Draft Determination

Commodity Ag

Exemption assessment of port terminal services provided via a port terminal facility at Albany

27 March 2023

Contents

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 Commodity Ag should be an exempt service provider of port terminal services provided by means of its port terminal facility at Albany, Western Australia (WA).

If the ACCC makes a final determination consistent with this draft determination, Commodity Ag will be subject to a lower level of regulation, as it will not be required to comply with Parts 3 to 6 of the Code while providing port terminal services via its port terminal facility at Albany.

In making its draft determination the ACCC has:

- considered the level of competitive constraint Commodity Ag will be subject to, and
- carefully considered the matters listed at subclause 5(3) of the Code.

This assessment was 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:

- Commodity Ag will be subject to a high level of competitive constraint from Co-operative Bulk Handling Limited (CBH) at Albany.
- Granting Commodity Ag an exemption will provide it with greater control over how it provides its port terminal services. This may allow it to better tailor its services to the needs of specific exporters and respond more flexibly to requests for services (or changes to services).
- Providing Commodity Ag with greater operational flexibility where it has strong competition-based incentives to provide exporters fair and transparent access to its services is likely to:
    - be in Commodity Ag's legitimate business interests
    - be in the public interest, including the public interest in having competition in markets, and may promote competition in upstream and downstream markets
    - be in the interests of exporters who may require access to Commodity Ag's port terminal services
    - promote the efficient operation of Commodity Ag's facility and may promote efficient investment in port terminal facilities.
- Granting Commodity Ag an exemption will likely allow this smaller-scale new entrant Port Terminal Service Provider (PTSP) to compete more effectively in the Albany grain catchment area market for bulk grain export port terminal services. The ACCC considers the entry of Commodity Ag to be a pro-competitive development that should provide more choice to grain exporters and growers.

These draft views are based on the ACCC's analysis of the extent to which Commodity Ag will compete with other providers of bulk grain export port terminal services. The ACCC has also considered the extent of any competitive constraint imposed by markets for containerised grain export port terminal services and domestic demand for grain (including bulk wheat). The ACCC's draft views on the level of competitive constraint Commodity Ag will be subject to at Albany are set out in chapter 2 of this document.

The ACCC's draft consideration of the matters that the ACCC is required to have regard to in deciding to grant an exemption (listed at subclause 5(3) of the Code) is set out in chapter 3. A high-level summary of the ACCC's draft consideration of the matters listed at subclause 5(3) of the Code is presented in table E.1 below.

Table E.1: Summary of the ACCC's draft consideration of the matters listed at subclause 5(3) of the Code

Subclause 5(3) matter	ACCC draft view
a) the legitimate business interests of the port terminal service provider	• The increased operational flexibility and reduced Code-related compliance costs associated with an exemption would be in Commodity Ag's legitimate business interests.
b) the public interest, including the public interest in having competition in markets **g) the promotion of competition in upstream and downstream markets**	• Exempting a new entrant PTSP in the Albany grain catchment area would likely promote competition between PTSPs and would also likely promote exporter participation in the market for bulk grain export port terminal services in the Albany grain catchment area. • Promoting competition between PTSPs and exporter participation in the Albany grain catchment area is in the public interest, including the public interest in having competition in markets, and may promote competition in upstream and downstream markets.
c) the interests of exporters who may require access to port terminal services	• Overall Commodity Ag will be subject to a high level of competitive constraint and will have strong incentives to provide exporters fair and transparent access to port terminal services at its Albany facility. • It is likely that the greater operational flexibility and reduced compliance costs associated with an exemption will benefit exporters through more competitive service offerings.
d) the likelihood that exporters of bulk wheat will have fair and transparent access to port terminal services	• Granting Commodity Ag an exemption in relation to its Albany facility is unlikely to reduce the likelihood that exporters of bulk wheat will have fair and transparent access to port terminal services. • The ACCC's view reflects that Commodity Ag: o will be subject to a high level of competitive constraint which provides it with strong incentives to provide exporters fair and transparent access to its services, and o is not an exporter or an associated entity of an exporter.
e) the promotion of the economically efficient operation and use of the port terminal facility	• Commodity Ag has strong competition-based incentives to provide exporters with fair and transparent access to services at its Albany facility and to provide the benefits of increased flexibility to exporters. • The ACCC therefore considers that granting Commodity Ag an exemption:

f) the promotion of efficient investment in port terminal facilities	○ would likely promote the efficient operation and use of Commodity Ag's port terminal facility ○ may promote efficient investment in Commodity Ag's port terminal facility and port terminal facilities more broadly through the elimination of unnecessary regulatory burden.
h) whether the port terminal service provider is an exporter or an associated entity of an exporter	• The ACCC understands that Commodity Ag is not an exporter or an associated entity of an exporter. • Commodity Ag will therefore be unlikely to be incentivised (or be in a position) to discriminate in favour of itself (or an associated entity) in the course of providing bulk grain export port terminal services at its Albany facility.
i) whether there is already an exempt service provider within the grain catchment area for the port concerned	• In 2014 the Minister for Agriculture granted CBH exemptions in relation to its port terminal facilities at Albany, Esperance, Geraldton and Kwinana.[1] Accordingly, CBH is an exempt service provider in the Albany grain catchment area.
j) any other matters the ACCC considers relevant	• The ACCC does not consider that there are any other matters relevant to this assessment.

Consultation on this draft determination

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 1.5 of this document.

Submissions must be received before **5:00pm (AEST), 20 April 2023**.

[1] As of 1 June 2022, the Minister for Agriculture, Fisheries and Forestry.

