



Australian
Competition &
Consumer
Commission

Issues Paper

Applications seeking exemption from certain provisions of the Port Terminal Access (Bulk Wheat) Code of Conduct:

GrainCorp Operations Limited's Geelong and Portland port terminals and Emerald Logistics Pty Ltd's Melbourne port terminal

12 December 2014

Australian Competition and Consumer Commission
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Summary

The ACCC is seeking views from stakeholders on whether to make a determination to exempt one or both of GrainCorp Operations Limited's (GrainCorp) Victorian port terminals and/or Emerald Logistics Pty Ltd's (Emerald's) Melbourne Port Terminal from certain provisions of the Port Terminal Access (Bulk Wheat) Code of Conduct (the Code).

GrainCorp submitted applications to be an exempt port terminal services provider in relation to port terminal services provided at its Geelong and Portland port terminals (GrainCorp's exemption applications) on 5 December 2014.

On 28 November 2014 Emerald submitted an application to be an exempt port terminal services provider in relation to port terminal services provided at its Melbourne Port Terminal (MBT) (Emerald's exemption application).

The ACCC is assessing both GrainCorp and Emerald's exemption applications at the same time because the associated port terminal facilities are located in similar geographic regions and may compete with each other.

The ACCC is conducting a public consultation process to inform its assessments of GrainCorp and Emerald's applications and invites public submissions on any or all of the applications by **30 January 2015**. The ACCC asks submitting parties to clearly identify the application/s that their submission relates to.

1. Introduction

The Port Terminal Access (Bulk Wheat) Code of Conduct (the Code) was made under section 51AE of the Competition and Consumer Act 2010 (CCA). It commenced on 30 September 2014 and regulates the conduct of bulk wheat port terminal service providers. The Code replaced the previous regulatory framework under the *Wheat Export Marketing Act 2008* (WEMA) where four port terminal service providers (including GrainCorp and Emerald) were subject to ACCC-approved access undertakings.

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

1.1 The Code

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

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

where:

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

and:

port terminal facility means a ship loader that is:

- (a) at a port; and
- (b) capable of handling bulk wheat;

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

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

The Code has six Parts which apply to all port terminal service providers except that Parts 3 - 6 do not apply to a port terminal service provider exempted by either the ACCC or the Minister for Agriculture.

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

¹ Clause 1(2) of the Code

- Part 3 of the Code requires a port terminal service provider:
 - 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.
- Part 4 of the Code requires a port terminal service provider to have, publish and comply with a port loading protocol which includes an ACCC approved capacity allocation system.
- Part 5 of the Code requires port terminal service providers to regularly publish expected capacity, stock information and key performance indicators.
- Part 6 requires retaining records such as access agreements and variations to those agreements.

1.2 Exemption from the Code

The Code provides for processes whereby the ACCC or the Minister for Agriculture may exempt a port terminal service provider from Parts 3 - 6 of the Code in relation to 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.

1.2.1 ACCC exemption from the Code

Under clause 5(2) of the Code, the ACCC may make a determination to exempt service providers in relation to specified port terminal facilities (an exemption determination). In doing so the ACCC must have regard to matters listed at subclause 5(3) of the Code (see section 1.5). The ACCC can also revoke an exemption determination under subclause 5(6) of the Code.

On 1 October 2014 the ACCC determined GrainCorp to be an exempt port terminal services provider in relation to its Carrington (Newcastle) Port Terminal Facility. The ACCC determined that although GrainCorp is vertically integrated as a port terminal service provider and an exporter, it would have limited ability to exercise market power at the Carrington facility due, in part, to effective competition in the provision of bulk grain port terminal services at the Port of Newcastle.² This determination followed the ACCC's earlier decision, under the previous access undertakings regime, to reduce GrainCorp's regulatory obligations regarding its Carrington facility.³

² ACCC, Determination: Exemption in respect of GrainCorp's Carrington (Newcastle) Port Terminal Facility, 1 October 2014

³ ACCC, Decision to accept: GrainCorp Operations Limited's Application to Vary the 2011 Port Terminal Services Access Undertaking, 18 June 2014

1.2.2 Ministerial exemption from the Code

Clause 5(1) of the Code provides that the Minister for Agriculture may determine that a port terminal service provider is an exempt service provider if the Minister is satisfied that the provider is a cooperative that has:

- (a) grain-producer members who represent at least a two-thirds majority of grain-producers within the grain catchment area for the port concerned; and
- (b) sound governance arrangements that ensure the business functions efficiently and that allow its members to influence the management decisions of the cooperative.

The ACCC does not have any role in exemptions under subclause 5(1).

On 17 November 2014 the Minister for Agriculture found that Co-operative Bulk Handling Limited's (CBH) port terminal facilities located at Albany, Esperance, Geraldton and Kwinana satisfactorily meet the criteria for exemption under clause 5(1) of the Code. The Minister therefore determined those facilities to be exempt from Parts 3 - 6 of the Code.

