



AUSTRALIAN COMPETITION  
& CONSUMER COMMISSION

# Draft Determination

## Port of Portland Pty Limited

Exemption assessment of port terminal services  
provided at the Portland port terminal facility

9 February 2022

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## Executive Summary

Under subclause 5(2) of the *Port Terminal Access (Bulk Wheat) Code of Conduct* (the Code), the Australian Competition and Consumer Commission (ACCC) has made a Draft Determination that Port of Portland Pty Limited (POPL) should be an exempt service provider of port terminal services provided by means of its port terminal facility at the Port of Portland.

If the ACCC makes a Final Determination consistent with this Draft Determination, POPL's facility will be subject to a lower level of regulation, as Parts 3 to 6 of the Code will not apply to POPL in relation to this port terminal facility.

In making its Draft Determination the ACCC has:

- considered the characteristics of POPL's facility, alongside the broader Victorian grain export industry, and
- carefully considered the matters listed at subclause 5(3) of the Code.

A summary of the ACCC's draft views in relation to POPL's facility is set out below.

This assessment has been based on information available to the ACCC at the time of making this Draft Determination.

### Summary of views

The ACCC's draft views are that:

- Determining POPL to be an exempt service provider in relation to its Portland facility will not be detrimental to competition in bulk grain port terminal services markets and is unlikely to be detrimental to competition in upcountry grain storage and handling markets.
- Determining POPL to be an exempt service provider in relation to its Portland facility will allow POPL to provide more flexible services for its customers, reduce regulatory burden and promote the efficient operation of this facility.
- POPL's facility faces a level of competitive constraint that will incentivise it to provide fair and transparent access to exporters. This level of competitive constraint is likely to remain if POPL is determined to be an exempt service provider.

These draft views are based on the ACCC's analysis of the extent to which POPL's facility competes with other bulk grain export port terminal facilities. The ACCC has also considered the extent of any competitive constraint imposed by container exports and domestic demand for grain, including bulk wheat. The ACCC's draft views on levels of competition in relevant markets are set out in chapter 3 of this document. The ACCC's draft assessment of the matters listed at subclause 5(3) of the Code is set out in chapter 4.

The ACCC has also considered whether POPL's vertical integration as a port terminal service provider (PTSP) and port owner and manager is relevant to its preliminary assessment of POPL's application for exemption at Portland. The ACCC's draft view is that the obligations and requirements in Parts 3 to 6 of the Code will not help to address any concerns of this nature, and POPL's role as a port owner and manager is outside the scope of this exemption assessment.

Given the above, the ACCC's draft view is that POPL's entry into the PTSP market in Portland is a pro-competitive development and should increase choice in the market for

growers and exporters. In particular it will assist in providing additional surge capacity to exporters, particularly during high volume seasons.

Stakeholder submissions assist the ACCC to undertake its assessment of exemption applications. The ACCC encourages stakeholders to make submissions in response to this Draft Determination. The process for making a submission is set out in section 1.3 of this document. Submissions must be received before **5:00pm (AEST), 9 March 2022**.

# 1. Introduction

The code set out in Schedule 1 of the *Competition and Consumer (Industry Code – Port Terminal Access (Bulk Wheat)) Regulation 2014* (the Code) is a prescribed mandatory code of conduct for the purposes of section 51AE of the *Competition and Consumer Act 2010* (Cth). It commenced on 30 September 2014 and regulates the conduct of PTSPs to ensure that exporters of bulk wheat have fair and transparent access to port terminal services.

The Code provides that the Australian Competition and Consumer Commission (the ACCC) or the Minister for Agriculture (the Minister) may exempt a PTSP from the application of Parts 3 to 6 of the Code in relation to port terminal services provided by means of a specified port terminal facility. Exempt service providers face a lower level of regulation as they remain subject to only Parts 1 and 2 of the Code.

## 1.1. Exempt service providers

PTSPs that are not exempt are required to comply with Parts 1 to 6 of the Code (that is, the entire Code).

PTSPs that are determined by the ACCC or the Minister to be exempt service providers are:

- only required to comply with Parts 1 and 2 of the Code; and
- not required to comply with Parts 3 to 6 of the Code.

Part 1 of the Code contains general provisions about the Code.

Part 2 of the Code requires all PTSPs to:

- deal with exporters in good faith;
- publish and make available a port loading statement;
- publish policies and procedures for managing demand for their services; and
- make current standard terms and reference prices for each port terminal facility that it owns or operates publicly available on their website.

Part 3 of the Code requires a PTSP:

- not to discriminate in favour of itself or its trading business or hinder third party exporters' access to port terminal services;
- to enter into an access agreement or negotiate the terms of an access agreement with an exporter to provide services if an exporter has applied to enter into an access agreement and certain criteria are satisfied;
- to deal with disputes during negotiation via specified dispute resolution processes including mediation and arbitration; and
- to include a dispute resolution mechanism in its standard terms and to vary standard terms in accordance with a prescribed procedure.

Part 4 of the Code requires a PTSP to have, publish and comply with a port loading protocol, which includes a capacity allocation system (and provides for the circumstances in which the capacity allocation system must be approved by the ACCC).

Part 5 of the Code requires a PTSP to regularly publish its expected capacity, stock at port information and key performance indicators.

Part 6 of the Code requires a PTSP to retain records such as access agreements and variations to those agreements.

Exempt service providers are still required to comply with the general competition law provisions in Part IV of the *Competition and Consumer Act 2010* (Cth).

## 1.2. Port of Portland's exemption application

Currently, Parts 1 to 6 of the Code apply to POPL's provision of port terminal services at its Portland bulk grain port terminal facility.

On 3 September 2021 POPL submitted an application to the ACCC seeking to be an exempt service provider of port terminal services provided by means of its Portland facility.

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

## 1.3. Public consultation undertaken to date

The ACCC released an Issues Paper on 29 October 2021 seeking submissions on POPL's exemption application.

The ACCC received 2 submissions from stakeholders in response to the Issues Paper:

- Victorian Farmers Federation (VFF); and
- Riordan Grain Services (RGS).

Details of stakeholder submissions to the Issues Paper are set out as relevant throughout this document.

## 1.4. Consultation on this Draft Determination

The ACCC invites public submissions on the Draft Determination set out in this document. Please include detailed reasons to support the views put forward in your submission.

The ACCC prefers that submissions be sent via email in Microsoft Word format (although other text readable document formats will be accepted). Submissions should be sent to both of the following email addresses:

[transport@acc.gov.au](mailto:transport@acc.gov.au)

[david.barrett@acc.gov.au](mailto:david.barrett@acc.gov.au)

Please address submissions to:

Mr Matthew Schroder  
General Manager  
Infrastructure & Transport - Access & Pricing Branch  
ACCC  
GPO Box 3131  
Canberra ACT 2601

### ***Due date for submissions***

Submissions must be received before **5:00pm (AEST), 9 March 2022**.

## **Confidentiality of information provided to the ACCC**

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

Sections of submissions that are claimed to be confidential should be clearly identified. The ACCC will consider each claim of confidentiality on a case by case basis. If the ACCC refuses a request for confidentiality, the submitting party will be given the opportunity to withdraw the submission in whole or in part. The ACCC will then assess the exemption application 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 *ACCC & AER Information Policy: collection and disclosure of information*, available on the ACCC website.

## **Further information**

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

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## **1.5. Outline of this document**

The Draft Determination document is set out as below:

- Chapter 2 identifies the relevant grain catchment areas and outlines the characteristics of port terminal facilities relevant to this assessment.
- Chapter 3 considers the level of competition in the bulk grain export supply chain and the degree of competitive constraint imposed by container exports and domestic demand.
  - The analysis of these issues informs the ACCC of whether a port terminal facility faces a sufficient degree of competitive constraint to promote fair and transparent access to port terminal services should Parts 3 to 6 of the Code not apply in respect of that facility.
- Chapter 4 uses the analysis and draft findings from chapters 2 and 3 to set out the ACCC's draft assessment of the matters listed at subclause 5(3) of the Code in relation to POPL's port terminal facility.

## 2. Bulk grain port terminal services

This chapter sets out the ACCC's draft views regarding the port terminal facilities it considers relevant to the assessment of POPL's application for exemption. The chapter begins with an overall assessment of the catchment areas and therefore port terminal facilities relevant to this assessment. The characteristics of each relevant facility, including capacity, are then considered.

The identification of the relevant catchment areas and the assessment of the characteristics of the related port terminal facilities are relevant to the matters the ACCC is required to consider under subclause 5(3) of the Code. The ACCC's draft views in relation to these matters are set out in chapter 4.

### 2.1. Relevant catchment areas

The ACCC considers the concept of grain catchment areas provides a method of assessing the level of competition that a PTSP applying for exemption is subject to.<sup>1</sup> Port terminals may be in competition with each other if, for example, grain from one area could practically move to either of the 2 (or more) terminals.

Catchment areas generally relate to the established transportation links, including the rail networks and road pathways, that connect each port terminal to growing regions, as well as the associated upcountry storage infrastructure. The ACCC recognises that there is a level of fluidity to catchment areas. However, the ACCC considers that the extent to which it is economically viable to move grain (either by exporters or growers) to different ports is relevant to the assessment of which port terminals may (or may not) effectively constrain each other. Therefore, the ACCC considers catchment areas remain relevant to exemption assessments.

#### The Portland grain catchment area

POPL has submitted that the Portland catchment area typically comprises Victoria's western district (as illustrated in figure 2.1 below):

*Grain for the Portland port catchment is typically grown in Victoria's western district. Geographically in relation to Victoria's grain producing areas, grain harvested on farmland located to the west of Horsham is more likely to be shipped into the Port of Portland, while grain sourced east of Horsham is more likely to be loaded for export at either the Port of Geelong or the Port of Melbourne.<sup>2</sup>*

However, POPL has also noted that cost and congestion in the supply chain can influence grain flows, and that Geelong, Melbourne and Adelaide offer alternative destinations to Portland:

*Movement of grain to ports outside of [the Portland catchment] zone varies depending on domestic requirements, rail logistics and demand at ports for grain. The Port of Geelong, for example, offers more efficient rail access and greater storage (whereas the Portland-Maroon rail line is speed and load restricted). With grain on trucks there is no physical impediment to moving within zones, however pricing points at different zones will ultimately determine end destinations for grain. The Ports of Geelong and Portland require similar road freight costs, depending on the grain site location. As a result, ports such as Geelong, Melbourne and Adelaide do offer an*

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<sup>1</sup> The grains industry generally refers to geographic areas where it is typically economically viable for grain to move to a particular port for export as a 'catchment area' (or 'catchment zone').

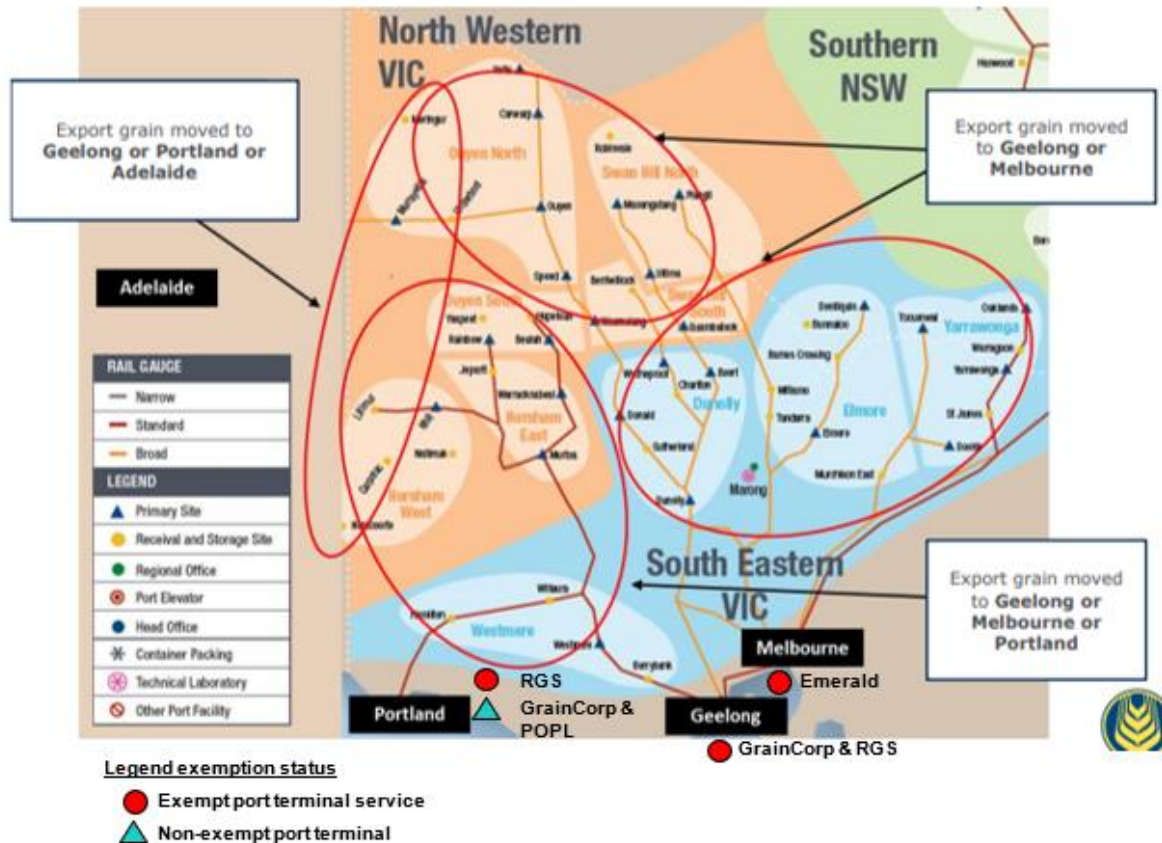
<sup>2</sup> Port of Portland Limited, *Application for exemption from Parts 3-6 of the Port Terminal Access (Bulk Wheat) Code of Conduct*, 3 September 2021, p. 6.



alternate destination to Portland, however typically over the longer term the best result for the grower in the Portland catchment zone would be for grain destined to Portland port.<sup>3</sup>

POPL submitted figure 2.1 below (taken from GrainCorp’s 2014 exemption application) in relation to what the relevant catchment area is for Portland.

