



Exempt service provider status assessment under the Port Terminal Access (Bulk Wheat) Code of Conduct

Port of Portland

Issues paper

29 October 2021

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Summary

The Australian Competition and Consumer Commission (ACCC) is seeking views on whether it should determine Port of Portland Limited (POPL) to be an exempt service provider of port terminal services provided by means of its port terminal facility at the Port of Portland.

Exempt service providers are not required to comply with Parts 3 to 6 of the *Port Terminal Access (Bulk Wheat) Code of Conduct* (the Code) in relation to port terminal services provided by means of specified port terminal facilities.¹ Accordingly, exempt service providers are not required to (among other things): have their process for allocating capacity approved by the ACCC; adhere to the Code's non-discrimination and no hindering obligations; deal with disputes via specified processes; or publish information on expected port capacity, performance indicators, and stocks at port.

The Code states that, in making a determination that a port terminal service provider (PTSP) is an exempt service provider, the ACCC must have regard to the matters listed at subclause 5(3) of the Code. The ACCC will consider these matters in subclause 5(3), along with submissions provided in response to this Issues Paper, prior to making its draft determination.

This will be the first time the ACCC has considered an exemption application of a service provider that is also a port owner and manager that provides access to berths for competing PTSPs. As such, the ACCC has decided to proceed with an Issues Paper to gather views ahead of a Draft Determination.

The ACCC notes that there are a number of exempt service providers within the Portland grain catchment area.

POPL provided an application to the ACCC seeking to be an exempt service provider of port terminal services in relation to its port terminal facility at the Port of Portland. Further details of this application are set out as relevant in section 2 of this Issues Paper.

The application is available on the ACCC's website for interested parties to consider.²

The ACCC invites comments in response to this Issues Paper by **5.00pm AEDT on 26 November 2021**.

Further information on the ACCC's exemption role is available at **Appendix A**.

¹ Subclause 4(8) of the Code

² See: <https://www.accc.gov.au/regulated-infrastructure/wheat-export/wheat-export-projects/port-of-portland-wheat-port-exemption-assessment>

1. Introduction

The Code commenced on 30 September 2014 and regulates the conduct of PTSPs to ensure that exporters of bulk wheat have fair and transparent access to port terminal services. The Code was prescribed by the *Competition and Consumer (Industry Code – Port Terminal Access (Bulk Wheat)) Regulation 2014* under section 51AE of the *Competition and Consumer Act 2010 (Cth)* (CCA).

The Code provides that the ACCC or the Minister for Agriculture³ (the Minister) may exempt a PTSP from the application of Parts 3 to 6 of the Code in relation to port terminal services provided by means of a specified port terminal facility. Exempt service providers face a lower level of regulation, as they remain subject to only Parts 1 and 2 of the Code. The obligations under each of the different Parts of the Code and the differences in regulatory requirements for exempt and non-exempt PTSPs are discussed further in section 1.2.

This section sets out why the ACCC has a role in assessing whether PTSPs should be determined to be exempt service providers, what that assessment process will involve, and how interested parties can participate in the process.

1.1. How the ACCC will assess whether it should determine Port of Portland to be an exempt service provider

The ACCC is assessing whether it should determine POPL to be an exempt service provider of port terminal services provided by means of its port terminal facility at the Port of Portland (Portland).

In assessing whether to determine under subclause 5(2) of the Code that a PTSP is an exempt service provider, the ACCC is required to consider the following matters listed at subclause 5(3) of the Code:

- (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.

³ The Code specifically refers to '...The Minister administering section 1 of the Farm Household Support Act 2014...'.

To inform its consideration of these matters, and consistent with the exemption guidelines,⁴ the ACCC considers that it is appropriate to seek the views of interested parties.

The ACCC is therefore conducting a public consultation during which interested parties are invited to comment on specific questions and matters relating to whether POPL should be granted exempt service provider status at Portland.

The ACCC will consider the matters listed at subclause 5(3) of the Code and the views expressed by interested parties during the course of the ACCC's public consultation process. The ACCC will then make its determination on whether to exempt POPL at Portland.