1.3 GrainCorp's exemption application

GrainCorp's Geelong and Portland bulk wheat port terminal facilities are currently subject to Parts 1 - 6 of the Code.⁴

Prior to the Code commencing and from September 2009, access arrangements at GrainCorp's Geelong and Portland facilities were governed by an access undertaking. Under this regime, GrainCorp's Geelong and Portland facilities were subject to a range of provisions, some of which are similar to those contained in the Code. From 30 September 2014 the Code has applied to GrainCorp's Geelong and Portland facilities.⁵

On 5 December 2014 GrainCorp submitted an application to the ACCC seeking exemption of its Geelong and Portland facilities from Parts 3 - 6 of the Code.

GrainCorp submits that:

GrainCorp is vertically integrated as a port service provider and an exporter of grain in Victoria. However, GrainCorp's ability to exercise market power in Victoria is limited given:

- Strong competition from competing alternative domestic and container packing markets, combined with excess country and packing capacity, for the majority of Victorian grain
- Strong competition in the provision of port elevation services for bulk grain from Emerald's Melbourne Port Terminal and the planned Bunge Terminal at Geelong, combined with competition from Glencore port terminals in Adelaide
- Excess port elevation capacity, and excess country storage capacity, where GrainCorp is commercially incentivised to maximise throughput at its Victorian port terminals.

⁴ GrainCorp's bulk wheat port terminal facilities located Port Kembla, Brisbane, Gladstone and Mackay are also currently subject to Parts 1 - 6 of the Code. GrainCorp's Carrington (Newcastle) terminal has been exempted and is subject only to Parts 1 and 2 of the Code.

⁵ As GrainCorp had an access undertaking regarding its Geelong and Portland facilities in place immediately before the Code commenced, the transitional arrangements outlined in clause 4(6) of the Code do not apply these facilities. Clause 4(6) of the Code specifies that the Code does not apply until 1 October 2015 to those operators who were providing services before the Code commenced but were not covered by the previous undertaking regime

GrainCorp contends that granting an exemption for its Geelong and Portland port terminals will:

- Place GrainCorp on a level playing field with alternative and competing markets that are not subject to regulation.
- Promote grain industry competition by allowing GrainCorp to provide competitive services to exporters for bulk grain exports.
- Support lower supply chain costs by allowing GrainCorp to operate its Victorian port terminals flexibly and invest in improving its port and supply chain infrastructure.⁶

Further details of GrainCorp's exemption application are set out as relevant in section 2 of this Issues Paper. GrainCorp's full submission in support of its exemption application is available on the ACCC's website at <http://www.accc.gov.au/wheat>.

1.4 Emerald's exemption application

Emerald's MPT is currently subject to Parts 1 - 6 of the Code.

From September 2011 until the commencement of the Code, access arrangements at Emerald's MPT were governed by an ACCC approved access undertaking, which contained similar provisions to those in the Code. From 30 September 2014 the Code has applied to Emerald's MPT.⁷

On 28 November 2014 Emerald submitted an application to the ACCC seeking exemption of its MPT from Parts 3 - 6 of the Code.

Emerald submits that:

MPT operates in a very competitive environment.

Unlike New South Wales, the logistics network in Victoria allows not only for competition between port terminal operators at the same port, it also allows for competition between terminals located at different port. In particular grain in Victoria can readily flow either to the port of Melbourne or the port of Geelong.

The requirement on Emerald under the Code to comply with Parts 3 - 6 is contrary to Emerald's legitimate commercial interests and, we would argue, the interests of exporters and producers. Given the availability of a strong domestic market and viable alternative export paths in the Victorian catchment zone, this additional regulation of Emerald is unnecessary and counter-productive to competition and efficiency.

Emerald's application represents an even more compelling argument for exemption than GrainCorp's port of Newcastle case because, while the same sort of competitive environment and surplus capacity issues apply in each case, Emerald's market power in the Victorian supply chain (port and up-country) is far weaker than GrainCorp's power in the Newcastle zone, and therefore there is a much lower risk that Emerald would be able to impose unilateral terms on exporters if an exemption were granted.⁸

Further details of Emerald's exemption application are set out as relevant in section 2 of this Issues Paper. Emerald's full submission in support of its exemption application is available on the ACCC's website at <http://www.accc.gov.au/regulated-infrastructure/wheat-export>.

⁶ GrainCorp, Submission in support, p. 3

⁷ The transitional arrangements under clause 4(6) of the Code do not apply to Emerald's MPT.

⁸ Emerald Grain, Submission in support, p. 3

1.5 Legislative framework

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

- (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.

1.6 ACCC assessment processes

1.6.1 Geographic based assessment processes

The ACCC outlined in its letter to industry stakeholders on 6 November 2014 its intent to conduct exemption assessments in an organised manner and assess the port terminal facilities located in certain geographic regions at the same time. The ACCC's letter is available on the ACCC website.

As the ports terminal facilities related to GrainCorp and Emerald's exemption applications are located in a similar geographic region and may compete with each other, the ACCC considers it appropriate and practical to assess these applications at the same time.