1. Introduction

The Code is set out in Schedule 1 of the *Competition and Consumer (Industry Code – Port Terminal Access (Bulk Wheat)) Regulation 2014* and 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.[2]

The Code provides that the ACCC or the Minister for Agriculture (the Minister) may determine that a PTSP is an 'exempt service provider'.

1.1. Exempt service providers

PTSPs that are not exempt service providers 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 a PTSP to:

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

Part 3 of the Code requires a PTSP:

- not to discriminate in favour of its own trading business or an exporter that is an associated entity, and not hinder an exporter's access to port terminal services;
- to enter into an access agreement with an exporter regarding its port terminal services (or negotiate the terms of such an agreement) if an exporter makes a request and certain criteria are satisfied;
- to deal with disputes about the terms of an access agreement via specified dispute resolution processes including mediation and arbitration; and
- to include a dispute resolution mechanism in its standard terms and to vary its standard terms in accordance with a specified 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 requires that the capacity allocation system must be approved by the ACCC if it involves the allocation of port terminal capacity more than 6 months in advance).

Part 5 of the Code requires a PTSP to annually publish the expected capacity of its port terminal facility for the following 12 months, publish updates on the available capacity of its

2 Port Terminal Access (Bulk Wheat) Code of Conduct, clause 2.

port terminal facility on at least a weekly basis, and publish certain information on volumes of grain stored at port 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 IVB of the *Competition and Consumer Act 2010* (Cth).

1.2. Assessment of Commodity Ag as a PTSP

Commodity Ag has submitted that:

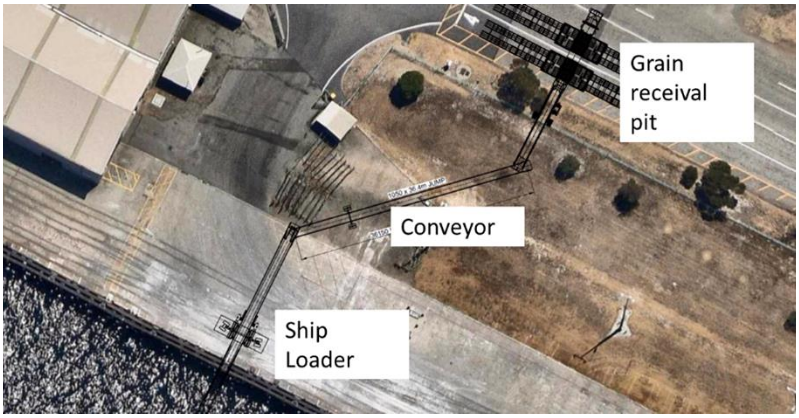
> Grain export loading will take place via a leased mobile loader operated from Berth 2 at the Port of Albany.[3]

and

> The mobile loader will consist of grain receival pit, conveyor and ship loader with a grain sampling and testing facility also co-positioned with at Berth 2. The at-port infrastructure will be leased from a 3rd party with Commodity Ag managing the organization of stevedores, the allocation of capacity to customers and coordinating deliveries to the mobile loader.
>
> Exporters will be able to enter into a port terminal service agreement with Commodity Ag to secure capacity. Capacity will be made available seasonally for short-term agreements with the application of interested exporters treated equally and in a fair and transparent manner.[4]

Figure 1.1 shows Commodity Ag's port terminal facility:

Figure 1.1: Commodity Ag's port terminal facility



Source: Commodity Ag, 'Application for exemption from the ACCC (Industry Code – Port Terminal Access (Bulk Wheat)) Regulation 2014', 2023, p. 4.

On the basis of this information the ACCC considers that Commodity Ag will be the 'operator' of a port terminal facility (and therefore a PTSP) for the purposes of the Code. This is because the ACCC understands that Commodity Ag will:

- deal with requests by grain exports for access to bulk grain export port terminal services delivered via the mobile ship loader (and enter into access agreements with exporters regarding these services); and

---

[3] Commodity Ag, 'Application for exemption from the ACCC (Industry Code – Port Terminal Access (Bulk Wheat)) Regulation 2014', p. 3, accessed 4 April 2023.

[4] Commodity Ag, 'Application for exemption', p. 4.

- direct the delivery of port terminal services at port (for example, manage the stevedores that will physically operate the ship loader and associated infrastructure).

1.3. Application for exemption by Commodity Ag

Currently, Parts 1 to 6 of the Code will apply to Commodity Ag's provision of port terminal services at its port terminal facility at Albany.

Following pre-lodgement discussions, on 6 March 2023 Commodity Ag submitted an application to the ACCC seeking to be an exempt service provider in relation to its Albany facility.

Aspects of Commodity Ag's application are referenced in this document as relevant. The full application is available on the ACCC's website at: https://www.accc.gov.au/by-industry/rail-shipping-and-ports/exemption-from-parts-of-the-wheat-port-code/commodity-ag-wheat-port-exemption-assessment/exemption-application.

1.4. Previous WA exemption assessments

On 17 September 2014 the Minister for Agriculture granted CBH exemptions in relation to its port terminal facilities at Albany, Esperance, Geraldton and Kwinana.

On 24 September 2015 the ACCC released a final determination granting an exemption to WAPRES regarding its port terminal facility at the Port of Bunbury.[5]

1.5. 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@accc.gov.au

fiona.cameron@accc.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), 20 April 2023**.

5 The WAPRES port terminal facility at Bunbury is sometimes referred to as the Bunge/WAPRES facility. Bunge is a grain exporter that invested in storage facilities on land adjacent to the WAPRES ship loading facility and connected to that ship loader by a belt conveyer.