**Figure 2.1: Victorian grain growing regions and typical routes to export**



Source: Screenshot from POPL exemption application p. 6 (with ACCC annotations). POPL sourced the picture from: GrainCorp, *Submission in support of exemption for its Geelong and Portland ports*, 5 December 2014, p. 6.

Notes: The exemption status of facilities in Victoria are:

<b>Portland GrainCorp</b>	Exemption not granted (25 June 2015), second application submitted on 7 February 2019 and withdrawn on 20 December 2019.
<b>Geelong GrainCorp</b>	Exempt (25 June 2015)
<b>Geelong RGS</b>	Exempt (29 May 2017)
<b>Portland RGS</b>	Exempt (31 March 2020)
<b>Melbourne Emerald Grain</b>	Exempt (25 June 2015)
<b>Portland POPL</b>	Under assessment

<sup>3</sup> *ibid.*, p. 6.

## Stakeholder submissions to the Issues Paper

RGS submitted that POPL's grain catchment area, while subject to seasonal conditions, extends from south-east South Australia, north to Lameroo and Swan Hill and then extends east to Wedderburn and Lismore.<sup>4</sup>

All these locations (Lameroo, Swan Hill, Wedderburn and Lismore) lie outside the catchment area indicated by POPL. RGS also stated that PTSPs located at Portland compete with other ports in Geelong, Melbourne and Adelaide.<sup>5</sup>

The VFF did not provide a view on POPL's grain catchment area in its response to the POPL Issues Paper. However, we note that in 2019 the VFF submitted that the Portland grain catchment area is generally defined by the silos on the Wimmera standard gauge lines that connect to Portland,<sup>6</sup> and that "other ports provide minimal competition at the margin of their catchment."<sup>7</sup>

## GTA Location Differentials

Grain Trade Australia's (GTA's) Location Differentials (LDs) can provide a useful indication of grain catchment areas. LDs are a value attributed to an upcountry grain storage and handling facility which represent the transport costs of moving grain from an upcountry site to a port terminal facility.<sup>8</sup>

GTA's 2021-22 LDs generally support the grain catchment area submitted by POPL (figure 2.1). GTA LDs indicate that Portland has a material advantage for sites which are approximately south of Rainbow and west of Horsham. GTA's LDs also indicate that sites west of Willaura and south of Hopetoun are advantaged to move grain to Portland, while sites east of Willaura are typically advantaged to move grain to Melbourne or Geelong.

Furthermore, GTA's 2021-22 LDs indicate that sites near the southern part of the Victorian and SA border are advantaged to move grain to Portland over Port Adelaide.<sup>9</sup> However, there are several sites in northern Victoria which have lower LDs for Port Adelaide than any of the 3 Victorian port sites.<sup>10</sup> This indicates that sites on the north of the border are advantaged to Port Adelaide, with sites further to the south of the border being advantaged to Portland.

While not submitted by POPL as part of the Portland catchment, GTA's LDs also indicate that grain from northern Victoria and southern NSW (Manangatang and Deniliquin) could move to Portland (as there a \$3.00 or less difference in the transportation values between Portland, Melbourne and Geelong at these 2 sites).<sup>11</sup> As such, GTA's LDs indicate that

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<sup>4</sup> Riordan Grain Services, *Submission in response to ACCC issues paper – Port of Portland Limited exemption assessment*, 29 November 2021, p. 2.

<sup>5</sup> *ibid.*, p. 3.

<sup>6</sup> Victorian Farmers Federation, *Supplementary submission in response to ACCC draft determinations – Port of Portland exemption assessments – Riordan Grain Services and GrainCorp*, 25 November 2019, p. 2.

<sup>7</sup> Victorian Farmers Federation, *Submission in response to ACCC draft determinations – Port of Portland exemption assessments – Riordan Grain Services and GrainCorp*, 31 October 2019, p. 2.

<sup>8</sup> According to *Grain Trade Australia Fact Sheet Series No.005 20 April 2018*, a Location Differential is the "value" attributed to a specific up-country grain bulk storage and handling facility to an export port terminal facility. LDs are produced by the GTA Commerce Committee for the purpose of valuing upcountry grain on a 'port basis'. For the determination of the Natural Terminal Port for a site, rail transportation to a port takes precedence over road transportation to that same port. For sites with only road access, the natural port terminal for a storage site is the port with the lowest location differential.

<sup>9</sup> Naracoorte, Frances and Lillimur have LDs which are \$18.60, \$11.15 and \$4.50 lower to Portland than Port Adelaide respectively.

<sup>10</sup> Murrayville, Walpeup and Werrimull have LDs which are \$20.50, \$8.25 and \$16.71 lower to Port Adelaide than the Victorian port with the lowest LD respectively.

<sup>11</sup> According to Grain Trade Australia, Manangatang has the following LDs: Melbourne (\$40.00), Geelong (\$41.75) and Portland (\$43.00). Deniliquin's LDs are: Melbourne (\$31.00), Portland (\$32.75) and Geelong (\$34.00).

Portland's catchment area may draw some grain from northern Victoria and southern NSW (which form part of the Melbourne and Geelong catchments).<sup>12</sup>

GTA's LDs support that there is a degree of overlap for Portland, Port Adelaide, Melbourne and Geelong grain catchment areas.

### **Previous ACCC assessments of the Portland market**

The ACCC notes it has previously considered the Portland market in its assessment of GrainCorp's 2014 and 2018 exemption applications and RGS' 2018 application.

Most recently, in March 2020 the ACCC found that the Melbourne, Geelong and Port Adelaide catchment areas overlapped to some extent with Portland's catchment area. However, due to the large distances between these alternative facilities and Portland (and therefore the limited overlap of the catchment areas), the ACCC concluded that these alternative facilities do not provide a significant competitive constraint on facilities at Portland. In particular, for the storage facilities in western Victoria not located on the rail line and which utilise road to move grain to port, the ACCC considered viable alternative port options may be limited.<sup>13</sup>

### **ACCC draft view**

Given the above, the ACCC's draft view is that Portland has its own distinct catchment area which likely includes, at least, the area submitted by POPL (that is, regions west of Horsham and along the Victoria and SA border). We have considered POPL's submission, RGS' submission, GTA's LDs as well as previous information submitted to the ACCC in forming this draft view.

There are 3 PTSPs in operation at Portland (POPL, GrainCorp and RGS). These port terminal facilities likely draw grain from the same catchment area and are therefore considered the most relevant facilities for this assessment.

While the ACCC acknowledges there is some fluidity and overlap with other catchment areas, the ACCC's draft view is that port terminal facilities located at Geelong, Melbourne and Port Adelaide pose a limited but not insignificant competitive constraint on facilities at Portland. Furthermore, a series of factors may influence the extent of any constraint from these locations. The level of constraint is also likely to vary over time. Key factors may include local and overall production levels,<sup>14</sup> specific operational decisions made by exporters or growers, and freight developments (such as upgrades or extensions to rail networks). The ACCC welcomes further views on the extent of substitutability between the port terminal facilities at Portland, Geelong, Melbourne and Port Adelaide.

## **2.2. Characteristics and capacity of relevant port terminal facilities**

The ACCC considers the availability and nature of port terminal services provided at POPL's facility and at alternative facilities to be relevant to the consideration of the matters specified in subclause 5(3) of the Code.

Noting the ACCC's draft view set out in section 2.1, the ACCC considers the port terminal facilities most relevant to this assessment are POPL's, RGS' and GrainCorp's Portland facilities.

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<sup>12</sup> As per figure 2.1 POPL submitted that grain in this region typically moves to Geelong or Melbourne.

<sup>13</sup> ACCC, *RGS Final Determination*, 31 March 2020, p. 22.

<sup>14</sup> That is production within the (local) Portland catchment area and the broader Victorian and SA market.

Noting the ACCC’s draft view set out in section 2.1, in addition to competing port terminal services at Portland, POPL also likely faces competition from PTSPs located at Geelong, Melbourne and Port Adelaide (to varying extents).

Table 2.1 below provides an overview of the features of the relevant port terminal facilities located at Portland.

The GrainCorp facility is located at KSA 1 berth, which is a dedicated GrainCorp operation and is used primarily for grain and woodchips; the berth is owned and operated by GrainCorp. The RGS facility is a mobile loader which is operated at common user berths (either Berth 5 or Berth 6) and is also moved between Geelong and Portland.

**Table 2.1: Overview of port terminal facilities at Portland**

	<b>POPL’s Portland facility</b>	<b>GrainCorp’s Portland facility</b>	<b>RGS’ Portland facility***</b>
<b>Rail receipt</b>	n/a	Standard gauge 1,000 t/hr 1 hopper	n/a
<b>Road receipt</b>	200 t/hr	250 t/hr	200 t/hr
<b>Loader rates</b>	200 t/hr (fixed and mobile)*	1,400 t/hr (fixed)	200 t/hr (mobile)
<b>Storage capacity</b>	18,000 tonnes (on Port)	60,000 tonnes (at port)	20,000 tonnes (near port)
<b>Port of anchorage declared depth</b>	12.2m	12.5m	12.2m for Berth 5 and 11.8m for Berth 6
<b>Nominal annual capacity</b>	600,000 tonnes	840,000 tonnes**	Up to 300,000 tonnes***

Source: POPL exemption application; GrainCorp 2014 and 2018 exemption application; GrainCorp 2021-22 Stem Opening; RGS 2018 exemption application; POPL website, see: <https://www.portofportland.com.au/port-operations/services-facilities/berths-port-infrastructure/>

Notes: \* POPL’s facility comprises both mobile and fixed infrastructure (see page 5 of POPL’s exemption application).

\*\* The nominal capacity of GrainCorp’s Portland facility was taken to be the total amount of short-term capacity released in the 2019–20 and 2020–21 seasons (of 840,000 tonnes). GrainCorp has previously indicated its Portland facility has a capacity of 1.5 million tonnes. POPL submitted GrainCorp’s Portland facility had capacity of 720,000 tonnes. See section 2.2.4 for further details.

\*\*\* RGS’ capacity of 300,000 tonnes was taken from their 2018 exemption application. In 2020–21 RGS shipped 631,000 tonnes. RGS’ capacity is discussed in section 2.2.4.

### 2.2.1. Receptions

Table 2.1 above shows GrainCorp’s Portland facility is the only PTSP at Portland who can receive grain via rail (and receives this grain at a rate of up to 1,000 tonnes per hour).<sup>15</sup>

<sup>15</sup> The ACCC notes that Emerald’s Melbourne facility and GrainCorp’s Geelong facility can receive grain via rail services at up to 1,000 and 2,000 tonnes per hour respectively. Source: Emerald Grain website, see: <https://emeraldgrain.com/home/industry-store-and-move-grain/shipping-at-melbourne-port-terminal/>; and GrainCorp,

POPL and RGS (Portland) both receive grain via road transport at up to 200 tonnes per hour, and GrainCorp's facility receives grain (via road services) at up to 250 tonnes per hour. As such, all 3 PTSPs' road receival rates are significantly below that of GrainCorp's rail receival rates.

Regarding GrainCorp's rail services at Portland, the ACCC notes that GrainCorp in its 2018 exemption application submitted that the Portland rail line has weight restrictions and travels via a circuitous route via Ararat, potentially limiting the effectiveness of rail freight service.<sup>16</sup> The ACCC also notes that GrainCorp's Portland facility rail line is standard gauge,<sup>17</sup> and that other Victorian rail lines are dual gauge (therefore excluding Portland from drawing grain by rail from north western Victoria).<sup>18</sup> The ACCC welcomes stakeholder feedback on any relevant changes or views regarding the effectiveness of rail services at Portland.