The ACCC wishes to conduct an efficient assessment process and to minimise the burden placed on industry in providing information to the ACCC. Industry participants may provide submissions which relate to both GrainCorp and Emerald's exemption applications.

1.6.2 Indicative timeline for assessment

On 16 October 2014 the ACCC released its *Guidelines on the ACCC's process for making and revoking exemption determinations* (the Guidelines).

The Guidelines set out that, when a port terminal service provider submits an exemption application, the ACCC will seek to conduct its exemption assessment and decide whether to make an exemption determination within 12 weeks.

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

Each exemption assessment process may be different and may include requests for information, consultation with interested parties, and a draft determination before the ACCC makes its final determination. A diagram of a typical assessment process is shown at Appendix A. The Guidelines, which are available on the ACCC website, provide further detail around the ACCC's process for making and revoking exemption determinations.

For the assessments of GrainCorp and Emerald's applications, the ACCC is seeking public submissions on the matters for comment outlined in this Issues Paper by 30 January 2015. After considering submissions the ACCC intends to make draft determinations and then make final determinations in April 2015, although the actual timeframe for assessing the exemption applications will depend on the nature of industry comments.

1.7 Consultation

The ACCC invites public submissions on any or all of GrainCorp and Emerald's exemption applications. The ACCC asks submitting parties to clearly identify the application/s that their submission relates to.

Section 2 of this Issues Paper sets out matters on which the ACCC is seeking views. Interested parties do not have to address all of these matters and may comment on other matters related to either or both of the exemption applications relevant to the ACCC's assessments. The ACCC encourages stakeholders to read GrainCorp and Emerald's submissions in support of their exemption applications in conjunction with this Issues Paper.

Please include detailed reasons to support the views put forward in submissions.

1.7.1 Making a submission

Please address submissions to:

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

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

1.7.2 Due date for submissions

Submissions must be received before 5:00pm (AEDST), **30 January 2015**.

1.7.3 Confidentiality of information provided to the ACCC

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

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

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

1.8 Further information

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

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2. Matters for comment

This section details the matters on which the ACCC is seeking comment from interested parties to assess whether to determine if GrainCorp and/or Emerald's exemption applications are appropriate, having regard to the matters specified in subclause 5(3) of the Code.

Interested parties are also invited to comment on any additional issues they consider relevant to the ACCC's assessment of the level of competition faced by GrainCorp and Emerald's Victorian port terminal facilities.

2.1 Current port operations

The ACCC is seeking comment from stakeholders on the current environments in which GrainCorp's Geelong and Portland facilities and Emerald's Melbourne facility operate, specifically in relation to the ability of third party exporters to access services at these facilities under the current regulatory regime.

GrainCorp submits that:

The largest exporters serviced at the Geelong facility over the last five years since the removal of the single wheat desk are GrainCorp Marketing (33%), Glencore (21%) and Cargill (21%). The top 5 exporters make up 89% of exports.

The largest exporters serviced from Portland Port Terminal over the last five years since the removal of the single wheat desk are GrainCorp Marketing (25%), Cargill (29%) and Glencore (14%). The top 5 exporters make up 88% of exports.⁹

GrainCorp also submits that:

Victoria has significant excess bulk export grain capacity. With the commissioning of the new Bunge terminal in Geelong, Victoria will be serviced by four bulk grain facilities and an estimated combined bulk elevation capacity of almost 7Mt per annum:

- 3.4Mt at GrainCorp's Geelong facility;
- 1.5Mt at GrainCorp's Portland facility;
- 1.5Mt at Emerald's MPT; and
- 0.45Mt at the Bunge Geelong Port Terminal.¹⁰

Emerald's submission in support indicates that it has serviced a number of customers through its MPT over the past five years. Emerald submits that:

Emerald continues to operate the Melbourne terminal such that other marketers/companies can export through Melbourne.¹¹

The ports in Victoria, with a total capacity of 5.5 million tonnes (and 5.9mmt once Bunge's Geelong terminal is operational), have significantly more capacity than is required to meet average bulk grain exports of 2.4 million tonnes and have been able to meet historical maximum demand of 5.2 million tonnes.¹²

⁹ GrainCorp, Submission in support, pp. 10-11

¹⁰ *ibid*, p. 15

¹¹ Emerald Grain, Submission in support, p. 10

¹² *ibid*, p. 9

Further detail regarding GrainCorp and Emerald's port operations are provided in their submissions in support of their applications, available on the ACCC website.

Issues for comment

1. *Under the current and previous regulatory regimes, have exporters been able to access services at reasonable terms and conditions at these ports? If not, why not?*
2. *Are there capacity constraints at these ports? If so, when and how often does this usually occur and to what extent are exporters disadvantaged by this?*
3. *Is capacity underutilised at these ports? If so, how much excess capacity is there at each port? When and how often does this usually occur and what factors (e.g. supply, demand, price) affect this?*

2.2 Current and recent regulations

GrainCorp's Geelong and Portland facilities and Emerald's Melbourne Port Terminal are currently subject to the whole Code.