The ACCC has previously considered issues relating to the Victorian grain market in its consideration of exemptions for GrainCorp's and Emerald's Victorian facilities in 2015,⁵ Riordan Grain Services' facility at Geelong in 2017,⁶ and Riordan Grain Services' and GrainCorp's facilities at Portland over 2018-20.⁷ The ACCC has also recently considered the interaction between the Victorian and South Australian grain markets as part of the Viterra exemption assessment.⁸ Interested parties may wish to make reference to those previous processes.

1.2. What a determination of a port terminal service provider as an exempt service provider means

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

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

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

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

Part 2 of the Code requires 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 port terminal services; and
- make current standard terms and reference prices for each port terminal facility that it owns or operates publicly available on its website.

Part 3 of the Code requires a PTSP:

⁴ ACCC, *Guidelines on the ACCC's process for making and revoking exemption determinations*, October 2014.

⁵ ACCC, *ACCC Determinations – Exemptions in respect of Emerald's Melbourne Port Terminal Facility, GrainCorp's Geelong Port Terminal Facility and GrainCorp's Portland Port Terminal Facility*, 25 June 2015.

⁶ ACCC, *ACCC Determination – Exemption in respect of Riordan Grain Services' Portland Port Terminal Facility*, 28 July 2017.

⁷ The ACCC released its Final Determination exempting Riordan from Parts 3 to 6 of the Code at Portland on 31 March 2020 (see: ACCC, *ACCC Final Determination – Port of Portland exemption assessment – Riordan Grain Services*, 31 March 2020). The ACCC notes GrainCorp withdrew its exemption application at the Port of Portland on 20 December 2019 (see: ACCC, *GrainCorp Letter to ACCC – withdrawal of application*, 20 December 2019).

⁸ ACCC, *Final Determinations – Viterra Operations Pty Ltd – Exemption assessment of port terminal services provided at the following port terminal facilities: Port Adelaide Inner Harbour, Port Adelaide Outer Harbor, Wallaroo, Port Giles*, 27 April 2021.

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

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

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

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

Exempt service providers are still required to comply with the general competition law provisions in Part IV of the CCA.

1.3. Consultation

The ACCC invites interested parties to provide their views on POPL's exemption application and this Issues Paper.

Section 2 of this Issues Paper contains what the ACCC considers to be key questions and issues relevant to the ACCC's assessment, as well as information provided by POPL in support of its exemption application.⁹

The ACCC invites interested parties to respond to these questions, comment on the information provided by POPL, and provide any additional information they consider relevant to the ACCC's assessment.

1.3.1. Making a submission

Please address submissions to:

Mr Matthew Schroder
 General Manager
 Infrastructure & Transport - Access & Pricing Branch
 ACCC
 GPO Box 520
 MELBOURNE VIC 3001

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

⁹ See: <https://www.accc.gov.au/system/files/Port%20of%20Portland%20Limited%20-%20Wheat%20Code%20Exemption%20Application.pdf>

transport@acc.gov.au

david.barrett@acc.gov.au

1.3.2. Due date for submissions

Submissions must be received before **5.00pm AEDT on 26 November 2021**.

1.3.3. 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 conduct its assessment 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/AER Information Policy*, available on the ACCC website.¹⁰

1.3.4. Further information

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

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1.4. Terminology used in the Issues Paper

As noted, the Code's purpose is to regulate the conduct of PTSPs to ensure that exporters of bulk wheat have fair and transparent access to port terminal services.

The ACCC notes that the terminology used by the bulk grain industry does not typically distinguish between bulk wheat and other bulk grains. For example, available capacity at a port terminal facility is not typically recorded or referred to with respect to a particular type of grain and a bulk grain port terminal facility (or a bulk grain loader) is rarely, if ever, exclusively used in relation to bulk wheat (though is almost always capable of handling bulk wheat).

¹⁰ See: <https://www.acc.gov.au/publications/acc-aer-information-policy-collection-and-disclosure-of-information>

The ACCC notes that, in making submissions to previous exemption application assessments, stakeholders have therefore typically taken the approach of referring to 'grain' rather than 'wheat'. Consistent with this, and for readability, the ACCC has also used the term 'grain' throughout this document. Where this has occurred, it should be taken to relate to 'bulk wheat' for the purposes of the Code.¹¹

¹¹ The ACCC notes that 54% of all bulk grain exported from Victoria between the 2011-12 and 2019-20 seasons was wheat.