### 2.2.2. Storage at the relevant port terminal facilities

Table 2.1 shows the storage that is located at (or near) each port terminal facility (i.e. storage which only needs to be transported a short distance to ship loading facilities).<sup>19</sup>

Specifically, table 2.1 shows that the storage located at Portland is relatively limited, with GrainCorp and POPL owning 60,000 and 18,000 tonnes of storage at port respectively.

Table 2.1 also shows that RGS does not own any storage at Portland, however as submitted by RGS in its 2018 exemption application:

*Around Portland RGS has access to sheds to lease at various locations with an approx. storage capacity of 20,000mt. This capacity is currently utilised solely for pre-accumulation for bulk vessel loading.*<sup>20</sup>

Off-site storage facilities are likely to provide RGS with some level of flexibility when managing its shipping program. However, the need to transport grain a short distance to port may limit RGS' effectiveness compared to storage located at port.

### 2.2.3. Ship loading capacity

POPL's facility has a ship loading rate of 200 tonnes per hour, using both fixed and mobile equipment. RGS' facility has an identical loading rate to POPL's, however RGS' mobile equipment is transported between Geelong and Portland. GrainCorp's fixed ship loader at Portland has a substantially higher loading rate of 1,400 tonnes per hour.

The ACCC understands that the size of a vessel that can be loaded at a port is also relevant to the economic efficiency of a port terminal service. GrainCorp's Portland facility can service

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*Submission – Victorian port terminals: exemption from port terminal access (bulk wheat) regulation*, December 2014, p. 10.

<sup>16</sup> GrainCorp, *Response – Riordan Grain Services application for exemption from the port terminal (bulk wheat) code of conduct*, November 2018, p. 3.

<sup>17</sup> The ACCC notes that standard rail gauge mean tracks can only facilitate trains of one size, while dual carriageways allow trains of 2 different sizes to use the rail line. Given GrainCorp's Portland facility is connected to a standard rail gauge, and Melbourne (Emerald) and Geelong (GrainCorp) ports are connected to dual carriageways, this potentially indicates the effectiveness of rail is likely more limited at Portland than at Melbourne and Geelong.

<sup>18</sup> GrainCorp, *Submission – Victorian port terminals: exemption from port terminal access (bulk wheat) regulation*, December 2014, p. 7.

<sup>19</sup> The ACCC considers that storage located directly at port likely provides a PTSP with a higher level of operational flexibility (as the PTSP is not reliant on transport services to be able to load grain onto a vessel). Off-site storage facilities located relatively close to port likely provide a higher level of operational flexibility than more distant storage sites (to the extent that shorter transport distances enable greater flexibility in grain movements). Consequently, the ACCC considers both on and off-site storage facilities relevant to its assessment.

<sup>20</sup> Riordan Grain Services, *Riordan Grain Services Exemption Application*, 4 October 2018, p. 8.

vessels up to 60,000 DWT,<sup>21</sup> while RGS and POPL can both service vessels up to 50,000 DWT.<sup>22</sup> As such, in terms of the vessels each PTSP can load, GrainCorp has a slight advantage over POPL and RGS.

#### 2.2.4. Capacity estimates of relevant port terminal facilities

The capacity available (and its utilisation) at each port terminal facility is relevant to the assessment of supply and demand for port terminal services,<sup>23</sup> and it enables the identification of capacity constraints (i.e. circumstances in which demand for capacity exceeds supply). In the absence of viable competitive alternatives, capacity constraints could lead to PTSPs exercising market power in the provision of port terminal services.

A variety of 'at port characteristics' affect the amount of grain a port terminal facility can load in a given year (i.e. a facility's capacity), in particular:

- **road and/or rail receival facilities:** road/rail receival facilities determine how quickly grain received at port can be processed into storage or onto a vessel;
- **at-port storage:** at-port storage provides a PTSP with greater flexibility to coordinate the receival and loading of grain; and
- **ship loading rate:** how quickly a PTSP can load grain onto a vessel is a significant factor in how much grain can be loaded via a port terminal facility in a given period.

The ACCC acknowledges that a facility's capacity may change in future seasons due to factors such as infrastructure works and changes in operational practices. It is also reasonable to expect that a PTSP may increase the amount of capacity it provides in response to an actual or anticipated increase in demand and opportunities presented by the market (e.g. by increasing staffing levels or extending work hours).

Table 2.2 below shows capacity estimates for each Portland port terminal facility and compares the various approaches to measuring capacity estimates. The ACCC has discussed its approach to estimating the capacity of a port terminal facility in detail in previous determinations.<sup>24</sup>

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<sup>21</sup> GrainCorp, *Response – Riordan Grain Services application for exemption from the port terminal (bulk wheat) code of conduct*, November 2018, p. 3; Dead weight tonnes (DWT) - the number of tonnes that a vessel can carry.

<sup>22</sup> Port of Portland Limited, *Application for exemption from Parts 3-6 of the Port Terminal Access (Bulk Wheat) Code of Conduct*, 3 September 2021, p. 4.

<sup>23</sup> Utilisation rates are discussed in section 3.1.2 and 3.1.3.

<sup>24</sup> See section 3.1.4 of the April 2021 Viterro Final Determinations, which discuss possible methodologies to determine capacity.

**Table 2.2: Different capacity estimates at Portland port terminal facilities (mt)**

Port terminal facility	Maximum published available capacity	Maximum season	9-month maximum historical monthly throughput	ACCC capacity estimate
<b>POPL</b>	0.60	0.36	0.75	0.60
<b>GrainCorp (Portland)</b>	1.50*	1.07	1.22	1.07
<b>RGS (Geelong and Portland)</b>	0.30	0.63	0.95	0.63
<b>Total:</b>	2.40	2.06	2.91	2.30

Source: POPL exemption application; GrainCorp 2014 exemption application; RGS 2018 exemption application; PTSP loading statements; ACF Shipping stem and market share report.

Notes: \* In its 2014 exemption application GrainCorp submitted that its Portland facility has an elevation capacity of 1.50 million tonnes.<sup>25</sup> GrainCorp also submitted (in its 2018 exemption application) that its Portland facility has capacity of "well over 2 million tonnes".<sup>26</sup> GrainCorp released 840,000 tonnes of short-term-capacity in each of the 2019-20 and 2020-21 seasons. The ACCC used this figure (840,000 tonnes) as its capacity measure in its 2020-21 monitoring report.

### **Capacity of POPL's facility**

POPL has submitted that its ship loader at Berth 5 at Portland has a nominal capacity of 600,000 tonnes per annum.<sup>27</sup> During the 2020-21 season (Victoria's and Portland's largest bulk export season on record)<sup>28</sup> POPL loaded 356,000 tonnes of grain.

Berth 5 at Portland is a common user berth and is used by POPL to load a variety of commodities (including mineral sands, fertiliser, livestock, break-bulk and general cargo).<sup>29</sup> POPL has submitted that achieving its capacity therefore depends on a variety of factors, including demand for the use of Berth 5:

*Achieving this estimated capacity through the POPL loading facility depends largely on:*

- *Seasonal growing conditions and supply in Portland catchment zone and domestic consumption.*
- *Capacity demand for use of the POPL shiploader by mineral sands exporters;*
- *Overall Port capacity, particularly the high demand for use of Berth 5 which is POPL's highest utilised common user berth for all break bulk commodities.*

<sup>25</sup> GrainCorp, *Submission Victorian Port Terminals: Exemption from Port Terminal Access (Bulk Wheat) Regulation*, December 2014, p. 11.

<sup>26</sup> GrainCorp, *Response Riordan Grain Services application for exemption from the Port Terminal (Bulk Wheat) Code of Conduct*, November 2018, p. 3.

<sup>27</sup> Port of Portland Limited, *Application for exemption from Parts 3-6 of the Port Terminal Access (Bulk Wheat) Code of Conduct*, 3 September 2021, p. 4.

<sup>28</sup> The ACCC notes that a record 4.99 million tonnes were exported from Victoria in 2020-21, exceeding the previous high of 4.75 million tonnes in 2011-12. Similarly, exports from Portland were also at record levels in 2020-21, with 1.20 million tonnes of grain exported, compared to the previous high of 1.07 million tonnes in 2011-12. The ACCC has bulk grain export data back to 2011-12.

<sup>29</sup> See: <https://www.portofportland.com.au/port-operations/services-facilities/berths-port-infrastructure/>. Accessed 14 December 2021.



- *POPL's ability to provide shiploading services is constrained by limited storage (maximum 18,000 tonnes across two sheds).*
- *Efficient loading: as bulk grain cargos are not comingled between customers, all cargo must be cleared from storage facilities following each shipment, and the next customer is unable to load until cargo is accumulated (typically 1 to 2 weeks).<sup>30</sup>*

In addition, RGS has submitted that for POPL to be able to facilitate 600,000 tonnes of grain, other users of Berth 5 will likely have to accept reduced access:

*There remains a risk to other port users that POPL will preference the utilisation of the assets they own for bulk loading of grain from Berth #5, at the expense of others...600,000 tonnes of bulk grain export capacity represents 50,000 tonnes exports per month which at ~5,000 tonnes per day load rate is 10 days loading per month weather going well. This represents around 1/3rd of the monthly capacity of berth #5 without weather delays – other POPL port users will likely have to accept reduced access to berth #5 to accommodate this.<sup>31</sup>*

The ACCC notes that, as both POPL and RGS will load grain from the same berth (Berth 5),<sup>32</sup> RGS' loading operations also have the potential to affect the capacity of POPL's facility.

The ACCC has considered the potential for other commodities and users of POPL's services to impact the amount of grain loaded by POPL at Berth 5, as well as POPL's exports in the 2020-21 season. The ACCC's draft view is that 600,000 tonnes represents the best available estimate of the capacity of POPL's facility at this time.

### **Capacity of GrainCorp's Portland facility**

In its 2014 exemption application GrainCorp submitted that its Portland facility had an elevation capacity of 1.50 million tonnes.<sup>33</sup> In its 2018 exemption application GrainCorp submitted that its Portland facility's "theoretical annual loading capacity is well over 2 million tonnes" and that its grain loading capacity is substantially underutilised.<sup>34</sup>

In contrast, GrainCorp released 840,000 tonnes of short-term-capacity in each of the 2019-20 and 2020-21 seasons. The ACCC notes that this figure does not include any long-term capacity which was potentially booked by exporters, and that GrainCorp is not obligated to release all its available capacity to the market. However, the ACCC understands that given the variability in grain production and recent east coast drought that any long-term capacity bookings were likely limited.

The maximum amount of grain GrainCorp has exported at its Portland facility is 1.07 million tonnes, which occurred in the 2011-12 season.<sup>35</sup> The ACCC notes that in the record 2020-21 season 625,000 tonnes of grain was loaded at GrainCorp's Portland facility, and in the upcoming season (estimated to have the third largest production on record) GrainCorp currently has 793,000 tonnes scheduled to be loaded.<sup>36</sup> This therefore suggests that 1.50 million tonnes may not be achievable due to site constraints or logistics issues.

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<sup>30</sup> Port of Portland Limited, *Application for exemption from Parts 3-6 of the Port Terminal Access (Bulk Wheat) Code of Conduct*, 3 September 2021, p. 10.

<sup>31</sup> Riordan Grain Services, *Submission in response to ACCC issues paper – Port of Portland Limited exemption assessment*, 29 November 2021, p. 2.

<sup>32</sup> *ibid.*, p. 3.

<sup>33</sup> GrainCorp, *Submission Victorian Port Terminals: Exemption from Port Terminal Access (Bulk Wheat) Regulation*, December 2014, p. 11.

<sup>34</sup> GrainCorp, *Response Riordan Grain Services application for exemption from the Port Terminal (Bulk Wheat) Code of Conduct*, November 2018, pp. 3-4.

<sup>35</sup> GrainCorp also exported 0.63 million tonnes of grain from its Portland facility in the record 2020-21 season and has 0.79 million tonnes of grain scheduled to be exported for the 2021-22 season.

<sup>36</sup> ACF Shipping stem and Market Share report.



Annualising the highest amount of grain exported in a single month over 9 months can also provide an indication of the capacity of a facility.<sup>37</sup> Using this method GrainCorp's Portland facility has an estimated capacity of 1.22 million tonnes.

While the ACCC acknowledges the differing sets of information above, its draft view is that 1.07 million tonnes is likely the best available capacity estimate for GrainCorp's Portland facility.

### **Capacity of RGS' Portland facility**

RGS submitted that its mobile loader operation could facilitate a maximum of 300,000 tonnes per year across both its Geelong and Portland facilities.<sup>38</sup>

In considering the capacity of RGS' mobile loader the ACCC notes that:

- RGS substantially exceeded this capacity in the record 2020-21 season, loading a total of 631,000 tonnes across both facilities (408,000 tonnes from Geelong and 223,000 tonnes from Portland);
- RGS' ability to move the mobile loader between Geelong and Portland complicates the estimation of the capacity of these facilities;
- Historical data (on which capacity estimates could be based) is relatively limited due to the east coast drought; and
- RGS' operation at Portland will share access to a common user berth with POPL's grain loading operations (as well as other commodities).