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:

Fiona Cameron
Assistant Director
Infrastructure & Transport – Access & Pricing Branch
Phone: 08 8213 3434
Email: fiona.cameron@accc.gov.au

2. Competitive constraint faced by Commodity Ag at Albany

The ACCC considers that the level of competitive constraint faced by a PTSP is relevant to its consideration of several of the matters listed at subclause 5(3) of the Code.

To assess the level of competitive constraint that Commodity Ag will be subject to, the ACCC has considered:

- the grain catchment area that Commodity Ag operates in (the Albany grain catchment area) (section 2.1),
- the sources and level of competitive constraint that Commodity Ag will be subject to in the Albany grain catchment area, including from other providers of bulk grain export port terminal services, and relevant markets for containerised grain export port terminal services and domestic demand (section 2.2 to 2.4).

The ACCC's draft assessment of the Albany grain catchment area and the level of competitive constraint faced by Commodity Ag are discussed in chapter 3 (the ACCC's draft consideration of the matters it must consider in granting an exemption, listed at subclause 5(3) of the Code).

2.1. Level of competition between PTSPs in the Albany grain catchment area

2.1.1. Assessment of the Albany grain catchment area

Commodity Ag submits that it in addition to facing competition from CBH at the Port of Albany, it will also face competition from CBH at Kwinana and Esperance, and WAPRES at Bunbury:

> Commodity Ag will source grain from across the traditional Albany Port Zone and face significant competition from incumbent export terminals operated by CBH (Kwinana, Albany, and Esperance) and Bunge / WAPRES at Bunbury that operate extensive upcountry grain storage facilities and permanent grain export terminals with grain storage at the port.
>
> A high degree of competition exists within the Albany Port Zone for grain deliveries by road into CBH Albany, CBH Esperance, Bunge / WAPRES at Bunbury, grain export container packers and the domestic human consumption and stockfeed processing markets.[6]

Figure 2.1 illustrates Commodity Ag's view of the Albany grain catchment area:

[6] Commodity Ag, 'Application for exemption', p. 5.

Figure 2.1: Map of Albany grain catchment area submitted by Commodity Ag

Source: Commodity Ag, 'Application for exemption', p. 5.

2.1.2. ACCC draft view on the Albany grain catchment area

The ACCC's draft view is that given CBH provides port terminal services at the Port of Albany both CBH and Commodity Ag will be providing port terminal services in the Albany grain catchment area.

Because CBH can receive grain by rail as well as road, the ACCC considers that the grain catchment area for CBH's facility is likely to be significantly larger than the grain catchment area for Commodity Ag's facility. The ACCC's draft view is that that Commodity Ag will compete with CBH's Albany facility for road receivals in the Albany grain catchment area.

The ACCC notes Commodity Ag's submission that it will compete with CBH's facilities at Esperance and Kwinana and also WAPRES' facility at Bunbury. The ACCC also notes that in its 2015 application for exemption, WAPRES submitted that the Bunbury grain catchment draws grain from the southern part of the Kwinana grain catchment area and the northern part of the Albany grain catchment area.[7]

The ACCC's draft view is that the level of competitive constraint imposed by CBH at its Albany facility will alone provide Commodity Ag with sufficient incentives to provide exporters with fair and transparent access to its port terminal services (see section 2.2). Accordingly, whilst the ACCC notes Commodity Ag's submission regarding competition from other port facilities, the ACCC does not consider it necessary to consider the extent to which Commodity Ag will be subject to additional levels of competitive constraint from PTSPs operating at ports other than Albany. To the extent that these other facilities impose an additional level of competitive constraint, this will only strengthen Commodity Ag's incentives to provide exporters fair and transparent access to its services.

The ACCC invites stakeholder views on the grain catchment area for the Port of Albany and the extent to which PTSPs operating at ports other than Albany will impose a competitive constraint on Commodity Ag.

[7] WAPRES, 'WA Chip & Pulp Company Pty Ltd (WAPRES) Application for Exemption from Parts 3-6 of the Port Terminal Access (Bulk Wheat) Code of Conduct', p. 13, accessed 4 April 2023.

2.2. Level of competitive constraint imposed by other providers of bulk grain export port terminal services in the Albany grain catchment area

The ACCC considers that competing PTSPs provide the most direct form of competitive constraint to an applicant for exempt service provider status.

The ACCC considers that the following matters are relevant to the assessment of the level of competitive constraint imposed by competing PTSPs to an applicant for exempt service provider status:

- the nature of the services offered by competing PTSPs, and
- the likely amount of spare capacity competing PTSPs have to offer.

2.2.1. The nature of the services offered by competing PTSPs

The ACCC considers the level of competitive constraint imposed by competing PTSPs depends in part on the nature of the services that those PTSPs provide.

If an applicant is competing with a PTSP that can provide services that are equivalent to or potentially more efficient than its own, that competing PTSP would be expected to impose a high level of competitive constraint on the applicant. This is because where an applicant's existing and potential customers can secure equivalent (or potentially more efficient and additional) services from a competitor, it will likely have strong incentives to offer exporters fair and transparent access to its services.

Table 2.1 sets out the nature of the services offered by Commodity Ag at the Port of Albany.

Table 2.1: Overview of Commodity Ag's port terminal facility at the Port of Albany

	Commodity Ag Albany
Rail receival	No rail receival capability
Road receival	500 mt/hr
Loader rate	400 mt/hr
At-port storage capacity	None
Vessel capacity	50,000mt DWT
Vessel type	Handymax

Source: Commodity Ag, 'Application for exemption', p. 4.

Noting the ACCC's view set out in section 2.1.2, the ACCC considers that CBH's port terminal facility at Albany will provide the clearest and most direct competition to Commodity Ag's Albany facility.