The ACCC must have regard to the legitimate business interest of the port terminal service provider in its assessment of the applications. As such the ACCC is seeking views on how Parts 3 - 6 of the Code, and how similar provisions contained in GrainCorp and Emerald's access undertakings, affect the service provider.

GrainCorp submits that:

Granting an exemption to GrainCorp's Geelong and Portland Port Terminals would:

- Allow GrainCorp to compete commercially for the export of bulk grain;
- Support operational flexibility to improve service and reduce supply chain costs;
- Provide equity with the competing export container packers that are not regulated; and
- Reduce the level of regulation and cost of compliance.¹³

Emerald submits that Parts 3 - 6 of the Code imposes constraints on contract flexibility and operational constraints:¹⁴ Emerald also submits that:

If commercial solutions are not available due to regulation it is likely to lead to a permanent decline in the profitability and relevance of Melbourne as an export facility.

Melbourne port terminals first-in first-served (FIFS) capacity allocation system does not provide its clients with sufficient security to invest in long term upcountry storage and efficient rail assets.

It is essential that Emerald is able to offer flexible and innovative supply chain solutions to its exporter customers, including but not limited to providing the security of long term access and tailored export programmes.

¹³ GrainCorp, Submission in support, p. 4

¹⁴ Emerald Grain, Submission in support, p. 4

Parts 3 - 6 of the Code contain impediments to achieving this strategy, in particular the rigidity of the capacity allocation system and the uncertainty of application of the non-discrimination test.

Parts 3 - 6 of the Code add a compliance cost which serves neither Emerald nor the industry.

Parts 3 - 6 of the Code are an impediment to Emerald's objective to minimise financial losses at Melbourne due to drought.¹⁵

Further detail is contained in GrainCorp and Emerald's submissions in support of their applications, available on the ACCC website.

Issues for comment

4. *To what extent do you think that the legitimate business interests of GrainCorp and Emerald are affected by Parts 3 - 6 of the Code applying to their Victorian port terminal facilities?*

2.3 Access to port terminal services

The purpose of the Code is to ensure that exporters of bulk wheat have fair and transparent access to port terminal services.¹⁶ Given that GrainCorp and Emerald are both vertically integrated firms, the ability of third party exporters to acquire fair and transparent access to port terminal services is an important aspect the ACCC will consider in making an exemption determination in relation to each port terminal facility.

Accordingly, the ACCC is seeking views on the potential for exporters to secure fair and transparent access to the facilities if they were no longer subject to Parts 3 - 6 of the Code.

An exempt port terminal service provider remains subject to Parts 1 and 2 of the Code.

GrainCorp submits that strong competition in upcountry and export grain infrastructure across Victoria constrains GrainCorp's ability to favour its internal Marketing business. GrainCorp submits that:

Most of GrainCorp's export customers have access to alternative supply chains, where the major export customers (Glencore, Cargill and Emerald), representing 70% of non-GrainCorp Marketing export volume own and operate or have access to alternative country and export capacity.

- Emerald owns the MPT bulk export facility in Melbourne with container packing capability.
- Glencore owns bulk export terminals at Port Adelaide, which provide an alternative route to market for grain originating from western Victoria.
- Glencore also has large container packing facilities in Laverton and Doon (near the South Australian border) with total storage estimated at 500,000 tonnes (GrainCorp estimates).
- All exporters will have access to Bunge's planned new Port Terminal at Geelong.¹⁷

¹⁵ Emerald Grain, Submission in support, p. 16

¹⁶ Clause 1(2) of the Code

¹⁷ GrainCorp, Submission in support, pp. 4, 5

Emerald submits that competition in bulk wheat export operations at the port of Geelong will effectively constrain Emerald's ability to favour its trading arm in a way that disadvantages competing wheat marketers. Emerald submits that:

There is significant excess export capacity between Melbourne, Geelong and Portland and competition between the ports is likely to constrain Emerald from favouring its trading arm if the Code exemption is granted.

In addition, exporters who do not want to negotiate terms of access with Emerald will have the choice of dealing with GrainCorp Geelong and, in the near future, Bunge Geelong.

It should be noted that Emerald's key clients to date have exported out of both Melbourne and Geelong and have significant bargaining power. One of those clients, Bunge, has announced that it is developing its own grain terminal.

If Emerald was minded to favour its own trading arm, or one or more marketers over others, exporters will still be able to compete in the grain export market on their relative merits through viable alternatives (including use of the container market).¹⁸

For additional detail refer to GrainCorp and Emerald's submissions in support of their applications, available on the ACCC website.