2. Matters for comment

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

The ACCC will consider whether POPL should be an exempt service provider in relation to services provided by means of its port terminal facility at Portland, having regard to the matters listed in subclause 5(3) of the Code.

The ACCC invites interested parties to provide submissions commenting on the specific questions and matters within this paper relating to whether POPL should receive exempt service provider status at Portland. Interested parties are encouraged to reference the matters listed in subclause 5(3) of the Code in their response.

Additional details relating to the information extracted below is available in POPL's submission in support of its application, available on the ACCC's website.¹²

2.1. Legitimate business interests of the service provider

In making a determination to exempt or not exempt a PTSP, the ACCC is required to consider the PTSP's legitimate business interests. Therefore, the ACCC is seeking views on how removing the obligation to comply with Parts 3 to 6 of the Code would impact on POPL's legitimate business interests.

In relation to the interests of the service provider, POPL submits that granting an exemption in respect of its port terminal facility at Portland would:

...reduce the significant regulatory cost of compliance in circumstances where POPL's bulk wheat shiploading services are small-scale and ad hoc, will give POPL greater operational flexibility and enable it to provide a more competitive port terminal service while ensuring commercial viability...¹³

POPL also submits that compliance with Parts 3 to 6 of the Code may result in POL ceasing to provide shipping services altogether.¹⁴ POPL submits:

While POPL operates the Port, its shiploading service comprises a small single port terminal facility which does not warrant, and could not support, the more burdensome compliance costs of Parts 3 – 6 of the Code.¹⁵

Key questions and issues

1. *How, and to what extent, are the legitimate business interests of POPL affected by having to comply with Parts 3 to 6 of the Code when providing port terminal services by means of its port terminal facility at Portland?*
2. *In what ways would an exemption for POPL impact the efficient operation and use of its port terminal facility at Portland?*

¹² See: <https://www.accc.gov.au/regulated-infrastructure/wheat-export/wheat-export-projects/port-of-portland-wheat-port-exemption-assessment/exemption-application>

¹³ Port of Portland, *Application for exemption from Parts 3-6 of the Port Terminal Access (Bulk Wheat) Code of Conduct*, 3 September 2021, p. 2.

¹⁴ *Ibid*, pp. 11-12.

¹⁵ *Ibid*, p. 11.

2.2. Access to port terminal services

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

Therefore, the ACCC is seeking views on how the interests of exporters of bulk grain will be impacted by removing the obligation on POPL to comply with Parts 3 to 6 of the Code, including the ability of exporters of bulk grain to secure fair and transparent access to port terminal services at Portland. The ACCC notes that POPL is vertically integrated between its bulk grain port terminal services and its role as a port owner and manager that provides access to berths for competing PTSPs. POPL is not vertically integrated as an exporter.

POPL submits that granting an exemption will not adversely affect exporters.¹⁶ Specifically, POPL submits as a new entrant in shiploading services it is incentivised to provide access to exporters in order to compete with GrainCorp and Riordan's facilities:

As a relatively new entrant in shiploading services, POPL is incentivised to provide access to exporters to attract customers to its facility over GrainCorp's and RGS's, and to maximise throughput and efficiency. POPL has, and will continue to provide fair and transparent access by offering to enter into commercial arrangements with each exporter to meet their needs and reasonable commercial terms.¹⁷

POPL submits they have adopted fair and transparent port productivity and berthing protocols across all berths:

POPL has...adopted fair and transparent port productivity and berthing protocols across all berths to accommodate increased demand for port capacity during a high grain year and promote efficient loading of vessels to maximise berth capacity across all berths (and all bulk grain berths of Berth 1,5 & 6);¹⁸

POPL submits that its facility will have capacity of 600,000 tonnes per annum,¹⁹ and that GrainCorp and Riordan have stated annual capacity of 720,000²⁰ and 150,000 tonnes²¹ at Portland respectively.²² POPL state there is excess bulk grain export capacity at Portland, which will incentivise throughput maximisation:

POPL operates in a competitive environment, and there is currently, and in future will be, excess capacity. In addition to competition from GrainCorp and potentially RGS, there is excess capacity at the Port. While there is a large zone of grain collection sites in Victoria that have Portland as the most viable choice of destination port, the ACCC has indicated that it regards there to be "spare capacity" at the Port, given the size of GrainCorp's existing facilities. This means that POPL is incentivised to fully utilise that capacity and maximise throughput by offering an efficient and competitive service.²³ (emphasis in original)

POPL submits that achieving the estimated capacity 600,000 tonnes per annum will depend on a number of factors, including:

¹⁶ Ibid, p. 13.