The ACCC does not possess equivalent information regarding CBH's Albany facility, but is able to make the following comparisons based on publicly available information:

- CBH can offer customers access to its extensive upcountry storage network and bundled services. The network effects associated with CBH's dominant presence in upcountry storage may result in exporters preferring to remain within the CBH network.[8]

[8] CBH's '2022/23 Grower Freight Rates' lists 32 sites in the 'Albany zone'. CBH, 'Grower Freight Rates Schedule 2022–23', accessed 4 April 2023.

- Commodity Ag will only be able to receive grain by road, whereas CBH can receive grain by rail as well as road.[9]
- Commodity Ag will not offer customers at-port storage services whereas CBH does,[10]
- Commodity Ag will deliver services via a mobile ship loader (with an estimated load rate of 400 mt/hr), whereas CBH delivers services via a fixed ship loader (with the Southern Ports website indicating a load rate of up to 1,600 tonnes per hour[11]).

The ACCC also notes that:

- challenges in sourcing transport services[12] may make it more difficult for Commodity Ag and/or its customers to arrange transport of grain by truck to Albany
- Commodity Ag's use of a mobile ship loader and the delivery of services at a common-user berth may present additional logistical challenges when compared to CBH's fixed loader operation.

The ACCC considers that CBH can offer port terminal services at its Albany facility that involve a faster loading rate and additional options for customers (including at-port storage and delivery by rail). The ACCC considers that CBH's ability to provide such services will provide Commodity Ag with strong incentives to provide exporters with fair and transparent access to its port terminal services.

The ACCC notes that while the nature and scale of the services offered by CBH may be more attractive to some customers, the services that Commodity Ag will provide will represent a valuable additional export pathway in the Albany grain catchment area.

2.2.2. Likely amounts of spare capacity offered by competing PTSPs

The ACCC considers that the amount of capacity available at competing port terminal facilities can impact the strength of a PTSP's incentives to provide fair and transparent access to its services.

The ACCC generally considers that an exporter's ability to shift all or part of their business to the PTSP that can best accommodate its needs depends on:

- the number of PTSPs competing in a particular grain catchment area, and
- the amount of port terminal capacity available to exporters competing in that grain catchment area.

The ACCC considers that where a PTSP is aware that its competitors can meet all or part of its customers' capacity needs, this likely provides the PTSP with strong incentives to provide exporters fair and transparent access to services.

Table 2.2 demonstrates that even with record exports from CBH's Albany facility in the 2021–22 shipping year (3.69mt) and strong year-on-year demand, on average CBH has had spare capacity available in both the peak and off periods since the 2014–15 shipping year. Based on the estimated capacity of CBH's and Commodity Ag's Albany facilities, CBH has

---

9 CBH's website states that 'The Albany Grain Terminal is one of CBH's four export terminals and is serviced by the Albany rail freight line'. CBH, 'Albany Grain Terminal', accessed 4 April 2023.

10 CBH's 'Storage & Handling: A guide to the CBH supply chain, services and pricing' document refers to its 'Albany Port' site (noting that ports include associated depots), p. 4, accessed 4 April 2023.

11 Southern Ports' website states that 'Grain loaded on No. 3 Berth by Co-operative Bulk Handling Ltd by any two out of three ship loaders with a total capacity of 1600 tonnes per hour'. Southern Ports, 'Port Services and Facilities', accessed 4 April 2023.

12 Grain Central, 'CBH Group reports record annual surplus', *Grain Central*, 16 December 2022, accessed 4 April 2022.

on average had more spare capacity available (0.68mt) than Commodity Ag will have total annual capacity (0.60mt).

Table 2.2: Estimated capacity and capacity utilisation figures for Albany port terminal facilities (2014–15 to 2021–22)

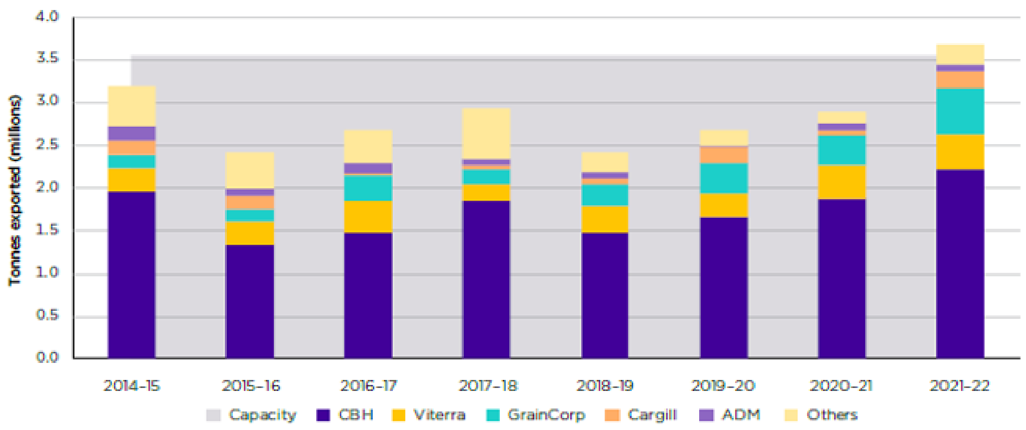
Facility	Estimated capacity[13]	Average exports	Average peak utilisation	Average off-peak utilisation
Commodity Ag	0.60mt			
CBH	3.55mt	2.87mt	84%	78%

Source: PTSP loading statements; Australian Crop Forecasters Shipping stem and market share report; and PTSP provided/published capacity statements and capacity data.

