



Final Determination

Lucky Bay

T-Ports Pty Ltd

Exemption assessment of a bulk wheat port terminal facility under the Port Terminal Access (Bulk Wheat) Code of Conduct

1 April 2020

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Summary

The Australian Competition and Consumer Commission (ACCC) has determined that T-Ports Pty Ltd (T-Ports) is an exempt service provider of port terminal services provided by means of its port terminal facility at Lucky Bay, on the Eyre Peninsula of South Australia.

In arriving at its decision to grant the exemption, the ACCC has had regard to the matters listed at subclause 5(3) of Port Terminal Access (Bulk Wheat) Code of Conduct (the Code). In summary, the ACCC has formed the view that:

- T-Ports' facility will face a significant level of competitive constraint (mainly from Viterra's Port Lincoln port terminal facility)
- T-Ports' facility should promote competition in the Eyre Peninsula market for bulk wheat export port terminal services (and related markets) which was previously serviced by a monopoly service provider
- T-Ports has strong incentives to provide fair and transparent access without Parts 3 to 6 of the Code applying to its operations.

The ACCC's full consideration of the matters listed in subclause 5(3) of the Code is set out in an ACCC final position document published on 23 August 2019.

The Code and exempt service providers

The Code, was prescribed as a mandatory industry code of conduct by clause 4 of the Competition and Consumer (Industry Code – Port Terminal Access (Bulk Wheat) Regulation 2014 under Part IVB of the *Competition and Consumer Act 2010* (Cth). It commenced operation on 30 September 2014.

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

The Explanatory Statement to the Code states that one of the Code's objectives is to 'reduce unnecessary regulatory burden on port terminal service providers'.² The Code facilitates a reduction in the level of regulation applying to PTSPs by allowing the Minister for Agriculture (in the case of cooperatives) and the ACCC to determine PTSPs to be determined 'exempt service providers'.³

T-Ports' application for exempt service provider status at Lucky Bay

On 28 March 2019, T-Ports submitted an application for exempt service provider status to the ACCC. The application noted that T-Ports was constructing a port terminal facility at Lucky Bay and intended to provide port terminal services from that facility from early 2020.

On 17 April 2019 the ACCC published an issues paper inviting responses to a range of questions regarding T-Ports' application for exemption.⁴ No submissions were received in response.

¹ Port Terminal Access (Bulk Wheat) Code of Conduct, cl. 2.

² Explanatory Statement, Select Legislative Instrument No. 136, 2014 (Cth).

³ Code, cl. 5(1)-(2).

⁴ The issues paper is available on the ACCC website at: <https://www.accc.gov.au/regulated-infrastructure/wheat-export/t-ports-lucky-bay-wheat-port-exemption-assessment/exemption-application>.

On 23 August 2019 the ACCC published a final position document which expressed the ACCC's intention to grant T-Ports exempt service provider status at Lucky Bay once T-Ports' facility was fully constructed and capable of handling bulk wheat.⁵

The final position document sets out the ACCC's consideration of the list of matters (subclause 5(3) of the Code) that the ACCC must have regard to in making an exempt service provider determination. It also sets out the reasons why the ACCC considered it appropriate to assess T-Ports' application prior to T-Ports owning or operating a port terminal facility that is capable of handling bulk wheat.

On 4 March 2020, T-Ports notified the ACCC by letter that its facility is fully operational and that it intended to load its first export vessel on 11 March 2020. T-Ports' letter also confirmed no material changes to the information provided in T-Ports' application for exemption (i.e. that the information the ACCC considered in reaching its final position to exempt remains current).

With confirmation that T-Ports' facility is now capable of handling bulk wheat the ACCC is satisfied that T-Ports is a PTSP as defined by the Code and is therefore capable of being granted exempt service provider status.

Accordingly, the ACCC considers it appropriate at this time to confirm its intention to determine T-Ports to be an exempt service provider of port terminal services provided by means of its port terminal facility at Lucky Bay, South Australia for the reasons set out in the ACCC's final position document published on 23 August 2019.

What the exemption means

The exemption means that T-Ports will not be required to comply with Parts 3 to 6 of the Code in the course of providing port terminal services from its Lucky Bay facility.

Parts 3 to 6 of the Code contain a range of obligations that require PTSPs to provide access to their port terminal facilities fairly and transparently. These include to provide access on standard terms (or enter into negotiations on terms of access), resolve disputes about access negotiations via a Code-prescribed dispute resolution process and not discriminate in favour of a related entity or hinder access in the course of providing services.

As is the case for all exempt service providers, T-Ports will still be required to comply with the obligations in Part 2 of the Code. This means that T-Ports will be required to deal with exporters in good faith and publish specific information about how they propose to provide port terminal services (e.g. its policies and procedures for managing demand for services and the standard terms and reference prices on which services are offered) and a statement of all current allocations of capacity at its Lucky Bay facility (e.g. a port loading statement).