¹⁷ Ibid, p. 17.

¹⁸ Ibid, p. 17.

¹⁹ Ibid, p. 9.

²⁰ The ACCC notes GrainCorp has previously submitted it has 1.50 million tonnes of capacity, and a theoretical maximum of "well over 2 million tonnes". See: GrainCorp, *Response: Riordan Grain Services application for exemption from the Port Terminal (Bulk Wheat) Code of Conduct*, 29 November 2018, p. 3; and GrainCorp, *GrainCorp's submission in support of exemption for its Geelong and Portland ports*, 5 December 2014, p. 11.

²¹ As per POPL's exemption application Riordan has previously submitted it has 150,000 tonnes of capacity at Portland (with total capacity across Geelong and Portland of 300,000 tonnes). See page 8 of POPL's exemption application.

²² Port of Portland, *Application for exemption from Parts 3-6 of the Port Terminal Access (Bulk Wheat) Code of Conduct*, 3 September 2021, p. 8.

²³ Ibid, p. 15.

- seasonal growing conditions and supply in Portland catchment zone and domestic consumption;
- capacity demand for use of the POPL shiploader by mineral sands exporters;
- overall port capacity, particularly the high demand for use of Berth 5 which is POPL's highest utilised common user berth for all break bulk commodities;
- POPL's ability to provide shiploading services is constrained by limited storage (maximum 18,000 tonnes across 2 sheds); and
- efficient loading: as bulk grain cargos are not comingled between customers, all cargo must be cleared from storage facilities following each shipment, and the next customer is unable to load until cargo is accumulated (typically 1 to 2 weeks).²⁴

The ACCC is also required to consider whether the port terminal service provider is an exporter or an associated entity of an exporter.

POPL submits that since it is not vertically integrated with any exporters or storage providers, it has no incentive or ability to favour any owned trading arm, upcountry storage facilities, or to foreclose exporters' access:

***POPL has no vertically integrated businesses** upstream or downstream of the Port. POPL is not a trader or exporter, and does not have any up country storage facilities. Therefore, it has no ability or incentive to favour any owned trading arm, up country storage facilities (the largest grain storage at Port is owned and operated by GrainCorp), or to foreclose competitors' bulk wheat export customers from accessing its ad hoc shiploading services.²⁵ (emphasis in original)*

Key questions and issues

3. *If POPL is not required to comply with Parts 3 to 6 of the Code (including the dispute resolution, non-discrimination, and capacity allocation system approval obligations), to what extent could exporters still expect to be able to secure fair and transparent access to POPL's own grain loading services? That is, would exporters be able to negotiate access to POPL's grain loading services on reasonable commercial terms?*
4. *Given Berth 5 is a common user berth and POPL use their shiploader for other break bulk commodities, will exporters of bulk grain be able to access the expected 600,000 tonnes of bulk grain export capacity at POPL's facility?*

2.3. Grain catchment area

The ACCC is required by subclause 5(3)(i) of the Code to have regard to whether there is already an exempt service provider within the grain catchment area for the port concerned.

The ACCC recognises that catchment areas for different port terminal facilities can be somewhat fluid. However, the ACCC considers that the extent to which it is economically viable to move grain to different ports is relevant to the assessment of the extent to which different port terminals may (or may not) effectively constrain each other.

Regarding the grain catchment area for Portland, POPL submits:

Grain for the Portland port catchment is typically grown in Victoria's western district. Geographically in relation to Victoria's grain producing areas, grain harvested on farmland located