For the purposes of this draft determination, the ACCC considers RGS' mobile loader operations have a total capacity of 0.63 million tonnes, with the potential for this capacity to be split between its Geelong and Portland facilities in a relatively flexible manner.

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<sup>37</sup> For a full discussion of the ACCC's views on this approach, see section 3.1.4 of the Viterro Final Determinations for IHB, OHB, Port Giles and Wallaroo, and section 2.2.4 of the ADM Final Determination.

<sup>38</sup> Riordan Grain Services, *Riordan Grain Services Exemption Application*, 4 October 2018, p. 8.

### 3. Competition across the bulk grain supply chain, container exports and domestic demand

This chapter sets out the ACCC's draft views on the level of competition in the market for bulk grain export port terminal services at Portland. The chapter also considers the extent to which the broader Victorian/SA markets for bulk grain export port terminal services and related markets place a competitive constraint on POPL at Portland.

The ACCC considers the level of competitive constraint POPL is subject to is relevant to its assessment of the matters listed at subclause 5(3) of the Code. The ACCC's draft views in relation to these matters are set out in chapter 4.

In particular, the ACCC has considered:

- POPL's role as port owner and manager of the Port of Portland and the relevance to its exemption application;
- POPL's capacity utilisation and its related incentives to provide fair and transparent access to exporters, as well as levels of utilisation at alternate facilities;
- the availability and ownership of upcountry storage in the relevant catchment areas to assess whether an exemption is likely to impact competition at port or upcountry and the extent to which storage is relevant to the level of competitive constraint that POPL faces at port;
- grain transport services in the Victorian market and how this affects the competitive constraint on POPL; and
- the extent to which containerised export and domestic markets impose a competitive constraint on POPL.

#### 3.1. Competition in the market for bulk grain export port terminal services

This section considers competition in the market for bulk grain export port terminal services by assessing the capacity utilisation at POPL's facility and relevant alternative facilities and assessing bargaining power of exporters at Portland.

As outlined in section 2.1, the ACCC considers that it is reasonable to expect that POPL's Portland facility will compete most directly for grain grown in the Portland grain catchment area (primarily the Western Victorian region). As such, this section considers GrainCorp and RGS as the most relevant facilities for this assessment.

The level of capacity constraint is a key factor in the ACCC's assessment of the level of competition for port terminal services. As a general proposition, the ACCC considers that where demand for port terminal services exceeds supply (i.e. capacity is constrained), a vertically integrated PTSP will have a stronger incentive to favour itself or an associated entity (i.e. its exporting business). The ACCC notes that POPL is not vertically integrated with an exporter, but POPL is however the port owner and manager, and this is considered below at section 3.1.1.

The ACCC considers that analysing capacity utilisation:

- at POPL's facility is relevant to the assessment of POPL's incentives to provide preferential treatment to certain exporters; and

- at alternative facilities is relevant to the assessment of the level of competitive constraint that POPL is subject to (and therefore the extent to which POPL's incentive to provide preferential treatment to certain exporters is constrained).

### 3.1.1. POPL is the port owner and manager

POPL is vertically integrated with respect to its bulk grain port terminal services and its role as a port owner and manager at the Port of Portland.

POPL's role as port owner and manager includes providing access to berths for competing PTSPs and more broadly overseeing the operation of the port. As such, there may be the potential for POPL to favour its own bulk grain loading operations at the Port of Portland over other PTSPs, such as RGS.

In addition, POPL is also responsible for administering its Berthing Protocols. The Berthing Protocols set out that in general POPL will provide access to berth on a "first come-first served" basis, however, POPL states that it "[reserves] the right to vary the berthing rotation".<sup>39</sup> As such this raises the potential for non-grain vessels (or POPL's grain vessels) to be prioritised ahead of other PTSPs' grain vessels.

The ACCC further understands that POPL is not subject to any economic regulation under Victoria's port regime. While price regulation was applied to POPL in the mid-1990s, it was progressively relaxed and then removed. Port of Melbourne remains the only port in Victoria subject to price regulation owing to its effective monopoly position in the handling of containerised trade in Victoria.<sup>40</sup>

The ACCC posed a series of questions in the Issues Paper seeking views from stakeholders on whether an exemption for POPL could affect its ability and/or incentive to favour its own operations at Berth 5 over other PTSPs and how this could impact grain exporters.

RGS submitted that there is the potential for POPL to favour its own services over other users, however RGS also submitted that commercial resolutions should be used to resolve any such issues:

*There remains a risk to other port users that POPL will preference the utilisation of the assets they own for bulk loading of grain from Berth #5, at the expense of others. This should not occur as part of the port protocol rules; however, the port does list a number of Productivity Rules for Port Users that allows for POPL at its discretion to move vessels to anchorage for example "in the event of cargo handling delays of more than 4 hours". Commercial resolutions should be used to limit this action as is the common practice in other ports RGS utilises.<sup>41</sup>*

In response to the Issues Paper, RGS also submitted:

*Exemption on its own should not impact other PTSP's operations at the port as long as the system works on first [Notice Of Readiness] tendered first on berth basis.<sup>42</sup>*

Furthermore, POPL submitted that there is little incentive to favour its own bulk wheat shipments over other PTSPs as its grain loading services are only a small proportion of its business:

<sup>39</sup> POPL's Berthing Protocols and Productivity rules are available at: <https://www.portofportland.com.au/port-operations/shipping/berthing-protocol/>; POPL, *Berthing Protocol*, p. 1.

<sup>40</sup> Department of Transport (Victoria), *Independent review of the Victorian Ports System Discussion Paper*, July 2020, p. 34.

<sup>41</sup> Riordan Grain Services, *Submission in response to ACCC issues paper – Port of Portland Limited exemption assessment*, 29 November 2021, p. 2.

<sup>42</sup> *ibid.*, p. 2.

*...even if ad hoc shiploading services were expanded, they are unlikely to become POPL's main business and so there is little ability or incentive for POPL to somehow prioritise bulk wheat shipments over other exports when it comes to managing berthing slots, capacity, towage and pilotage services etc. To do so would be to the detriment of POPL's main commercial operations and revenue streams.*<sup>43</sup>

The ACCC's draft view is that the obligations in Parts 3 to 6 of the Code do not address the relationship between port owners/managers and PTSPs, and POPL's role as owner and manager of the Port of Portland is therefore not relevant to this exemption assessment.

The Code does not provide a regulatory framework to address potential concerns around the relationship between PTSPs located at the same port. Specifically, Parts 3 to 6 of the Code seeks to ensure that third party exporters obtain fair and transparent access to a PTSP's facilities where there is limited competition and/or vertical integration with an exporter by placing additional obligations on non-exempt PTSPs.

In addition to the framework set out by the Portland Berthing Protocols, the arrangements POPL may enter into with other PTSPs regarding berth access will be commercial in nature and most likely subject to specific contractual arrangements. Accordingly, should a potential dispute arise, an affected party would need to consider a remedy particular to their circumstances (for example a commercial agreement may include a dispute resolution process).

More broadly, should issues of monopoly pricing or berth access arise they may be more appropriately addressed via other economic regulatory mechanisms, or if appropriate considered under the general competition provisions in Part IV of the *Competition and Consumer Act 2010* (Cth).

The ACCC acknowledges POPL's submission that its grain loading services are small and provide limited ability or incentive to favour those shipments over other exports at the berth.

### **3.1.2. Annual capacity utilisation**

The ACCC considers that where there is spare export capacity at a port terminal facility, a non-vertically integrated PTSP will have an incentive to provide access to exporters to increase throughput. A vertically integrated PTSP has incentives to increase exports by its own trading business but in relation to spare capacity that cannot be filled by its own trading business, it will have an incentive to provide access to third party exporters.

Conversely, where there are capacity constraints, the ACCC considers that a vertically integrated PTSP may have an incentive to exclude other exporters and preference its own trading business.

The ACCC considers the relationship between supply and demand and identifying capacity constraints which, in the absence of a substitute facility, could lead to the exercise of market power in the provision of port terminal services.

Table 3.1 below provides annual capacity utilisation rates for each of the 3 PTSPs at Portland. As can be seen from an annual perspective, capacity was historically underutilised at GrainCorp's Portland facility prior to the introduction of RGS in 2016-17 and POPL in 2020-21. As such, the introduction of further capacity will result in even greater access being available for exporters seeking to gain access to port terminal services.

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<sup>43</sup> Port of Portland Limited, *Application for exemption from Parts 3-6 of the Port Terminal Access (Bulk Wheat) Code of Conduct*, 3 September 2021, p. 17.

Table 3.1 below indicates the 2011-12 and 2020-21 seasons are potential exceptions to when capacity was underutilised. In regard to the 2011-12 season, we note that GrainCorp was the only port terminal facility operational at that time, utilising all of its 1.1 million tonnes of capacity. However, given the introduction of POPL and RGS this would add an extra 0.9 million tonnes in capacity,<sup>44</sup> meaning only 1.1 million tonnes of an available 2.0 million tonnes would have been utilised, therefore suggesting there would have been a significant amount of spare capacity available.<sup>45</sup>

POPL and RGS recorded utilisation rates of 79% and 100% in the record 2020-21 season.<sup>46</sup> Regarding POPL and RGS capacity utilisation the ACCC notes:

- POPL did not begin operations until late January 2021; if they began operations earlier this could potentially have eased any capacity constraints which occurred at their facility in the record 2020-21 season. Additionally, given 2020-21 was a record season, POPL's capacity utilisation rates may not be indicative of utilisation in more typical shipping years.
- The majority of RGS ship loading operations (65%) occurred at Geelong in 2020-21, and in future years RGS may perform greater proportions of shipments at Portland.
- GrainCorp appears to have had significant amounts of spare capacity available, with an annual utilisation rate of just 58%.

In total, 1.2 million tonnes of grain were exported from Portland in the record 2020-21 season, out of an annual capacity of 2.0 million tonnes.<sup>47</sup>

Consequently, from an annual perspective the ACCC's draft view is that it appears likely there would be spare capacity available at all 3 of the PTSPs at Portland in future seasons. This therefore suggests POPL will have a reduced incentive and ability to hinder an exporter's access to port terminal services.

**Table 3.1: Annual capacity utilisation rates for Portland PTSPs**

	GrainCorp (Portland)	POPL	RGS (Portland & Geelong)***
2011-12	100%	-	-
2012-13	73%	-	-
2013-14	47%	-	-
2014-15	13%	-	-
2015-16	14%	-	-
2016-17	44%	-	43%
2017-18	16%	-	28%
2018-19	0%	-	0%
2019-20	22%	3%*	15%
2020-21	58%	79%**	100%

Source: PTSP loading statements; and ACF Shipping stem and market share report; POPL exemption application.

Notes: \* POPL performed one shipment in January 2020 season for Pharos Trading.

<sup>44</sup> Assuming RGS splits its capacity evenly between Geelong and Portland.

<sup>45</sup> The ACCC notes that the introduction of RGS and POPL may attract further tonnages to be delivered to Portland if an equivalent season were to arise.

<sup>46</sup> Victoria exported 4.99 million tonnes of bulk grain in 2020-21, exceeding the previous record of 4.75 million tonnes in 2011-12. 1.20 million tonnes of grain were exported from Portland in 2020-21, exceeding the previous record of 1.07 million tonnes in 2011-12.

<sup>47</sup> As above this assumes that RGS split their operations evenly between Geelong and Portland.

\*\* POPL began operations in late January 2021. As such, their capacity estimate in 2020-21 is taken to include only months from January to September.

\*\*\* RGS capacity utilisation figures are taken across both their Portland and Geelong facilities.