Issues for comment

In relation to each of GrainCorp's Geelong and Portland port terminals, and Emerald's Melbourne Port Terminal:

5. *Would exporters be able to negotiate and secure fair access to port terminal services at these port terminals if GrainCorp and/or Emerald were not required to comply with Parts 3 - 6 of the Code? Would it be appropriate that either or both of these port operators were:*
 - a. *no longer subject to the non-discrimination and no hindering provision?*
 - b. *no longer subject to the dispute resolution process provided for under the Code? What alternative measures could exporters use to resolve potential disputes?*
 - c. *to have full discretion over capacity allocation systems and not require ACCC approval of the type or operation of the system?*
 - d. *not required to publish capacity and stocks information and key performance indicators?*
6. *As vertically integrated firms, what incentives or safeguards ensure that the port terminal operators would negotiate fair access arrangements with third party exporters, or that exporters could secure alternative port services?*

2.4 Competition in bulk wheat port terminal services

A central consideration in the assessment of exemption applications will be the extent of competition between various bulk wheat port terminals. To the extent that competing terminals provide a competitive constraint on a particular port terminal facility, there is less

¹⁸ Emerald Grain, Submission in support, p. 17

need for regulated third party access because access seekers have alternatives through which to export their wheat.

The ACCC is seeking comment on the extent to which onsite services at GrainCorp and Emerald's Victorian facilities compete with each other as well as with services offered at any other port terminal facilities. Table 1 shows some of the key attributes of the bulk wheat port terminal facilities currently operating in Victoria.

Table 1: Selected port attributes related to bulk wheat

Capability	GrainCorp Geelong	GrainCorp Portland	Emerald Melbourne
Annual elevation capacity	3.4 million tonnes	1.5 million tonnes	1.5 million tonnes
Ship loading	Single ship loader up to 2500 TPH ¹⁹	Single ship loader up to 1400 TPH	Single ship loader up to 1200 TPH
Rail receipt	Dual gauge up to 2000 TPH	Standard gauge up to 1000 TPH	Dual gauge up to 1200 TPH
Road receipt	Up to 8000 T/day	Up to 4000 t/day	2 hoppers up to 1000 TPH
Berth depth	13 m	11.5 -12.5 m	10.8 - 11.4 m
Vertical storage capacity	140,000 tonnes	60,000 tonnes	48,000 tonnes

Source: GrainCorp and Emerald's Submissions in support

GrainCorp submits that its Geelong and Portland facilities face competition from Emerald's MPT, as well as Bunge's planned Terminal at Geelong and Glencore's port terminals in Adelaide.²⁰ GrainCorp submits that:

The barriers to entry for new port terminal elevation capacity are low. In Victoria potentially an additional 1Mt of new port elevation capacity could be developed by large multinational grain traders.

Bunge's new port terminal will not be subjected to the Code until the end of 2015, and in the meantime is exempt and able to negotiate with customers without the access requirements and transparency prescribed by the Code. As such, GrainCorp's Geelong facility and Portland facility operating within the Code are currently competitively constrained.²¹

Emerald submits that its MPT faces competition from GrainCorp's Geelong and Portland facilities and Bunge's planned Terminal at Geelong.²² Emerald submits that:

Victoria is one of Australia's most competitive grain regions.

¹⁹ Tonnes per hour

²⁰ GrainCorp, Submission in support, p. 3

²¹ *ibid*, p. 5

²² Emerald Grain, Submission in support, p. 10

Buyers of free on board (FOB) bulk grain cargoes do not differentiate between shipping from Melbourne or Geelong. As there is no advantage for a FOB buyer of shipping from one port over the other, grain marketers have no advantage/disadvantage of using one supply chain over the other. Assuming excess port capacity, there are options available for a marketer to use either port.

Bunge's plans together with GrainCorp's recently announced Project Regeneration are expected to place increasing pressure on the draw and supply chain to Melbourne port terminal.

Both GrainCorp and Emerald also note the ability for current and future port operators to increase their port capacity in Victoria.

Additional details of the specifications and services offered at the facilities, including proposed new facilities, are provided in the GrainCorp and Emerald's submissions in support of their applications, available on the ACCC website.

Issues for comment

7. *How well does Table 1 (above) and GrainCorp and Emerald's respective submissions in support of their applications represent the specifications and services offered at the facilities? What other factors are relevant in comparing services provided at each facility?*
8. *To what extent do the services offered by:*
 - a. *GrainCorp's Geelong facility represent a viable competitive alternative to the services offered at Emerald's Melbourne facility, and vice versa?*
 - b. *GrainCorp's Portland facility represent a viable competitive alternative to the services offered at Emerald's Melbourne facility, and vice versa?*
 - c. *GrainCorp's Geelong facility represent a viable competitive alternative to the services offered at GrainCorp's Portland facility, and vice versa?*
9. *Do services offered at port terminals outside Victoria represent a viable alternative to services offered at either of GrainCorp's Geelong or Portland facilities, or to Emerald's Melbourne facility? If so, how? What evidence supports this?*
10. *Do exporters/producers have a preferred port? In what circumstances do/would exporters or producers utilise an alternative port instead of their preferred port?*
11. *Does the location, port size, berth capability, landside receival facilities, efficiency or any other factor related to these port facilities provide either of the port operators with a competitive advantage?*
12. *To what extent could future bulk wheat export developments provide a competitive constraint on the facilities?*

2.5 Competition in upstream, downstream and related markets

The bulk wheat export market interacts with a range of industries and services in the broader supply chain. These include the domestic wheat market, upcountry storage facilities, road and rail transportation services, and the export container market.