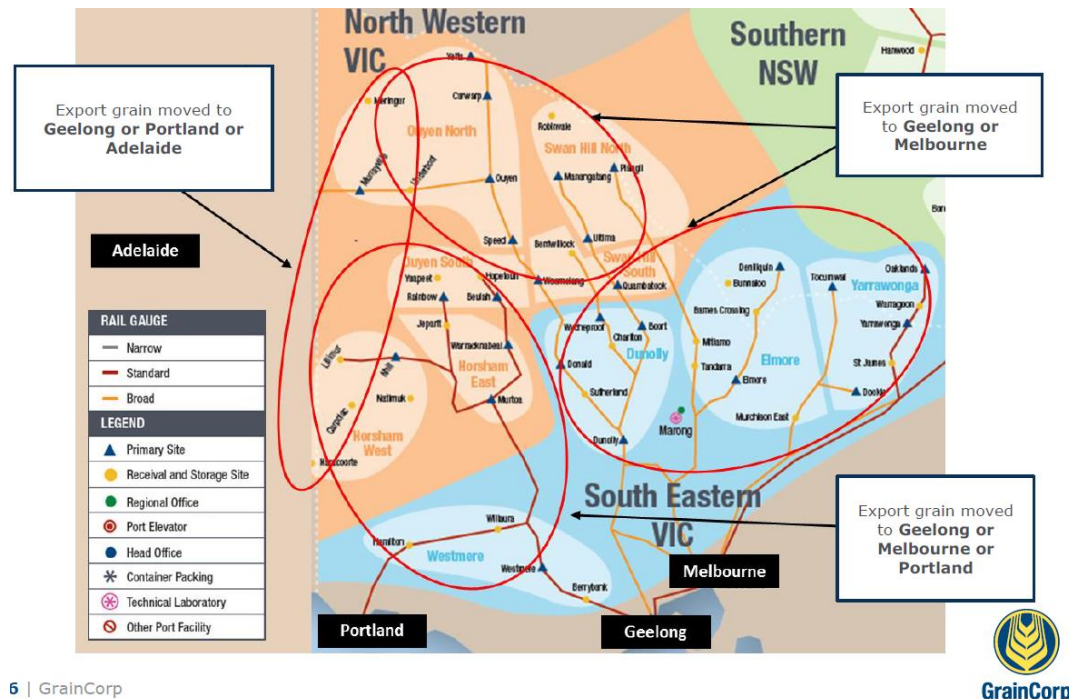
²⁴ Ibid, p. 10.

²⁵ Ibid, p. 16.

to the west of Horsham is more likely to be shipped into the Port of Portland, while grain sourced east of Horsham is more likely to be loaded for export at either the Port of Geelong or the Port of Melbourne. Movement of grain to ports outside of this rough zone varies depending on domestic requirements, rail logistics and demand at ports for grain. The Port of Geelong, for example, offers more efficient rail access and greater storage (whereas the Portland-Maroona rail line is speed and load restricted). With grain on trucks there is no physical impediment to moving within zones, however pricing points at different zones will ultimately determine end destinations for grain. The Ports of Geelong and Portland require similar road freight costs, depending on the grain site location. As a result, ports such as Geelong, Melbourne and Adelaide do offer an alternate destination to Portland, however typically over the longer term the best result for the grower in the Portland catchment zone would be for grain destined to Portland port.

This is illustrated in the map below.²⁶

Figure 3: Victorian grain growing regions and typical routes to export



POPL also submits that its catchment area contains several exempt port terminal service providers:

RGS is already an exempt service provider within the Portland grain catchment area: an exemption will provide equity with RGS which is a similarly smaller-scale operator and with export container packers that are not regulated.²⁷ (emphasis in original)

POPL therefore submits that the Portland catchment area includes GrainCorp at Port of Geelong and Emerald at Port of Melbourne (both exempt service providers) and potentially Viterra in Adelaide.²⁸

Key questions and issues

5. What regions should be considered part of the Portland grain catchment area?
6. What are the key factors that exporters and/or growers consider when choosing

²⁶ Ibid, p. 6.

²⁷ Ibid. p. 2.

²⁸ Ibid, p. 7.

which port to export grain through in this region? To what extent does transport factor into a grower or exporter's decision making?

2.4. Competition in bulk grain port terminal services

Whether a PTSP is incentivised to provide exporters with fair and transparent access to its port terminal services is an important consideration in determining whether to exempt a PTSP. Competing terminals can provide a competitive constraint on a port terminal facility and provide an incentive for a PTSP to provide fair and transparent access to exporters.

The ACCC seeks to assess the current and expected levels of competition in port terminal services at Portland. In particular, the ACCC is considering the levels of capacity, demand and spare capacity at Portland.