Monitoring and potential review of this determination

Subclause 5(6) of the Code provides that the ACCC can revoke an exemption if, after having regard to the matters listed in subclause 5(3), it is satisfied that the reasons for granting the exemption no longer apply.

In order to maintain an awareness of how capacity is being allocated at both exempt and non-exempt facilities, the ACCC conducts ongoing monitoring of Australian bulk grain exports and publically reports its findings in the annual ACCC bulk grain ports monitoring report.

⁵ The final position document is available on the ACCC website at: <https://www.accc.gov.au/regulated-infrastructure/wheat-export/t-ports-lucky-bay-wheat-port-exemption-assessment/final-position>.

The preparation of this report includes a public consultation process in which the ACCC invites stakeholders to provide views on access to these facilities, including views on whether exempt PTSPs are denying fair and transparent access.

In the event that the ACCC identifies or receives information that suggests an exempt PTSP (such as T-Ports) is denying fair and transparent access, or that the reasons for a particular exemption may no longer apply, the ACCC has the ability to review and if appropriate revoke the exemption.

Further information

Documents relevant to this assessment including the ACCC issues paper, and T-Ports' application for exemption are available on the [ACCC website](#). The reasons for the decision are set out in the ACCC's final position document.

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

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Background

The Code's obligations

The Code contains obligations that are designed to ensure fair and transparent access and is comprised of six parts.

Part 1 of the Code contains general provisions about the Code (e.g. the Code's purpose, definitions).

Part 2 of the Code requires PTSPs to deal with exporters in good faith and publish certain information about how access to its port terminal facility will be (or has been) allocated, specifically:

- publish (and provide to the ACCC) a port loading statement that provides information about ships that are scheduled to load grain at the PTSP's facility (or facilities)
- publish policies and procedures for managing demand for port terminal services (commonly referred to as the PTSP's 'port loading protocols')
- publish current standard terms and reference prices for port terminal services provided by means of each port terminal facility owned by the PTSP.

Part 3 of the Code requires PTSPs to deal with exporters fairly and transparently in the course of seeking and receiving access to the PTSP's services. Part 3 requires PTSPs to:

- not discriminate in favour of itself or an exporter of which it is an associated entity in the course of providing access, or hinder an exporter's access to its port terminal services

- enter into an access agreement on its published standard terms or enter into negotiations about the terms of an access agreement
- deal with disputes regarding negotiations regarding the terms of an access agreement via specified dispute resolution processes including mediation and arbitration.

Part 4 of the Code requires a PTSP to have, publish and comply with a port loading protocol which includes an ACCC-approved capacity allocation system (that is, the process by which access to the PTSP's port terminal facility is allocated).

Part 5 of the Code requires a PTSP to regularly publish the expected capacity of its facility, the amount of stock 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

A PTSP can be determined to be an exempt service provider at a specified facility (or facilities) in one of two ways:

- the Minister for Agriculture can determine a PTSP to be exempt service provider if the Minister is satisfied that the PTSP is a cooperative that meets certain membership and governance arrangements
- the ACCC can determine a PTSP to be exempt service provider but in making such a determination, must have regard to the list a matters specified at subclause 10(3) of the Code:
 - (a) the legitimate business interests of the port terminal service provider
 - (b) the public interest, including the public interests 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.

Exemption assessment timeline

Table 1 sets out the timeline of the ACCC's assessment of T-Ports' application for exempt service provider status at Lucky Bay.

Table 1: ACCC assessment

Date	Action
28 March 2019	T-Ports provided the ACCC with a written application seeking to be determined an exempt service provider of port terminal services provided by means of its under-construction port terminal facility at Lucky Bay.
17 April 2019	ACCC publishes an issues paper to commence a public consultation process regarding T-Ports' application for exemption.
17 May 2019	Submissions in response to the ACCC issues paper close. No submissions were received.
23 August 2019	ACCC publishes a final position document stating the ACCC's intention to determine T-Ports to be an exempt service provider of port terminal services provided by means of a port terminal facility at Lucky Bay, once that facility is capable of handling bulk wheat.
4 March 2020	T-Ports advises the ACCC by letter that it now has a facility that is capable of handling bulk wheat and that it intends to load its first shipment via that facility on or about 11 March 2020. The letter also confirms that there has been no change to the information contained in its application in support of exemption.
1 April 2020	ACCC determines that T-Ports is an exempt service provider of port terminal services in relation to its port terminal facility at Lucky Bay.

ACCC final determination

Consistent with the ACCC's final position published on 23 August 2019, the ACCC's final determination is that T-Ports is an exempt service provider of port terminal services provided by means of its port terminal facility located at Lucky Bay, South Australia for the reasons set out in the ACCC's final position document published on 23 August 2019.

In making this determination the ACCC has had regard to the matters listed at subclause 5(3) of the Code. The ACCC's consideration of these matters is set out in the ACCC final position document regarding T-Ports' application for exemption.