As illustrated by Table 2.2 adding the estimated capacity of Commodity Ag's facility to the estimated capacity of CBH's facility, there will be an estimated 4.15 million tonnes of bulk grain export port terminal capacity at Albany against an average annual export task of 2.87 million tonnes.

Figure 2.1 shows the level of capacity utilisation (including spare capacity) at CBH's Albany port terminal facility between the 2014–15 and 2021–22 shipping years, inclusive.

Figure 2.1: Exporter market share and total exports at CBH Albany, 2014–15 to 2021–22



Source: ACCC, 'Bulk grain ports monitoring report – data update – 2020–21: Appendix 1 – Supplementary spreadsheet – tables and charts', Chapter 4.

The ACCC considers that in most shipping years Commodity Ag will be offering services to exporters who will have the ability to have their capacity needs met by CBH. Combined with the fact that CBH can offer more diverse services, the ACCC considers that the level of spare capacity available at CBH's Albany facility will provide Commodity Ag with strong incentives to provide fair and transparent access to its port terminal services.

13 Estimated capacity reflects estimates provided by Commodity Ag in its application for exemption and by CBH to the ACCC (in response to a request for an updated estimate) in 2021.

2.2.3. ACCC draft view on the level of competitive constraint imposed by other PTSPs on Commodity Ag at Albany

The ACCC's draft view is that Commodity Ag will be subject to a high level of competitive constraint from competing PTSPs in the Albany grain catchment area.

The basis for the ACCC's draft view is that:

- Commodity Ag competes with CBH in the Albany grain catchment area, and
- CBH will offer larger-scale and more diverse services than Commodity Ag (that is, provide faster loading rates, the ability to receive grain via rail and use of an extensive storage and handling network).

As illustrated by Table 2.2, except for the record 2021–22 shipping year, CBH has typically had spare capacity in both peak and non-peak periods. This means that in most years exporters considering using Commodity Ag's facility will have the ability to secure services from CBH.

2.3. Level of competitive constraint imposed by markets for containerised grain exports

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

- containerised grain 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 shipments due to limitations in port infrastructure or the size of their operations, and so receive grain via containers; 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 grain exports may provide a viable alternative export path for some growing regions, niche and high-quality products, or for particular destinations. The ACCC therefore considers containerised exports have the potential to impose some level of competitive constraint on PTSPs, including Commodity Ag's Albany facility.

2.3.1. Level of competition Commodity Ag faces from markets for containerised grain export port terminal services

While WA is on average Australia's highest bulk grain exporter at 12.92 million tonnes per year, it only exports an average of 0.41 million tonnes per year in containers. On average WA has the lowest proportion of containerised grain exports of any state at 3%.

Table 2.3 demonstrates that between the 2014–15 and 2021–22 shipping years the vast majority of grain exported via containers from WA was exported from Kwinana (91.0%) with a comparatively small amount exported from Albany (2.9%).

Table 2.3: WA containerised grain exports by port (2014–15 to 2021–22) (tonnes)

	2014–15	2015–16	2016–17	2017–18	2018–19	2019–20	2020–21	2021–22	Total
Albany		8,461	6,512	943		10,680	24,259	43,590	**94,445**
Bunbury							11,990	16,800	**28,790**
Esperance			6,388	515	15,947	34,124	44,485	22,672	**124,131**
Geraldton			10,549			26,646		10,500	**47,696**
Kwinana	369,922	229,610	228,697	360,079	810,595	370,265	281,903	344,363	**2,995,434**
Perth	1	3	7	19	62	68		2	**163**
Total	**369,923**	**238,074**	**252,154**	**361,555**	**826,604**	**441,783**	**362,637**	**437,928**	**3,290,658**

Source: Australian Crop Forecasters Shipping stem and market share report.

2.3.2. ACCC draft view on the level of competitive constraint Commodity Ag faces from markets for containerised grain export port terminal services

The ACCC considers that the market for containerised grain export port terminal services will likely impose a limited competitive constraint on Commodity Ag's Port Albany facility. This view reflects:

- the small size of the containerised grain export market in WA; and
- that most of the containerised grain exported from WA occurs via Kwinana.

2.4. Level of competitive constraint imposed by domestic demand

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

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 high protein wheat.

Overall, WA has a relatively low level of domestic grain consumption. Of the grain exporting states in Australia, WA has had the second lowest level of domestic consumption in each of the last eight shipping years (with South Australia having the lowest). However, domestic consumption in WA has been increasing over the past 2 years.[14]

2.4.1. ACCC draft view on the level of competitive constraint imposed by domestic demand

In previous exemption assessments some stakeholders have expressed the view that since the domestic market has 'first call' on grain, it does not place a competitive constraint on the bulk export market.[15] However, consistent with views previously expressed by the ACCC,

[14] ACCC, 'Bulk grain ports monitoring report – data update – 2021–22', 2021, p.18, accessed 4 April 2023.

[15] ACCC, 'Viterra Final Determinations – Inner Harbour, Outer Harbor, Wallaroo and Port Giles', 2021, p.151, accessed 4 April 2023.

the ACCC continues to consider that the presence of the domestic market imposes some constraint on bulk export markets.

The ACCC notes that data on domestic demand for grain specifically in the Albany grain catchment area is not readily available.

Given WA's average domestic consumption (1.44 million tonnes[16]) is relatively low compared to average bulk grain exports (12.71 million tonnes[17]) the ACCC's draft view is that the WA domestic market likely imposes a limited degree of competitive constraint on Commodity Ag at Albany.

2.5. ACCC draft view on the overall level of competitive constraint Commodity Ag faces at Albany

The ACCC's draft view is that Commodity Ag will be subject to:

- a high level of competitive constraint from CBH at the Port of Albany,
- a limited level of competitive constraint from the market for containerised grain export port terminal services, and
- a limited level of competition from the WA market for domestic consumption.