### 3.1.3. Peak period capacity utilisation

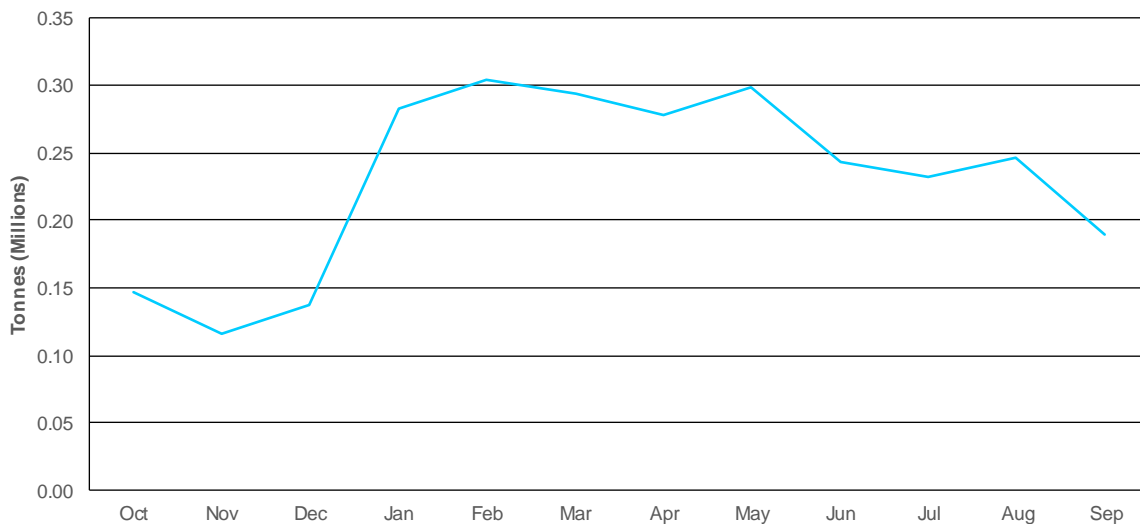
The demand for access to port terminal services can be expected to be highest in the ‘peak period’ of the Australian shipping year. Therefore, the ACCC considers it is also appropriate to specifically consider levels of utilisation and PTSPs’ incentives during the period when third party exporters are most likely to be seeking access. The utilisation rates of competing PTSPs during the peak period are particularly relevant to the consideration of the level of competitive constraint that a PTSP faces.

The ACCC considers that the peak period in the shipping year occurs when exporters can receive the best prices internationally. During this period there is more demand from exporters for shipping capacity at port terminal facilities. In its annual Bulk grain ports monitoring reports, the ACCC has generally regarded the peak period to occur, on a national level, between the months of February and May (inclusive).

RGS submitted peak period capacity constraints are likely occur between January and June.<sup>48</sup>

As per figure 3.1 below, Victoria’s bulk exports peak from January through to May. As such for the purposes of the ACCC’s draft determination, the ACCC will consider January to May the peak export period in Victoria.

**Figure 3.1: Average monthly exports from Victoria, 2011-12 to 2020-21**



Source: PTSP loading statements; ACF Shipping stem and market share report.

Figures 4 to 6 below show spare peak period capacity by season for each of POPL’s, RGS’ and GrainCorp’s (Portland) facilities broken down by exporter. Figures 4 to 6 indicate that peak utilisation has historically been highly variable between seasons. Additionally, any peak period constraints experienced by GrainCorp in the 2011-12 to 2013-14 seasons are less likely to occur due to the introduction of RGS’ and POPL’s alternative capacity.

<sup>48</sup> Riordan Grain Services, *Submission in response to ACCC issues paper – Port of Portland Limited exemption assessment*, 29 November 2021, p. 3.

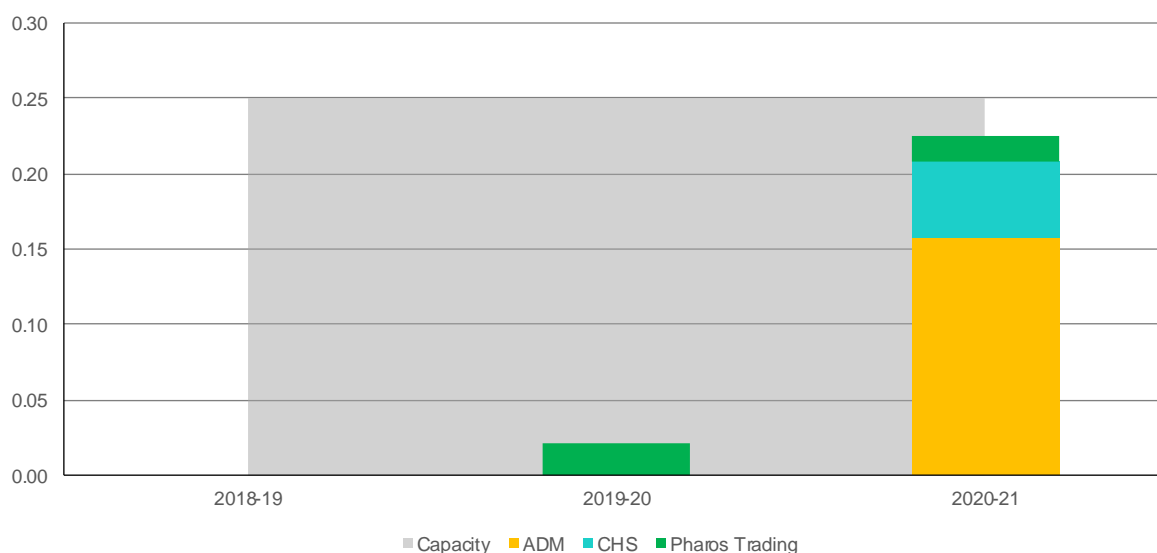
Figures 4 to 6 also show there was substantial peak period capacity available between the 2014-15 and 2019-20 seasons at both GrainCorp's and RGS' facilities during the peak period. However, the ACCC understands that drought conditions across the 2017-18 to 2019-20 seasons resulted in substantial quantities of grain being transported to NSW and Queensland to meet domestic demand, meaning less grain was available for bulk export in these seasons.<sup>49</sup>

In addition, figures 4 to 6 indicate that in the record 2020-21 season there was likely capacity constraints during the peak period for RGS' mobile loader and POPL's facilities (with POPL and RGS utilising 90% and 100% of their estimated available peak period capacity respectively). There may have also been peak period capacity constraints at GrainCorp's facility, with GrainCorp utilising 80% of its estimated peak period capacity.

In regard to the 2021-22 season, the ACCC notes that over the peak period GrainCorp's Portland facility is scheduled to load 338,000 tonnes, RGS is scheduled to load 397,000 tonnes and POPL 260,000 tonnes.<sup>50</sup> Assuming all these tonnes are loaded, this means that GrainCorp, RGS and POPL would have estimated peak period capacity utilisation rates of 75%, 93% and 104% respectively. As such, this suggests there may be capacity constraints in the current season for port terminal services at Portland.

The ACCC understands that Victoria's 2021-22 harvest is estimated to be the third largest on record (at 8.4 million tonnes) and 21% above average.<sup>51</sup>

**Figure 3.2: Capacity utilisation across the peak period by exporter at POPL, 2018-19 to 2020-21**



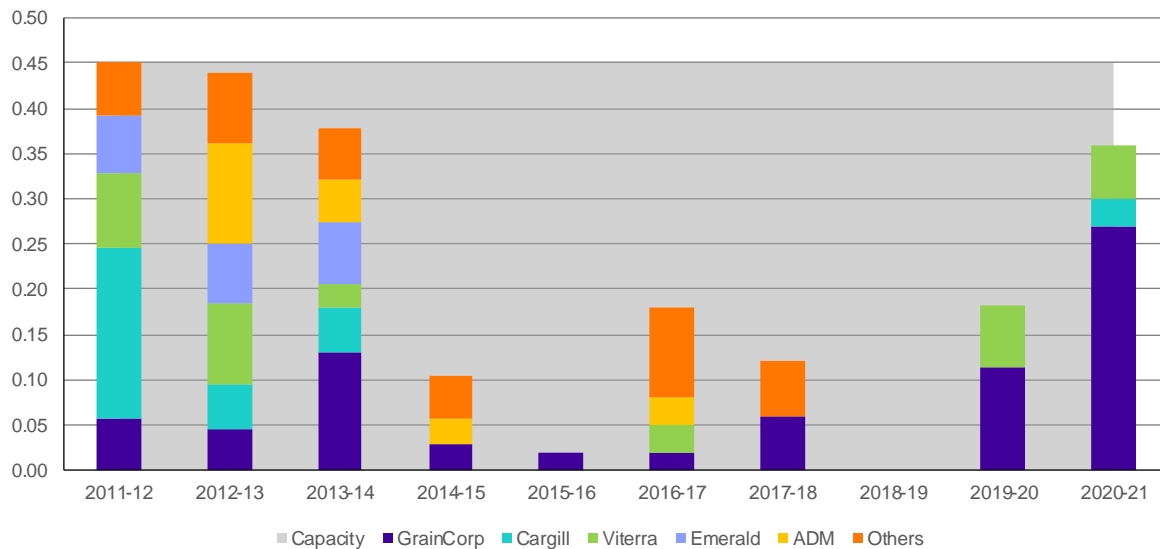
Source: PTSP loading statements; ACF Shipping stem and market share report; POPL exemption application.

<sup>49</sup> ACCC, *Bulk grain ports monitoring report 2019-20*, March 2021, p. 3.

<sup>50</sup> ACF Shipping stem and Market Share report.

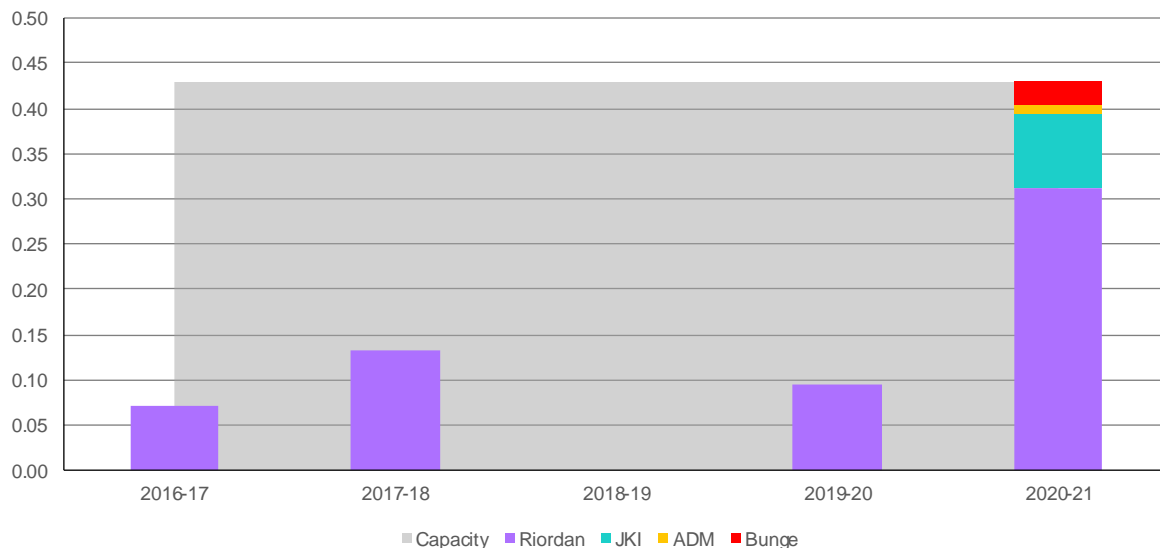
<sup>51</sup> ABARES, State data underpinning: Australia crop report: December 2021 No. 200.

**Figure 3.3: Capacity utilisation across the peak period by exporter at GrainCorp Portland, 2011-12 to 2020-21**



Source: PTSP loading statements; ACF Shipping stem and market share report

**Figure 3.4: Capacity utilisation across the peak period by exporter at RGS (Geelong and Portland), 2016-17 to 2020-21**



Source: PTSP loading statements; ACF Shipping stem and market share report

### ACCC's draft view on peak period capacity utilisation at Portland

The ACCC's draft view is that there is the potential for each of the 3 Portland PTSPs to experience peak period capacity constraints during high production seasons. In particular, there were likely capacity constraints during last season's record shipping year, and it appears there will also be capacity constraints in the current season. However, as shown in figures 4 to 6, in most seasons it appears there is likely to be significant peak period capacity available.



### 3.1.4. Exporters and bargaining power

The ACCC has considered the bargaining power of exporters and whether exporters have viable alternatives to export or market grain at Portland. This is relevant to the ACCC's assessment of the exemption application, having regard to the matters under subclause 5(3) of the Code.

Tables 3.2 to 3.4 below display the exporter market shares of each of the PTSPs at Portland. Table 3.2 and figure 3.3 show that historically a number of exporters have secured access to GrainCorp's Portland facility in high output seasons. However, GrainCorp performed 86% of all shipments at its Portland facility in the record 2020-21 season. It is possible this has been due to the introduction of RGS and POPL facilities which provide non-GrainCorp exporters with other port terminal services options.

POPL's introduction into the market provides further options to exporters seeking to secure port terminal services, therefore increasing their bargaining power when attempting to secure port terminal services at Portland facilities.

The ACCC considers that high production seasons may increase POPL's incentive to provide preferential access to certain exporters. However, given POPL competes at Portland with GrainCorp and RGS (as well as with PTSPs at Geelong, Melbourne and Port Adelaide) and is not vertically integrated with an exporter, this likely limits its incentive and ability to do so.