The ACCC considers that it is relevant for this Issues Paper to seek information on a range of these aspects which are likely to affect the level of competition faced by Victorian wheat ports. This in turn may influence an exporter's ability to export bulk wheat from the Geelong, Portland or Melbourne port terminals.

The ACCC is seeking industry comment on the following supply chain matters relating to the Victorian facilities, including:

- Grain flows
- Up-country wheat storage and handling facilities
- Wheat transportation services
- Container market for wheat
- Domestic market for wheat.

2.5.1 Grain flows relevant to Victoria

GrainCorp's website states that its Victorian country operations are divided into two operating regions, South Eastern and North Western Victoria. These regions service both the domestic market and the export market via the Geelong and Portland export elevators.²³

GrainCorp submits that:

The movement of grain from Victoria is shaped by the interplay of the export (container and bulk) and domestic markets. Grain from Victoria can move north, south and west into the export and domestic markets (by rail and road).²⁴

The Victorian grain industry, given its close proximity and supporting rail connections, can access port elevation capacity in Adelaide.²⁵

Emerald's website states that it has upcountry facilities in Victoria and Southern New South Wales which feed its Melbourne Port Terminal and the new joint venture terminal at Port Kembla (due for completion October 2015).²⁶

Emerald submits that:

Victoria's key catchment areas include the Melbourne, Loddon, Goulburn, Ovens-Murray, Gippsland, East Gippsland, Central Highlands, Barwon, Western District, Wimmera and Mallee statistical divisions. The Melbourne (port terminal) catchment area could be

²³ GrainCorp, <http://www.graincorp.com.au/storage-and-logistics/country-operations/vic>

²⁴ GrainCorp, Submission in support, p. 8

²⁵ *ibid*, p. 14

²⁶ Emerald Grain, <http://emeraldgrain.com/home/about/>

considered as the region which should be freight advantaged to Melbourne port terminal under normal circumstances.²⁷

Grain produced in Victoria is consumed domestically or exported through Melbourne port terminal or its competitor ports, primarily Geelong and Portland but also Port Kembla and Port Adelaide.²⁸

GrainCorp and Emerald provide additional detail in their submissions in support of their applications, available on the ACCC website.

Issues for comment

13. *What are the appropriate regions to be considered in relation to wheat export activity at GrainCorp's Geelong and Portland facility, and Emerald's Melbourne facility?*
14. *Is it appropriate to consider a Victorian market for the services provided by GrainCorp's Geelong and Portland facility, and Emerald's Melbourne facility? Why, or why not?*
15. *How do wheat producers decide into which markets to sell their wheat?*
16. *To what extent can these port terminals, or any other port terminals outside Victoria, be accessed at similar costs to exporters and producers?*

2.5.2 Upcountry wheat storage and handling facilities

The degree of competition in certain upcountry storage and handling facilities may also have an influence on the level of competition for port terminal services in Victoria.

GrainCorp estimates that Victoria has a total storage capacity of 14 million tonnes with significant excess capacity.²⁹

GrainCorp operates 50 country silos in Victoria with a total capacity of 5 million tonnes.³⁰ These sites consist of primary sites and receival and storage sites.³¹ GrainCorp's primary sites are export focused and are directly accessible by rail.³² The majority of receival and storage sites are also accessible by rail.

GrainCorp is in the process of leasing or selling a number of sites closed under Project Regeneration and has noted significant interest from potential buyers.³³ In 2015-16 GrainCorp intends to continue its consolidation of storage sites under Project Regeneration and close a further small number of sites in the Victorian regions.³⁴

²⁷ Emerald Grain, Submission in support, p. 4

²⁸ *ibid*, p. 5

²⁹ GrainCorp, Submission in support, p. 18

³⁰ *ibid*, p. 19

³¹ GrainCorp, 2014-15 Country Network

³² GrainCorp, Project Regeneration fact sheet

³³ Queensland Country Life,

<http://www.queenslandcountrylife.com.au/news/agriculture/cropping/grains/some-graincorp-site-deals-finalised/2716508.aspx>

³⁴ GrainCorp, Project Regeneration Country Network map and site list

Emerald operates seven upcountry storage and handling facilities in Victoria and operates additional facilities in NSW.³⁵ Emerald submits that:

GrainCorp has a significantly larger and more geographically diversified upcountry storage and handling network than Emerald. This assists GrainCorp in providing more competitive pricing in regions around its upcountry silos.³⁶

A number of other firms offer storage and handling facilities in Victoria, including Cargill's subsidiary GrainFlow which operates four storage facilities as well as other facilities throughout NSW. Broadbent Grain owns a grain receival facility at Lakaput in the Western District of Victoria.