The ACCC's draft view is that overall Commodity Ag will be subject to a high level of competitive constraint which provides it with strong incentives to provide exporters fair and transparent access to its port terminal services. The ACCC's draft view is that because these incentives are competition-based, they will not be impacted by being granted exemption from Parts 3 to 6 of the Code.

[16] ACCC, 'Bulk grain ports monitoring report – data update – 2020–21: Appendix 1 – Supplementary spreadsheet – tables and charts', Chapter 4.

[17] ACCC, 'Bulk grain ports monitoring report – data update – 2020–21: Appendix 1 – Supplementary spreadsheet – tables and charts', Chapter 4.

3. Draft consideration of whether Commodity Ag should be granted exemption

This chapter sets out the ACCC's draft assessment of whether it should determine, under subclause 5(2) of the Code, Commodity Ag to be an exempt service provider in relation to its port terminal facility at Albany. This assessment draws on the findings in chapter 2 regarding the level of competitive constraint faced by Commodity Ag.

Subclause 5(3) of the Code provides that in making a determination under subclause 5(2) 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 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.

<u>Overlapping nature of subclause 5(3) matters</u>

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

In deciding whether to exempt a PTSP, subclause 5(3)(a) of the Code requires the ACCC to have regard to the PTSP's legitimate business interests.

Relevant submissions by Commodity Ag

Commodity Ag submitted that:

> An exemption for Parts 3-6 of The Code would allow Commodity Ag to continue to grow its existing business operations in a sustainable manner and also provide customers with a more complete supply chain service for the export of grain.
>
> An exemption granted to Commodity Ag will also encourage new competition for grain exports from Western Australia with CBH capacity fully allocated.[18]

ACCC draft consideration

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 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 (that is, ensuring that exporters of bulk wheat have fair and transparent access to port terminal services).

The ACCC is not in a position to assess the direct (or indirect) costs Parts 3 to 6 the Code will impose upon Commodity Ag (or any other PTSP) and specific estimates were not submitted by Commodity Ag. 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 of Agriculture, Fisheries and Forestry[19] 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.[20]

18 Commodity Ag, 'Application for exemption', p. 7.

19 Then, the Department of Agriculture and Water Resources.

20 Australian Export Grains Innovation Centre (AEGIC), 'Australia's grain supply chains – costs, risks and opportunities', 2018, p. 35, accessed 4 April 2023.

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. Increased operational flexibility also has the potential to 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 smaller-scale PTSPs only operating a single port terminal facility, given that compliance costs will be proportionately higher compared to overall costs and revenue. A larger-scale PTSP operating multiple port terminal facilities may be able to spread compliance costs over its facilities.

ACCC draft view

The ACCC's draft view is that an exemption is in the legitimate business interests of Commodity Ag.

If Commodity Ag is determined to be an exempt service provider, it could be expected to engage more freely in commercial negotiations with exporters and offer tailored access agreements. It would also face reduced direct and indirect Code-compliance costs, largely due to having greater flexibility in how it provides its services.

Given Commodity Ag has strong competition-based incentives to provide exporters fair and transparent access to its services (which would not be impacted by being granted an exemption), the ACCC's draft view is that the increase in operational flexibility and reduction in Code-compliance costs is in Commodity Ag's legitimate business interests.

However, the ACCC considers that Commodity Ag's legitimate business interests must be balanced against the other matters the ACCC must have regard to in subclause 5(3) of the Code.

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

In deciding whether to exempt a PTSP, subclause 5(3)(b) requires the ACCC to consider the public interest, including the public interest in having competition in markets, and subclause 5(3)(g) requires the ACCC to consider the promotion of competition in upstream and downstream markets.

Relevant submissions by Commodity Ag

Commodity Ag submitted that:

> The granting of an exemption to Commodity Ag to Parts 3-6 of The Code will allow Commodity Ag with a less onerous and more efficient business to provide increased competition in the supply chain and grain export market.[21]

and

> The provision of an exemption to Commodity Ag will increase competition across the supply chain for bulk grain exports. Commodity Ag will operate in a highly competitive market for bulk grain exports with competitors who have already secured exemptions from the ACCC.[22]

---

[21] Commodity Ag, 'Application for exemption', p. 7.

[22] Commodity Ag, 'Application for exemption', p. 8.

ACCC draft consideration

<u>Competition in relevant markets for bulk grain export port terminal services</u>

The ACCC considers that competition in relevant markets for bulk grain export port terminal services will be promoted by:

- applying Parts 3 to 6 of the Code to PTSPs that are not subject to a level of competitive constraint which provides them with incentives to provide exporters fair and transparent access to their services (that is, using regulation to ensure that a range of exporters are able to access services fairly and transparently)
- removing the application of Parts 3 to 6 of the Code to PTSPs that are subject to a level of competitive constraint which provides them with incentives to provide exporters fair and transparent access to their services.

As noted in chapter 2 the ACCC's draft view is that Commodity Ag will be subject to a high level of competitive constraint in the market for bulk grain export port terminal services in the Albany grain catchment area. This provides it with strong, competition-based incentives to provide exporters with fair and transparent access to its services, which will not be impacted by being granted an exemption.

The ACCC's draft view is in these circumstances exempting Commodity Ag from having to comply with Parts 3 to 6 of the Code may increase its competitiveness in the market for bulk grain export port terminal services in the Albany grain catchment area. For example, granting Commodity Ag an exemption may positively impact the number and nature of exporters that are able to participate in the Albany grain catchment area. Further, the additional operational flexibility Commodity Ag would have if granted exemptions would be valued by exporters.