**Table 3.2: Exporter market share at Portland GrainCorp, 2011-12 to 2020-21**

	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20	2020-21
GrainCorp	21%	12%	38%	32%	100%	25%	64%	-	58%	86%
Cargill	38%	26%	13%	14%	0%	0%	0%	-	0%	5%
Viterra	20%	15%	9%	0%	0%	6%	0%	-	30%	10%
Emerald	12%	12%	14%	0%	0%	0%	0%	-	0%	0%
ADM	0%	15%	15%	21%	0%	12%	0%	-	0%	0%
Others	9%	19%	11%	32%	0%	57%	36%	-	13%	0%
Number of exporters	6	6	7	5	1	5	2	0	3	3

Source: PTSP loading statements; ACF Shipping stem and market share report.

**Table 3.3: Exporter market share at Portland (Port of Portland Limited), 2019-20 to 2020-21**

	2019-20	2020-21
ADM	0%	65%
CHS	0%	24%
Pharos Trading	100%	4%
RGS	0%	6%
Number of exporters	1	4

Source: PTSP loading statements; ACF Shipping stem and market share report.

**Table 3.4: Exporter market share at RGS (Portland and Geelong), 2011-12 to 2020-21**

	2016-17	2017-18	2018-19	2019-20	2020-21
RGS	100%	100%	-	100%	74%
JKI	0%	0%	-	0%	17%
ADM	0%	0%	-	0%	6%
Bunge	0%	0%	-	0%	4%
Number of exporters	1	1	0	1	4

Source: PTSP loading statements; ACF Shipping stem and market share report.

## 3.2. Upcountry storage and grain transport services

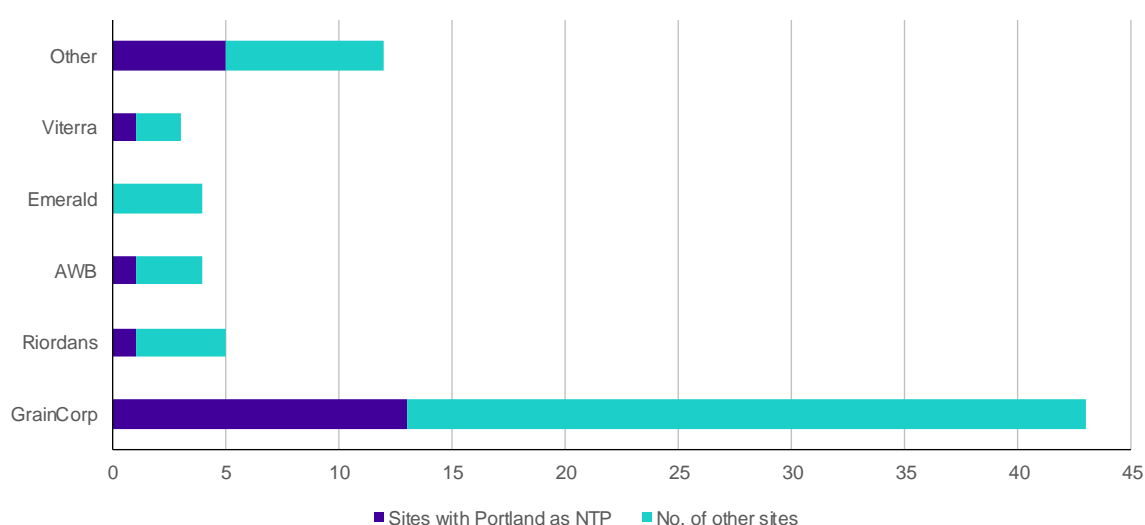
### 3.2.1. Upcountry storage and handling

The ACCC considers the state of competition in upcountry storage and handling markets to be relevant to the assessment of an exemption application. If a PTSP does not own a storage facility or a network of facilities it may be placed at a competitive disadvantage when compared to other PTSPs with storage and handling assets. POPL does not own any upcountry storage facilities, while figure 3.5 shows that POPL's largest competitor GrainCorp owns the vast majority of upcountry storage services in Victoria.<sup>52</sup> Figure 3.5 also shows that RGS owns 5 sites in Victoria.

Without sufficient competition in upcountry storage there is potential for a vertically integrated PTSP to use its position upcountry to limit the ability of third-party exporters to access port terminal services on fair and transparent terms. In this respect, POPL is not vertically integrated with any grain exporter or upcountry storage provider.

Consequently, the ACCC's draft view is that POPL does not have the ability to use its ownership of upcountry storage to limit exporter access at port.

**Figure 3.5: Ownership of Victorian upcountry storage sites**



Source: GTA Location differentials 2021/22, Victoria, effective as of 1 October 2021.

### 3.2.2. Grain transport services

The ACCC considers the use of rail and/or road networks to transport grain from storage facilities to port can be a relevant consideration when examining the level of competition between bulk grain port terminal facilities.

For example, the ACCC considers that the ability of a PTSP to receive grain by rail as well as by road may provide these PTSPs with a competitive advantage over facilities that can only receive grain via road. Further, the ability of competing PTSPs to secure transport services may be relevant to an assessment of the level of competitive constraint an individual PTSP faces.

<sup>52</sup> GrainCorp owns 43 of the 71 upcountry storage sites in Victoria, including 13 of the 21 sites with Portland as their NTP.

POPL does not have any ownership interests in road or rail freight companies. POPL is also unable to receive grain via rail services at its Berth 5 facility at Portland.<sup>53</sup>

GrainCorp's Portland facility does have access to rail services. RGS who also operate out of Berth 5 (as well as Berth 6) do not have access to rail services.

As per section 2.2.1, GrainCorp's rail services at Portland have weight restrictions and travel via a circuitous route via Ararat, potentially limiting the effectiveness of its rail freight service.<sup>54</sup> GrainCorp's Portland facility uses a standard gauge track, and that other Victorian rail lines are dual gauge (therefore excluding Portland from drawing grain by rail from north western Victoria).<sup>55</sup> The ACCC also notes RGS' submission that road freight and logistics are the main capacity constraint at Portland.<sup>56</sup>

Given the above, the ACCC's draft view is that POPL's facility may be at a competitive disadvantage relative to GrainCorp's Portland facility which can receive grain via rail.

### 3.3. Container exports and domestic demand

The ACCC considers the domestic and container markets are relevant to its consideration of the level of competition faced by bulk grain export port terminal facilities.

POPL submitted that the domestic and container markets provide a constraint on any attempt in its operations to engage in anti-competitive conduct.<sup>57</sup>

#### 3.3.1. Containerised exports

Grain can be exported either in bulk or via containers. The ACCC understands that:

- container export markets allow growers and exporters to access international customers who demand high quality and niche grain products in relatively small volumes (compared to the bulk market);
- some international customers are unable to receive grain via bulk services due to limitations in port infrastructure or lack of finances, and so receive grain via container services; and
- exporters may also respond to price signals in the global container trade and bulk vessel markets.

As such, the ACCC does not consider containerised grain exports to be a perfect substitute for bulk grain exports. However, containerised exports may provide a viable alternative export path for some growing regions, niche and high-quality products, or for particular destinations.

As per section 3.1.1, the Portland catchment area is likely competitively constrained, to some extent, by port terminal services at both Melbourne and Port Adelaide. In particular,

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<sup>53</sup> Port of Portland Limited, *Application for exemption from Parts 3-6 of the Port Terminal Access (Bulk Wheat) Code of Conduct*, 3 September 2021, p. 5.

<sup>54</sup> GrainCorp, *Response – Riordan Grain Services application for exemption from the port terminal (bulk wheat) code of conduct*, November 2018, p. 3.

<sup>55</sup> GrainCorp, *Submission – Victorian port terminals: exemption from port terminal access (bulk wheat) regulation*, December 2014, p. 7.

<sup>56</sup> Riordan Grain Services, *Submission in response to ACCC issues paper – Port of Portland Limited exemption assessment*, 29 November 2021, p. 3.

<sup>57</sup> Port of Portland Limited, *Application for exemption from Parts 3-6 of the Port Terminal Access (Bulk Wheat) Code of Conduct*, 3 September 2021, pp. 14-16.

RGS comments that ‘containerised export demand is already active in regions such as Horsham’.<sup>58</sup>

Containers make up 36% of all Victorian grain exports (with the remaining 64% in bulk), which is the highest of any Australian state.<sup>59</sup> However, as shown in table 3.5 the vast majority (96%) of containerised grain in Victoria is exported from Melbourne, therefore likely limiting any competitive constraint imposed on POPL.

Furthermore, the Port Adelaide container market is approximately a third of the size of the Melbourne container market and is located significantly further away from Portland.<sup>60</sup> As such any competitive constraint imposed by the Port Adelaide container market is likely significantly smaller than that imposed from Melbourne.

In addition, as reported in the Bulk grain ports monitoring report– data update 2020-21 a shortage of containers (and associated disrupted global shipping operations) has affected the container grain market.<sup>61</sup> Greater access to containers and the resumption of more typical shipping practices is likely to take several years.<sup>62</sup>

Given the above the ACCC’s draft view is that containerised export markets likely impose a limited but not insignificant competitive constraint on POPL. The extent of any constraint is likely to vary greatly subject to a range of factors, including but not limited to future access to containers, international demand, and local production levels.

**Table 3.5: Location of containerised grain exports out of Victoria and Port Adelaide, 2016-17 to 2020-21 (mt)**

	2016-17	2017-18	2018-19	2019-20	2020-21	Total
Geelong	0.01	0.02	0	0.01	0.09	0.12
Melbourne	1.66	1.45	0.43	1.03	1.43	5.99
Portland	0	0	<0.01	0.02	0.11	0.13
<b>Victoria Total</b>	<b>1.67</b>	<b>1.46</b>	<b>0.43</b>	<b>1.05</b>	<b>1.63</b>	<b>6.25</b>
Port Adelaide	0.37	0.35	0.45	0.49	0.35	2.01
<b>Total</b>	<b>2.04</b>	<b>1.81</b>	<b>0.88</b>	<b>1.55</b>	<b>1.97</b>	<b>8.25</b>

Source: ACF, Export Report

### 3.3.2. Domestic demand

The ACCC notes that domestic demand affects the amount of grain that is available for export. The ACCC understands that Australia’s domestic markets are generally considered within the industry to have ‘first call’ on grain, with the amount of grain remaining after demand in domestic markets has been satisfied often referred to as the ‘exportable surplus’.

POPL submitted that the domestic market constrains them in engaging in anti-competitive conduct,<sup>63</sup> and that domestic demand has ‘first call’ on grain.<sup>64</sup> RGS submitted that the south-west Victorian domestic market provides additional competition for grower tonnes.<sup>65</sup>

<sup>58</sup> Riordan Grain Services, *Submission in response to ACCC issues paper – Port of Portland Limited exemption assessment*, 29 November 2021, p. 4.

<sup>59</sup> The proportion of grain exported in containers for each state is: WA, 3%; SA, 6%; NSW, 28%; Queensland, 34%; and Victoria 36%. Source: ACF, Export Report.

<sup>60</sup> On average Melbourne exports 1.20 million tonnes of grain in container and Port Adelaide exports 0.40 million tonnes. Melbourne and Port Adelaide are located 348km and 566km from Portland respectively.

<sup>61</sup> ACCC, *Bulk grain ports monitoring report – data update 2020–21*, p. 24.

<sup>62</sup> ACCC, *Container stevedoring monitoring report 2020–21*. See conclusion on page xxii.

<sup>63</sup> Port of Portland Limited, *Application for exemption from Parts 3-6 of the Port Terminal Access (Bulk Wheat) Code of Conduct*, 3 September 2021, p. 14-16.

As indicated in figure 3.6 below Victoria has the second largest domestic market, which has steadily grown over time. On average, annual Victorian grain production is 7.0 million tonnes and domestic demand accounts for 3.5 million tonnes (49% of production).<sup>66</sup>

Southern NSW and SA domestic markets may also draw Victorian grain. In particular, Portland's catchment zone may extend into SA, as well into southern NSW (see section 2.1). However, RGS submitted that "the southern NSW domestic market in most years is not relevant for pricing into the Portland Zone."<sup>67</sup>

Given the differences in the type of grain required for each market, the domestic market is often not a directly interchangeable market with the bulk export market. For example, the domestic feed market demands lower protein wheat compared to the overseas milling market's demand for the bulk export of high protein wheat. However, the ACCC understands that this is client driven and therefore grain preferences may shift.

More generally, stakeholders in previous exemption assessments have expressed the view that since the domestic market has 'first call' on grain, that it does not place a competitive constraint on the bulk export market.<sup>68</sup> However, consistent with views previously expressed by the ACCC, the ACCC continues to consider that the presence of the domestic market imposes some constraint on bulk export markets.

The ACCC's draft view is that because the domestic market (both Victorian and any potential interstate markets) has 'first call' on grain this limits the competitive constraint imposed on the bulk export market. However, the ACCC considers that the competitive constraint imposed by domestic markets may be stronger in years of reduced supply, or where there are baseline or long term export commitments in place and domestic grain prices are high.