Both GrainCorp and Emerald note the presence of over 20 other privately owned storage facilities as well as on-farm storage facilities. GrainCorp submits that:

GrainCorp faces competition from over 100 competing country silos. These country silos are owned by 23 competitors including major grain exporters Cargill, Emerald, Glencore and Louis Dreyfus and have an estimated capacity of 5.5 million tonnes.³⁷

GrainCorp also faces significant competition from on-farm storage. Victoria has around 3.2 million tonnes of on farm-storage.³⁸

GrainCorp and Emerald provide additional detail in their submissions in support of their applications.

Issues for comment

17. *Does the above description, and the related descriptions in GrainCorp and Emerald's submissions accurately reflect the storage and handling facilities in Victoria and Southern NSW?*
18. *What level of competition is there in upcountry storage and handling facilities in Victoria and Southern NSW? Aside from GrainCorp and Emerald, how significant is the presence of other storage and handling companies in Victoria and Southern NSW?*
19. *To what extent do producers and exporters base their decisions to use certain port terminal services on their ability to access upcountry storage and handling facilities?*
20. *Does Emerald and other companies' positions in upcountry storage and handling facilities constrain GrainCorp's activities at its Geelong and Portland ports?*
21. *Does GrainCorp and other companies' positions in upcountry storage and handling facilities constrain Emerald's activities at its Melbourne port?*
22. *Is there likely to be an increase in competition for storage and handling facilities in the future, including through the potential lease or sale of any GrainCorp sites through its Project Regeneration?*

³⁵ Emerald Grain, <http://emeraldgrain.com/home/about/>

³⁶ Emerald Grain, Submission in support, p. 12

³⁷ GrainCorp, Submission in support, p. 19

³⁸ *ibid*, p. 20

23. *To what extent does on-farm storage influence the level of competition in storage and handling facilities, and port terminal services in Victoria?*
24. *To what extent could exemption of any of the facilities affect the level of competition in upcountry storage and handling facilities?*

2.5.3 Wheat transportation services

Transport services to move wheat from upcountry facilities to port may also influence the level of competition for port terminal services in Victoria.

GrainCorp submits that road transport has become the primary means of transport to port as most grain is located within distances of 250 to 350 kilometres, while rail transport is generally limited to longer hauls of over 400 km for export grain from north west Victoria. GrainCorp estimates that over 50 per cent of bulk export grain is moved by road.³⁹ Emerald, however, submits that rail deliveries account for approximately 70 to 80 per cent of export operations at Victorian ports.⁴⁰

Both GrainCorp and Emerald own and operate trains to transport bulk grain to port. According to Emerald, grain marketers engage other rail providers such as Pacific National and Qube to operate trains and transport grain to port under fixed volume take or pay contractual arrangements.⁴¹

Throughout central and north west Victoria, rail networks connect most GrainCorp storage facilities to either GrainCorp's Geelong or Emerald's Melbourne terminal. Networks in western Victoria connect storage facilities to GrainCorp's Portland and Geelong terminals, Emerald's MPT and to port terminals in Adelaide.⁴²

GrainCorp's Geelong and Emerald's Melbourne port terminals have dual (standard and broad) gauge rail receival facilities while GrainCorp's Portland facility has only standard gauge rail access. GrainCorp submits that its Portland facility is disadvantaged compared to the other Victorian ports due, in part, to rail weight restrictions, the standard gauge rail line and the ability for western Victorian grain to access a range of ports via rail.⁴³

GrainCorp has in place bundled transport and handling services to buyers under its ExportDirect model.⁴⁴ The introduction of ExportDirect is part of GrainCorp's Project Regeneration and allows 'stock swap' arrangements allowing GrainCorp to move grain to port from the most cost-effective site.⁴⁵ Some exporters have been able to enter into arrangements directly with rail operators such as Pacific National.⁴⁶

All three port terminals are accessible by road. In addition to road transport services provided by GrainCorp and Emerald, other private road transport services are available, including Broadbent Grain which provides both bulk storage and road delivery to port.⁴⁷

³⁹ GrainCorp, Submission in support, pp. 8,9

⁴⁰ Emerald, Submission in support, p. 14

⁴¹ *ibid*, p. 14

⁴² GrainCorp, Submission in support, p. 9

⁴³ *ibid*, p, 7

⁴⁴ GrainCorp Investor presentation, financial year ended 30 September 2014

⁴⁵ GrainCorp, Project Regeneration fact sheet

⁴⁶ <http://asciano2014.reportonline.com.au/annual-report-2014/operating-and-financial-review/pacific-national>

⁴⁷ Broadbent Grain, <http://broadbentgrain.com.au/>

GrainCorp submits that:

Grain produced in Victoria, given the size of the State and dominance of road transport, enjoys a range of substitutable demand alternatives. For most grain growing areas:

- The road distance (and therefore cost) to sell grain through the Melbourne Container Terminals and into the Melbourne Domestic Market is comparable to the distance to moving grain to Bulk Export Port Terminals in Melbourne, Geelong and Portland.
- The road and rail distance (and therefore cost) to sell export grain through Melbourne and Geelong Port Terminals or Melbourne / Geelong and Portland Port Terminal or Portland and Adelaide Port Terminals is comparable.⁴⁸

GrainCorp is aware of competitive rail rates from Victoria into Adelaide.⁴⁹

Additional detail regarding grain transport services across Victoria is provided in GrainCorp and Emerald's submissions in support of their applications.