Accordingly, the ACCC's draft view is that granting Commodity Ag an exemption may promote competition in the market for bulk grain export port terminal services in the Albany grain catchment area.

<u>Competition in upstream and downstream markets</u>

The ACCC considers that promoting competition in markets for bulk grain export port terminal services may promote competition in upstream and downstream markets.

For example, the presence of a range of competing PTSPs (including non-vertically integrated PTSPs), an increase in the number of exporters seeking these services or an increase in demand for bulk grain export port terminal services may increase the demand for goods and services in upstream and downstream markets (such as the grain acquisition market, markets for grain storage and handling and grain transportation services). It may also increase opportunities for parties to compete in these markets.

As noted above, the ACCC's draft view is that granting Commodity Ag an exemption would likely promote exporter participation in the Albany grain catchment area. Accordingly, the ACCC considers that granting Commodity Ag an exemption may promote competition in upstream and downstream markets.

ACCC draft view

The ACCC's draft view is that:

- Exempting a new entrant PTSP in the Albany grain catchment area would likely promote competition between PTSPs and would likely also promote exporter participation in the market for bulk grain export port terminal services in the Albany grain catchment area.

- Promoting competition between PTSPs and exporter participation in the Albany grain catchment area is in the public interest, including the public interest in having competition in markets. This may promote competition in upstream and downstream markets.

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

Subclause 5(3)(c) requires the ACCC to consider the interests of exporters who may require access to port terminal services in deciding whether to exempt a PTSP.

Relevant submissions by Commodity Ag

Commodity Ag submitted that:

> With the granting of an exemption to The Code, Commodity Ag will be able to expand its business operations to include the loading of grain for export and provide the market with new capacity for the export of bulk grain.[23]

ACCC draft consideration

The ACCC considers that the obligations in Parts 3 to 6 of the Code seek to create certainty over how PTSPs provide their port terminal services. In order to provide this certainty these obligations restrict a PTSPs operational flexibility in certain ways.

For example, PTSPs that are required to comply with Parts 3 to 6 of the Code are required to, among other things:

- have a port loading protocol that includes a capacity allocation system,
- manage demand for their port terminal services in accordance with that port loading protocol (and capacity allocation system), and
- (if the PTSP proposes to allocate capacity more than six months in advance) have their capacity allocation system (and any subsequent variations to that system) approved by the ACCC.

The ACCC considers that where a PTSP will not be subject to a level of competition that provides it with incentives to provide exporters fair and transparent access to it services, the application of the obligations in Parts 3 to 6 are required to provide certainty over the fairness and transparency of access provided by that PTSP. In these circumstances the ACCC considers that to the extent the obligations in Parts 3 to 6 restrict a PTSP's operational flexibility, this is necessary to ensure that the Code's purpose of ensuring that exporters of bulk wheat have fair and transparent access to port terminal services is promoted. In these circumstances the ACCC considers that the application of Parts 3 to 6 of the Code to a PTSP is in the interests of exporters who may require access to port terminal services.

On the other hand, where a PTSP will be subject to a level of competitive constraint that provides it with incentives to provide exporters fair and transparent access to its services, the ACCC considers that the application of Parts 3 to 6 to the PTSP is unnecessary. In these circumstances the ACCC considers that any restrictions on a PTSP's operational flexibility would not be in the interests of exporters of bulk wheat.

---

23 Commodity Ag, 'Application for exemption', p. 7.

ACCC draft view

As noted in section 2.5, the ACCC's draft view is that Commodity Ag will be subject to a high level of competitive constraint that provides it with strong incentives to provide exporters fair and transparent access to its services.

As Commodity Ag will be subject to a high level of competitive constraint, the ACCC considers the greater operational flexibility associated with an exemption can be expected to be exercised to the benefit of all exporters through more competitive service offerings. Therefore, the ACCC's draft view is that granting an exemption to Commodity Ag is likely to be in 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

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

Relevant submissions by Commodity Ag

Commodity Ag submitted that:

> Commodity Ag following the granting of an exemption to Parts 3-6 will have a reduced compliance burden and be able to facilitate its expansion into the provision of bulk grain export services to new and existing clients.[24]

ACCC draft consideration

The ACCC considers that the following are key considerations in the assessment of the likelihood that exporters will have fair and transparent access to port terminal services:

- the level of competitive constraint a PTSP will be subject to, and
- whether the PTSP is an exporter or an associated entity of a grain exporter.

The ACCC considers that where a PTSP will be subject to a high level of competitive constraint it will have strong incentives to provide exporters fair and transparent access to its services without Parts 3 to 6 of the Code applying.

As noted at section 2.5 the ACCC's draft view is that Commodity Ag will be subject to a high level of competitive constraint that will provide it with strong incentives to provide exporters with fair and transparent access to its services.

Where a PTSP has competition-based incentives, the ACCC considers that granting a PTSP an exemption is unlikely to negatively impact the likelihood that exporters of bulk wheat will have fair and transparent access to port terminal services.

The ACCC considers that where a PTSP is also a grain exporter or an associated entity of a grain exporter, that PTSP likely has incentives to discriminate in favour of itself or an associated entity in the course of providing bulk grain export port terminal services.

The ACCC understands that Commodity Ag is not a grain exporter or an associated entity of a grain exporter. Commodity Ag therefore will not have the ability to discriminate in favour of

[24] Commodity Ag, 'Application for exemption', p. 7.

itself as a grain exporter in the course of providing exporters access to its port terminal services.

