.

Further information

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

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