Issues for comment

25. *How much wheat is usually transported to GrainCorp's Geelong and Portland facilities and to Emerald's Melbourne facility by rail and by road?*
26. *To what extent do producers and exporters use GrainCorp or Emerald's transport services? Why or why not? What other transport services do producers and exporters use?*
27. *Does GrainCorp's position in the upcountry transport market, including its rail access arrangements, affect producers' or exporters' ability to access viable alternative port terminal services? If so, how?*
28. *Does Emerald and other companies' positions in the upcountry transport market act as a competitive constraint at GrainCorp's activities at its Geelong and Portland ports?*
29. *To what extent could exemption of any of the facilities affect the level of competition in wheat transportation services?*

2.5.4 Container market for wheat

The nature of the container market for wheat may also influence the level of competition for port terminal services across Victoria. GrainCorp submits that around 15 to 20 per cent of wheat production in Victoria is sold to the container export market which usually has first call of export grain.⁵⁰ The container export market is not regulated by the Code.

Container packing facilities are available at GrainCorp's Geelong port terminal, but not at its Portland facility. GrainCorp also operates a container packing facility at Sunshine (Melbourne). Emerald's Melbourne Port Terminal also offers container packing services. Other packing services are available in country Victoria and can access either the Geelong

⁴⁸ GrainCorp, Submission in support, p. 6

⁴⁹ *ibid*, p. 14

⁵⁰ GrainCorp, Submission in support, p. 15

or Melbourne port terminal by rail or road. Other packers are owned by grain exporters such as Glencore, and companies including Riordans, Jepsens and Agripack.⁵¹

Both GrainCorp and Emerald submit that the export container market provides significant competition against their respective bulk wheat export programmes, particularly due to the expansion in this market over the last 5 years.⁵²

GrainCorp submits that:

GrainCorp faces competition from 16 major container packers with an estimated total packing capacity of around 2.5 million tonnes. In the last five years, on average 1.3 million tonnes has been exported by containers, peaking at 1.7 million tonnes.⁵³

Emerald submits that its major competitors in the grain container market include GrainCorp, Viterra (Glencore) and Agripack.⁵⁴

GrainCorp and Emerald's submissions in support of their applications provide further detail on the container market for wheat.

Issues for comment

30. *To what extent does the container wheat export market provide a competitive constraint on the bulk wheat export market in Victoria?*
31. *Do you agree with the descriptions of the container market provided by GrainCorp and Emerald in their submissions in support of their application? If not, why?*
32. *Is any priority given to supplying the container market over supplying the bulk wheat export market, or vice versa? If so, when does this occur?*
33. *Does GrainCorp's container export facilities at its Geelong facility constrain Emerald's bulk wheat services at its Melbourne port facility?*
34. *Does Emerald's container packing facilities at its Melbourne facility constrain GrainCorp's bulk wheat services at its Geelong and Portland facilities?*

2.5.5 Domestic market for wheat

The nature of the domestic market for wheat is likely to influence the amount of wheat available for bulk export and hence the demand for port terminal services. Domestic demand in Victoria is related to grain malting, milling and poultry feed markets.⁵⁵

Both GrainCorp and Emerald submit that the domestic market provides competition against their respective bulk wheat export programmes. GrainCorp submits that around 35 to 45 per cent of wheat production in Victoria is sold to the domestic market, which is able to pay a

⁵¹ *ibid*, p. 17

⁵² *ibid*, p. 18

⁵³ GrainCorp, Submission in support, p. 17

⁵⁴ Emerald Grain, Submission in support, p. 15

⁵⁵ *ibid*, p. 14

higher price than the bulk wheat market due to less supply chain infrastructure and access to back loading road rates.⁵⁶

The ACCC is seeking stakeholder comments on how the domestic market may impact on the demand for port terminal services, and how this affects access to port terminal services.

Further information on the domestic market is provided in GrainCorp and Emerald's submissions in support of their applications.

Issues for comment

35. *To what extent does the domestic market for wheat provide a competitive constraint on the bulk wheat export market in Victoria?*
36. *Do you agree with the descriptions of the domestic market provided by GrainCorp and Emerald in their submissions in support of their application? If not, why?*
37. *Is any priority given to supplying the domestic market over supplying the bulk wheat export market, or vice versa? If so, when does this occur?*
38. *Does the amount of wheat available for bulk wheat export through Victorian port terminal facilities alter the competitiveness of various port terminal services?*

⁵⁶ GrainCorp, Submission in support, pp. 5, 15

Appendix A. Potential stages of an ACCC exemption assessment process

The diagram below shows the ACCC's a typical assessment process of an exemption application.