ACCC draft view

The ACCC's draft view is that because Commodity Ag is:

- subject to a high level of competitive constraint which provides it with strong incentives to provide exporters with fair and transparent access to its services, and
- not a grain exporter or an associated entity of a grain exporter,

granting Commodity Ag an exemption is unlikely to negatively impact the likelihood that exporters of bulk wheat will have fair and transparent access to its 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 the promotion of efficient investment in port terminal facilities.

Relevant submissions by Commodity Ag

Commodity Ag submitted that:

> The granting of an exemption will increase the efficient operation of the Commodity Ag export service and encourage further investment in the supply chain to continue to improve the service and competitive offering available to growers and grain exporters.[25]

and

> With the granting of an exemption to Parts 3-6 of the Code the compliance burden and cost faced by Commodity Ag will be reduced. The mobile loader utilized by Commodity Ag provides the market with additional capacity and increased flexibility to export grain.[26]

ACCC draft consideration

The ACCC considers that where PTSPs are subject to a high level of competitive constraint they will likely have strong incentives to provide exporters with fair and transparent access to their services. In these circumstances the ACCC considers that PTSPs will also likely have incentives to provide the benefit of the additional operational flexibility they have with an exemption to a range of exporters.

In addition to being in the legitimate business interests of the PTSP and the interests of exporters who may require access to services, where a PTSP has competition-based incentives, the ACCC considers that granting a PTSP an exemption may promote the efficient operation of the PTSP's facility. This is because increasing the operational flexibility of the PTSP will likely result in that PTSP being able to better respond to customer requests (which it is incentivised to do to compete with other facilities).

Because Commodity Ag will have strong incentives to provide exporters fair and transparent access to its services without Parts 3 to 6 of the Code applying to its operations, the ACCC

---

25 Commodity Ag, 'Application for exemption', p. 7.

26 Commodity Ag, 'Application for exemption', p. 7.

considers that applying these obligations to Commodity Ag is unnecessary. The ACCC considers that avoiding the application of unnecessary regulation (and promoting the efficient use of port terminal facilities) in a competitive market may encourage Commodity Ag to invest efficiently in its existing facilities. This is because Commodity Ag may be more inclined to invest in a port terminal facility that it has a greater level of operational control over. The ACCC considers that granting an exemption to an applicant that is or will be subject to a high level of competitive constraint may also promote efficient investment in port terminal facilities more broadly.

ACCC draft view

The ACCC's draft view is that because Commodity Ag will have strong competition-based incentives to provide exporters with fair and transparent access to its services, granting Commodity Ag an exemption:

- will likely promote the efficient operation and use of Commodity Ag's port terminal facility, and
- may promote efficient investment in Commodity Ag's port terminal facility and port terminal facilities more broadly.

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

In deciding whether to exempt a PTSP subclause 5(3)(h) requires the ACCC to consider whether the PTSP is an exporter or an associated entity of an exporter.

Relevant submissions by Commodity Ag

Commodity Ag submitted that:

> Commodity Ag will operate as a service provider to exporters for the loading of grain for export. Commodity Ag is not a grain exporter supplying overseas customers.[27]

ACCC draft view

The ACCC understands that Commodity Ag is not a grain exporter or an associated entity of a grain exporter. Commodity Ag will therefore be unlikely to be incentivised to (or be in a position to) discriminate in favour of itself (or an associated entity) in the course of providing bulk grain export port terminal services at its Albany facility.

(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 port concerned.

The ACCC generally considers that where a PTSP is competing with an exempt service provider in a grain catchment area, this supports the PTSP's case for exemption.

The ACCC considers that where a PTSP will not be subject to a level of competitive constraint that will provide it with incentives to provide exporters fair and transparent access

[27] Commodity Ag, 'Application for exemption', p. 8.

to its services, it may be appropriate that Parts 3 to 6 of the Code apply to the PTSP despite the presence of competing exempt PTSPs in the relevant grain catchment area.

On the other hand, where a PTSP does have competition-based incentives to provide exporters fair and transparent access to its services, the presence of exempt service providers in the relevant grain catchment area will support the case for the PTSP's exemption. This is because the ACCC considers that having different regulatory arrangements for PTSPs that all have incentives to provide exporters fair and transparent access to their services when not required may lead to distortions in competition and efficiency.

Relevant submissions by Commodity Ag

Commodity Ag submitted that:

> Both CBH and Bunge / WAPRES are exempt service providers from The Code and source grain from the same catchment area as exporters utilising the Commodity Ag service.[28]

and

> Furthermore, CBH and Bunge / WAPRES have been provided with exemptions from Parts 3 to 6 of the wheat export code and the granting of the same to Commodity Ag will ensure competition is maximised across the industry.[29]

ACCC draft consideration

On 17 November 2014 the Minister for Agriculture granted CBH an exemption in relation to all four of its WA port terminal facilities (including its Albany facility). The ACCC also notes that the ACCC's draft view is that Commodity Ag will be subject to a high level of competitive constraint from CBH's Albany facility.

ACCC draft view

The ACCC's draft view is that the presence of CBH's exempt facility at Albany supports Commodity Ag's case for exemption. The ACCC considers it appropriate in this case that Commodity Ag's smaller-scale new entrant facility not be subject to a more onerous level of Code regulation than the larger-scale CBH facility.

(j) any other matters the ACCC considers relevant

The ACCC does not consider there to be any other matters relevant to this assessment.

4. Draft determination

The ACCC's draft determination is that Commodity Ag should be an exempt service provider of port terminal services provided by means of its port terminal facility at Albany.

28 Commodity Ag, 'Application for exemption', p. 8.

29 Commodity Ag, 'Application for exemption', p. 5.