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<sup>64</sup> Port of Portland Limited, *Application for exemption from Parts 3-6 of the Port Terminal Access (Bulk Wheat) Code of Conduct*, 3 September 2021, p. 16.

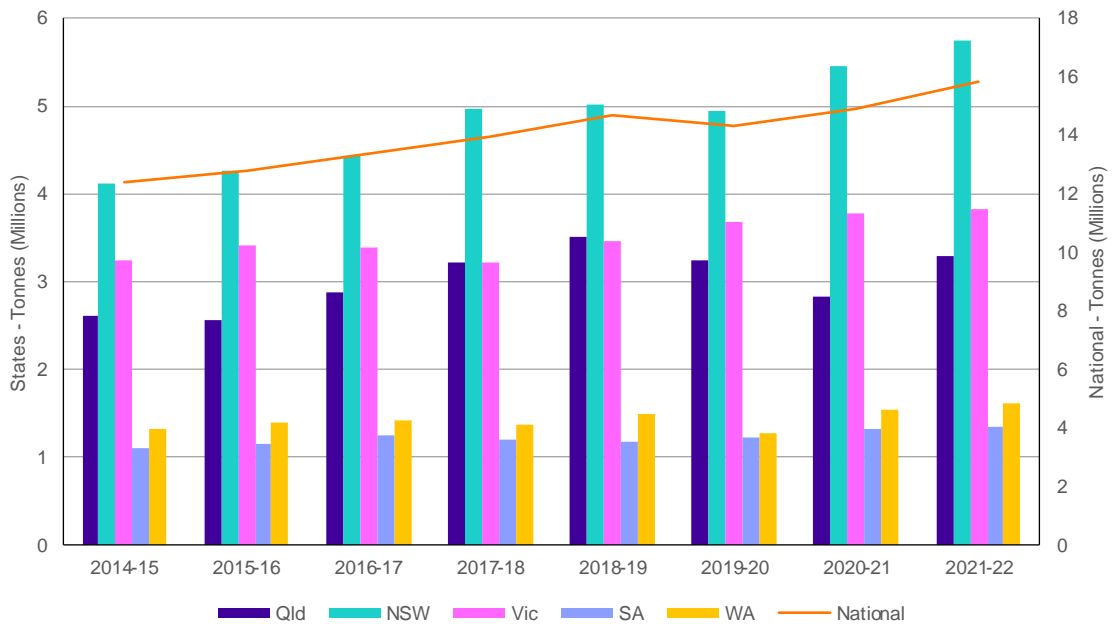
<sup>65</sup> Riordan Grain Services, *Submission in response to ACCC issues paper – Port of Portland Limited exemption assessment*, 29 November 2021, p. 4.

<sup>66</sup> ABARES, State data underpinning: Australia crop report: December 2021 No. 200; ACF, Supply and Demand Report.

<sup>67</sup> Riordan Grain Services, *Submission in response to ACCC issues paper – Port of Portland Limited exemption assessment*, 29 November 2021, p. 4.

<sup>68</sup> See page 151 of the Viterra Final Determinations for IHB, OHB, Port Giles and Wallaroo. Available at: <https://www.accc.gov.au/regulated-infrastructure/wheat-export/wheat-export-projects/viterra-wheat-port-exemption-assessment/final-determinations-inner-harbour-outer-harbour-wallaroo-and-port-giles>

**Figure 3.6: Domestic grain consumption across Australia**



Source: ACF, Supply and Demand Report.

Notes: Domestic consumption' includes all grain used domestically, including for human consumption, animal feed or other purposes.

## 4. ACCC's preliminary exemption assessment of POPL's Portland port terminal facility

This chapter sets out the ACCC's preliminary assessment of whether it should determine under subclause 5(2) of the Code that POPL is an exempt service provider at its Portland port terminal facility. This assessment draws on the findings in chapters 2 and 3 regarding the levels of competition in the market for bulk grain export port terminal services and related markets, and the extent to which these markets place a competitive constraint on POPL at Portland.

In making a determination under subclause 5(2), subclause 5(3) provides that the ACCC must have regard to the following matters:

- 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.

The ACCC's preliminary assessment below is set out against the matters which the ACCC must have regard to in subclauses 5(3)(a) to (j) of the Code.

### ***Overlapping nature of subclause 5(3) matters***

The ACCC notes that a number of the subclause 5(3) matters 'overlap' to some extent. For example, the ACCC considers that:

- the interests of exporters who may require access to port terminal services (subclause 5(3)(c)) includes an interest in having fair and transparent access to port terminal services (subclause 5(3)(d)); and
- exporters securing fair and transparent access to port terminal services (subclause 5(3)(d)) will likely promote efficient investment in port terminal facilities (subclause 5(3)(f)) and competition in relevant upstream and downstream markets (subclause 5(3)(g)).

The ACCC also considers that a PTSP's legitimate business interests needs to be balanced against a number of other subclause 5(3) matters, including other specific interests that the ACCC is required to consider. Unlike the examples of overlap noted above (subclauses 5(3)(c) and 5(3)(d); 5(3)(d), 5(3)(f) and 5(3)(g)), the ACCC does not consider that these interests will always be aligned and the ACCC's assessment includes balancing these interests.



For example, the ACCC considers that the legitimate business interests of the PTSP (subclause 5(3)(a)) will not necessarily align with the public interest in having competition in markets (subclause 5(3)(b)) and the interests of exporters who may require access to port terminal services (subclause 5(3)(d)), if the PTSP is not subject to sufficient competition in the provision of port terminal services.

### ***(a) the legitimate business interests of the PTSP***

Subclause 5(3)(a) of the Code requires the ACCC to have regard to the PTSP's legitimate business interests in deciding whether to grant an exemption.

The ACCC considers that an exemption will be in a PTSP's legitimate business interests where there are sound reasons why it is not necessary for the PTSP to be subject to all of the Code's obligations. For example, obligations in the Code intended to prevent a PTSP exercising market power may not be necessary where competition already provides sufficient constraint on the PTSP's ability to exercise market power.

The ACCC considers when having regard to the legitimate business interests of the PTSP (as required under subclause 5(3)(a) of the Code), the following may be relevant:

- the ongoing commercial viability of services provided from the relevant port terminal facility.
- the likely impact that obligations to comply with Parts 3 to 6 of the Code may have on any investment decisions made by the PTSP.
- the likely costs or impacts associated with the PTSP having to comply with Parts 3 to 6 of the Code and the broader impact of the PTSP incurring these costs.
- the likely impact that the application of Parts 3 to 6 of the Code may have on the PTSP's ability to compete in the provision of port terminal services or other related markets.

The ACCC recognises that regulation imposes costs, both direct and indirect, on the regulated business. To the extent that compliance with the obligations under Parts 3 to 6 of the Code results in such costs, the ACCC considers that this is appropriate to the extent necessary to ensure that the Code's purpose is achieved (i.e. ensuring that exporters of bulk wheat have fair and transparent access to port terminal services). In relation to the interests of the service provider, POPL submitted that granting an exemption in respect of its port terminal facility at Portland would:

*...reduce the significant regulatory cost of compliance in circumstances where POPL's bulk wheat shiploading services are small-scale and ad hoc, will give POPL greater operational flexibility and enable it to provide a more competitive port terminal service while ensuring commercial viability...*<sup>69</sup>

POPL submitted that the application of Parts 3 to 6 of the Code would be burdensome given the small size of its bulk wheat operations.<sup>70</sup> POPL also submitted that compliance with Parts 3 to 6 of the Code may result in POPL ceasing to provide shipping services altogether.<sup>71</sup>

RGS submitted that 'having to comply with parts 3 to 6 of the Code will unnecessarily burden POPL with regulation and compliance at the expense of offering additional services'.<sup>72</sup>

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<sup>69</sup> Port of Portland Limited, *Application for exemption from Parts 3-6 of the Port Terminal Access (Bulk Wheat) Code of Conduct*, 3 September 2021, p. 2.

<sup>70</sup> *ibid.*, p. 11.

<sup>71</sup> *ibid.*, pp. 11-12.



The ACCC is not in a position to assess the direct (or indirect) costs Parts 3 to 6 the Code imposes upon POPL (or any other PTSP) and specific estimates were not submitted by POPL. In relation to the direct costs of the Code, the ACCC accepts that the costs of compliance with the full Code are likely significant and that being granted an exemption from Parts 3 to 6 of the Code would substantially reduce a PTSP's direct costs of complying with the Code. The Department provided estimates on compliance costs prior to the commencement of the Code, as follows:

*The mandatory code at its introduction was estimated to impose a lower direct cost of \$360,000 per year for operators subject to the full provision of the Code and only \$20,000 per year for exempt operators.<sup>73</sup>*

In addition to direct regulatory costs, the ACCC acknowledges that Parts 3 to 6 of the Code have the potential to reduce a PTSP's flexibility to respond to its customers, imposing indirect costs. The ACCC also considers that increased operational flexibility could also benefit other parties, particularly exporters, in circumstances where exporters are able to secure fair and transparent access to port terminal services.

The ACCC considers that compliance costs may be particularly significant for a smaller PTSP only operating a single port terminal facility, given that compliance costs will be proportionately higher compared to overall costs and revenue. A larger PTSP operating multiple port terminal facilities may be able to spread compliance costs over its facilities. POPL is a smaller operator and therefore its compliance costs may be proportionally higher for its operation.

#### **ACCC draft view**

The ACCC's draft view is that an exemption is in the legitimate business interests of POPL. If POPL is determined to be an exempt provider it could be expected to engage more freely in commercial negotiations with access seekers, including through offering tailored access agreements. If exempted, POPL would also face reduced direct and indirect costs, largely as a result of greater flexibility to make changes to its capacity allocation arrangements and operations more broadly.

The ACCC's draft view is that the combination of being able to interact with access seekers more freely and operate a bulk grain export operation with greater flexibility (and not in accordance with the requirements and obligations set out in Parts 3 to 6 of the Code) is in POPL's legitimate business interests.

However, the ACCC considers that POPL's legitimate business interests must be balanced against the level of competitive constraint faced by POPL and the other matters the ACCC must have regard to in subclause 5(3) of the Code. This includes the interests of exporters who may require access to port terminal services, as well as the public interest.

#### ***(b) the public interest, including the public interest in having competition in markets; and (g) the promotion of competition in upstream and downstream markets***

The ACCC considers that subclauses 5(3)(b) and (g) relate to the promotion of competition in markets, including the market for bulk grain port terminal services as well as for upstream, downstream and related markets.

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<sup>72</sup> Riordan Grain Services, *Submission in response to ACCC issues paper – Port of Portland Limited exemption assessment*, 29 November 2021, p. 1.

<sup>73</sup> AEGIC, *Australia's grain supply chains – costs, risks and opportunities*, October 2018, p. 35.

Upstream and downstream markets considered as relevant by the ACCC are discussed in chapter 3 and include grain storage and handling services, and the transport of grain to port.

As per previous relevant exemption determinations, the ACCC considers the following factors are relevant when having regard to subclauses 5(3)(b) and (g):

- Whether there is sufficient competition in the market for bulk grain export port terminal services, such that the full application of the Code may not be required to promote competition for those services or in upstream and downstream markets.
- Whether reducing regulation will allow the PTSP to better compete in upstream or downstream markets, such that it would also promote competition. This consideration overlaps with the ACCC's consideration of legitimate business interests (subclause 5(3)(a), discussed above).
- Whether there is sufficient competition in upstream and downstream markets, such that there is a constraint on the exercise of market power in the provision of port terminal services in the absence of Parts 3 to 6 of the Code applying.

### **Competition in the market for bulk grain export port terminal services**

The ACCC's draft view is that POPL's Portland facility will compete for grain most directly with the other PTSPs operating at Portland (see section 2.1).

The VFF submitted that there is insufficient competition in the market for bulk grain port terminal services at Portland to support granting an exemption:

*The existing composition of competition at the Port of Portland holds only two port terminal service providers offering ship loading services in the area. The VFF strongly believes that this number of service providers does not qualify as a sufficient level of competition to provide exemptions to Part 3 & 6 of the Port Terminal Access (Bulk Wheat) Code of Conduct.<sup>74</sup>*

The VFF also raised concerns about the impact an exemption may have on the grain trading market, and that exemption could ultimately lead to anti-competitive behaviour and a less secure grain trading market.<sup>75</sup>

In contrast, RGS submitted that RGS Portland and GrainCorp Portland represent viable competitive alternatives to POPL.<sup>76</sup>

The ACCC considers that POPL competes most directly with GrainCorp's and RGS' Portland facilities. In particular, GrainCorp's Portland facility is significantly larger than POPL's ad-hoc operations and is supported by a large upcountry network (see section 2.2 and 3.2). Although RGS moves its loader between Geelong and Portland, it will still impose a material level of competition on POPL's operations.<sup>77</sup> The ACCC notes that in the record 2020-21 season POPL accounted for 30% of Portland's grain exports.<sup>78</sup>

Furthermore, Portland's catchment area likely overlaps with PTSPs at Geelong, Melbourne and Port Adelaide to varying extents (see section 2.1), which will therefore place additional competitive constraints on POPL's bulk grain export operations.

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<sup>74</sup> Victorian Farmers Federation, *Submission in response to ACCC issues paper – Port of Portland Limited exemption assessment*, 26 November 2021, p. 1.

<sup>75</sup> *ibid.*, p. 1.

<sup>76</sup> Riordan Grain Services, *Submission in response to ACCC issues paper – Port of Portland Limited exemption assessment*, 29 November 2021, p. 4.

<sup>77</sup> In the 2020-21 season, 35% of grain loaded by RGS occurred at Portland (with the other 65% being loaded at Geelong).

<sup>78</sup> GrainCorp and RGS accounted for 52% and 18% of Portland's 2020-21 grain exports respectively.

As such the ACCC's draft view is that POPL is subject to a high level of competitive constraint from competing PTSPs at Portland, and to a lesser and varying extent from PTSPs at Geelong, Melbourne and Port Adelaide.

### **Competition in upstream and downstream markets**

The ACCC has also considered the extent to which granting POPL an exemption might impact competition in upstream and downstream markets.

In relation to transport and storage markets, POPL does not have any ownership interests in road or rail freight companies and does not own any upcountry storage. POPL submitted:

*Exemption will enable POPL to better compete as a viable alternative and this may encourage exporter investment in up country storage and/or onsite storage at Port. This increased demand for capacity, would in turn support POPL investing in additional storage, rail and port infrastructure to facilitate the growing demand for all grain exporters. Such investments would allow new entrants (in both storage and grain export) to compete more easily.<sup>79</sup>*

The ACCC's draft view is that granting an exemption to POPL will enable it to better compete as an alternative port terminal facility. The exemption may also support investment in upcountry storage by establishing a new export pathway.

While the ACCC's draft view is that POPL entering the market for port terminal services may promote competition in the upcountry storage and handling market, the extent of this impact is not clear. Accordingly, the ACCC's draft view is that granting POPL an exemption at Portland will not be detrimental to competition in upstream and downstream markets.

### **ACCC draft view**

The ACCC's draft view is that exporters in the Portland region likely have a number of available bulk export pathways. In particular GrainCorp's Portland facility is significantly larger than POPL's operations and is supported by rail services and an extensive upcountry network. POPL will also be subject to a material competitive constraint from RGS who moves its mobile loader between Portland and Geelong.

POPL is also likely to experience a degree of competitive constraint from PTSPs at Geelong, Melbourne and Port Adelaide. As noted above a series of factors may influence the extent of any constraint from these locations. The level of constraint is also likely to vary over time. Key factors may include local and overall production levels,<sup>80</sup> specific operational decisions made by exporters or growers, and freight developments (such as upgrades or extensions to rail networks). The ACCC welcomes further views on the extent of substitutability between the port terminal facilities at Portland, Geelong, Melbourne and Port Adelaide.

As such the ACCC's draft view is that exempting POPL from Parts 3 to 6 of the Code in relation to its Portland facility is likely to be in the public interest, and unlikely to be detrimental to competition in upstream and downstream markets.

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

In deciding whether to exempt a PTSP, subclause 5(3)(c) of the Code requires the ACCC to have regard to the interests of exporters who may require access to port terminal services.

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<sup>79</sup> Port of Portland Limited, *Application for exemption from Parts 3-6 of the Port Terminal Access (Bulk Wheat) Code of Conduct*, 3 September 2021, p. 16.

<sup>80</sup> That is production within the (local) Portland catchment area and the broader Victorian (and SA) market.

The ACCC generally considers that granting an exemption will not be detrimental to the interests of exporters requiring access to port terminal services if exporters are likely to be able to access port terminal services on a fair and transparent basis and therefore compete on their relative merits. Related markets which the ACCC considers are relevant to the interests of exporters (i.e. obtaining fair and transparent access) are discussed in chapter 3 and include containerised grain export and domestic grain markets.

POPL is not vertically integrated with a grain exporter. The ACCC notes that grain exporters seeking access to POPL's facility have 2 other grain exporting operators at Portland (GrainCorp and RGS).

In particular, GrainCorp's Portland facility is significantly larger than POPL's ad-hoc loading operations and also has access to rail services as well as an extensive upcountry network to support its operations.

POPL is also subject to a range of other constraints, including from RGS, other PTSPs at Geelong (competes most directly), Melbourne and Adelaide, as well as container and domestic markets. In relation to the containerised and domestic markets (see section 3.3), the ACCC considers they likely provide a limited but not insignificant level of competitive constraint on POPL.

The ACCC also notes that where regulation is unnecessary this may impose limits on a PTSPs operational flexibility, which will not be in the interests of exporters. In particular, POPL submitted that a reduction in regulation will enable them to respond to its customers' needs more adeptly.<sup>81</sup>

Similarly, RGS submitted in regard to exporters ability to gain fair and transparent access that:

*Exemption for POPL would assist to improve competition for grower tonnes in the zone and see an increased requirement for transportation services and upcountry pricing of grain. This would be a result of reduced compliance and regulation on POPL enabling them more time to focus on their customers.<sup>82</sup>*

Overall, the ACCC considers that the added operational flexibility available to an exempt PTSP (as well as the direct cost savings to a lesser extent) can reasonably be expected to allow POPL to better respond to the needs of exporters.

### **ACCC draft view**

The ACCC considers that POPL introduces further competition into the Portland market, and it will be in the interests of exporters to have another PTSP available to facilitate exports at Portland. The ACCC also considers that the container and domestic markets likely provide a limited but not insignificant level of competitive constraint to the bulk export market at Portland.

The ACCC generally considers that granting an exemption to be in the interests of exporters requiring access to port terminal services, if exporters can continue to access port terminal services on a fair and transparent basis and therefore compete on their relative merits. As such the consideration of exporters' interests overlap to an extent with consideration of subclause 5(3)(d), as discussed below.

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<sup>81</sup> Port of Portland Limited, *Application for exemption from Parts 3-6 of the Port Terminal Access (Bulk Wheat) Code of Conduct*, 3 September 2021, p. 13.

<sup>82</sup> Riordan Grain Services, *Submission in response to ACCC issues paper – Port of Portland Limited exemption assessment*, 29 November 2021, p. 4.

The presence of sufficient competitive alternatives likely means that the added flexibility associated with an exemption can be expected to be exercised to the benefit of all exporters. Therefore, given the ACCC considers that POPL is subject to a high level of competitive constraint, the ACCC's draft view is that granting an exemption to POPL is likely to be in the interests of exporters.

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

In deciding whether to exempt a PTSP, subclause 5(3)(d) requires the ACCC to consider the likelihood that exporters of bulk wheat will have fair and transparent access to port terminal services.

The ACCC considers that as a new entrant into the market, it is reasonable to expect that POPL will need to seek throughput and attract customers. As per section 3.1.3, it appears likely that there will be excess peak period capacity available at Portland in most seasons, therefore reducing the incentive to discriminate or hinder export access to port terminal services. POPL may also offer access to exporters on favourable terms in order to attract exporters to use its facility rather than RGS' or GrainCorp's facilities, thereby maximising throughput and the profitability of POPL's facility.

***ACCC draft view***

The ACCC's draft view is that POPL is subject to significant competitive constraints, most notably by GrainCorp's Portland facility which provides an incentive for POPL to provide exporters with fair and transparent access to services. The ACCC also considers the container and domestic markets likely provide a limited but not insignificant competitive constraint on POPL. Specifically, the ACCC considers POPL will likely have an incentive to provide access to its facility on fair and transparent terms in order to maximise throughput. Finally, the ACCC considers that the full level of regulation under the Code is not necessary to ensure fair and transparent access for exporters seeking to use POPL's port terminal services.

***(e) the promotion of the economically efficient operation and use of the port terminal facility; and (f) the promotion of efficient investment in port terminal facilities***

In deciding whether to exempt a PTSP, subclauses 5(3)(e) and (f) of the Code require the ACCC to have regard to the promotion of the economically efficient operation and use of the port terminal facility and efficient investment in port terminal facilities.

POPL submitted that they face a substantial level of competition from GrainCorp and that this will drive efficient operation and investment in its facility, and that unnecessary compliance costs have the potential for POPL to discontinue its ship loading services.<sup>83</sup>

POPL also submitted that it would only be economically efficient to further invest in its shiploading services if they were granted an exemption.<sup>84</sup>

RGS submit that an exemption is unlikely to impact investment in port terminal facilities at Portland,<sup>85</sup> and that an exemption from the Code would increase the operational efficiency of POPL's facility as this would reduce POPL's regulation and compliance costs.<sup>86</sup>

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<sup>83</sup> Port of Portland Limited, *Application for exemption from Parts 3-6 of the Port Terminal Access (Bulk Wheat) Code of Conduct*, 3 September 2021, p. 14.

<sup>84</sup> *ibid.*, p. 13.

### **ACCC draft view**

The ACCC's draft view is that POPL faces a substantial level of competition from RGS and GrainCorp at Portland and this is sufficient to drive POPL's efficient operation of its port terminal facility. The competition posed will also be sufficient to encourage POPL as a new entrant to make efficient investments in its facility.

The ACCC considers that avoiding the application of unnecessary regulation will drive greater operational efficiency at POPL's facility and promote efficient investment in port terminal facilities more broadly.

### ***(h) whether the PTSP is an exporter or an associated entity of an exporter***

Under subclause 5(3)(h) the ACCC will generally consider the degree to which the PTSP is vertically integrated in grain exportation. The extent to which a vertically integrated operator favours, or is likely to favour, its own trading arm will influence the ACCC's decision on whether it is necessary for the full extent of the Code to apply or whether an exemption should be granted.

### **ACCC draft view**

The ACCC notes that POPL is not an exporter or an associated entity of an exporter<sup>87</sup> and therefore does not have this type of incentive.

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

Subclause 5(3)(i) of the Code requires the ACCC to have regard to whether there is already an exempt service provider within the grain catchment area for the facility concerned. The ACCC generally considers that, in circumstances where there is already an exempt service provider within a grain catchment area, or where the Code does not otherwise apply to a service provider in a catchment area, this supports the case for exemption. However, the ACCC considers this matter on a case-by-case basis, taking into account the full extent of competitive constraint operating on each facility.

The ACCC notes that 2 other PTSPs are located within the Portland catchment area. RGS is an exempt service provider at Portland, and POPL therefore has an exempt service provider within its grain catchment area. The other PTSP, GrainCorp (Portland), is a non-exempt service provider.

The ACCC also considers that the catchment area for POPL's facility at Portland overlaps with the catchment areas of Geelong, Melbourne and Port Adelaide (see section 2.1). All PTSPs at Geelong, Melbourne and Port Adelaide are exempt.

### **ACCC draft view**

The ACCC considers that having different regulatory arrangements for competing PTSPs when not required may lead to distortions in competition and efficiency. Where one PTSP has already been granted an exemption, this may support an exemption for a competing PTSP if the level of competitive constraint is sufficient.

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<sup>85</sup> Riordan Grain Services, *Submission in response to ACCC issues paper – Port of Portland Limited exemption assessment*, 29 November 2021, p. 3.

<sup>86</sup> *ibid.*, p. 1.

<sup>87</sup> Port of Portland Limited, *Application for exemption from Parts 3-6 of the Port Terminal Access (Bulk Wheat) Code of Conduct*, 3 September 2021, p. 2.

At Portland direct competition arises from the exempt RGS facility and the non-exempt GrainCorp facility. In addition, facilities at Geelong (competes most directly), Melbourne and Port Adelaide to some extent compete with POPL (as set out further in sections 2.1 and 2.2).

Accordingly, the ACCC's draft view is that it would be appropriate for POPL's facility to be subject to the same level of regulation as the exempt competing facilities. This is supported by the ACCC's draft view that POPL is subject to a high level of competitive constraint which will provide an incentive for POPL to provide fair and transparent access to exporters.

***(j) any other matters the ACCC considers relevant***

The ACCC has considered whether POPL's vertical integration as a PTSP and port owner and manager is relevant to its preliminary assessment of POPL's application for exemption at Portland. In particular, the ACCC considered whether an exemption for POPL would affect its ability and/or incentive to hinder other PTSPs' access to berths and whether this in turn could have an impact on grain trading or hinder exporters' ability to obtain fair and transparent access to capacity at Portland.

The ACCC's draft view is that the obligations and requirements in Parts 3 to 6 of the Code will not help to address any concerns of this nature, and POPL's role as a port owner and manager is outside the scope of this exemption assessment.

The ACCC does not consider that there to be any other matters relevant to its assessment of POPL's application.

## **5. Draft Determination**

The ACCC has made a draft determination that POPL should be an exempt service provider of port terminal services provided by means of its port terminal facility located at Portland.