The ACCC is also required to have regard to the promotion of efficient investment in port terminal facilities.

As previously noted, POPL submits that its ability to engage in anti-competitive conduct in relation to its ad hoc shiploading services is limited by a range of factors, including that it 'operates in a competitive environment, and there is currently, and in future will be, excess capacity'.²⁹

POPL submits it faces strong competition from GrainCorp at Portland:

Given the strong competition at the Port from GrainCorp's facility (which is subject to full regulation under the Wheat Code), there is even greater constraint on any attempt by POPL to engage in anti-competitive conduct in relation to the ad hoc shiploading services.³⁰

POPL further submits it faces constraint from Riordan at Portland:

POPL is competitively constrained by GrainCorp as the largest, and non-exempt, PTSP at Port, and (the threat of) RGS.³¹

The ACCC notes POPL is vertically integrated between its bulk grain port terminal services and its role as a port owner and manager who provides access to berths for competing PTSPs. As such, the ACCC is seeking views on the extent to which an exemption in relation to POPL may impact other PTSPs' operations at bulk grain-related facilities at Portland.

POPL submits that barriers to entry for the supply of port terminal services are low, and that there have been a number of new entrants across Australia.³² POPL submits that to provide port terminal services at Portland, it has:

- invested capital into existing infrastructure to efficiently load grain vessels, such as adapting a truck unloading conveyor, to enable transfer grain onto an existing mineral sands conveyor system;
- modified fixed and mobile equipment to provide grain handling and meet export requirements; and
- provided storage facilities to facilitate the efficient transfer of bulk export grain to vessels on Berth 5.³³

²⁹ Ibid, p. 16.

³⁰ Ibid, pp. 14-15.

³¹ Ibid, p. 12.

³² Ibid, p. 16.

³³ Ibid, p. 17.

Given the above, the ACCC understands that POPL's own bulk grain loading operation is currently located at Berth 5. POPL submits that bulk grain is currently loaded out of Berth 1, 5 and 6.³⁴ Additionally, POPL submit its operation involves both mobile and fixed equipment.³⁵ The ACCC understands that some of POPL's mobile equipment could potentially be moved to other berths at Portland to use with other existing shiploading equipment (in order to provide port terminal services at other Portland berths).

POPL, in relation to its incentive to invest further in its shiploading operations, submits:

*POPL's current shiploading infrastructure is mixed use and its bulk wheat shiploading services are scalable. POPL would consider further investment in these operations, in response to customer demand, however it would only be operationally and commercially efficient to do so if an exemption were in place to reduce the costs of the operation.*³⁶

POPL also submits that it is a price-taker in international grain markets:

*Victoria is a price-taker in international grain markets and POPL operates in a global market which is subject to significant competition from other Australian and global grain producing regions. POPL therefore has to compete with port terminal and shiploading providers in Victoria, South Australia and globally.*³⁷ (emphasis in original)

Key questions and issues

7. *How might an exemption in relation to POPL impact other PTSPs' operations at bulk grain-related facilities at Portland? Would this impact on other PTSPs' operations be likely to affect bulk grain exporters' ability to obtain fair and transparent access to port terminal facilities at Portland and if so, how?*
8. *At the Port of Portland are there benefits to using certain berths over others? If so, what are these benefits?*
9. *To what extent do the services offered at Riordan Portland or GrainCorp Portland, represent viable competitive alternatives to the port terminal services provided by POPL at Portland? What are the relevant characteristics or factors at these PTSPs' port terminal facilities that affect competition between the PTSPs?*
10. *To what extent do PTSPs at Portland compete with PTSPs at the other Victorian and South Australian ports?*
11. *Are there capacity constraints at Portland? If capacity is constrained, when and how often does this occur, and what factors affect this?*
12. *Would an exemption for POPL be likely to affect investment in port terminal facilities across the Port of Portland and if so, how?*
13. *It may be possible for some of POPL's mobile equipment at Berth 5 to be moved to other berths at Portland and then be used with other shiploading equipment to load bulk grain. What effect, if any, would an exemption for POPL that applies to all berths (i.e. is not limited to Berth 5) be likely to have on stakeholders?*

³⁴ Ibid, p. 17.

³⁵ Ibid, p. 4.

³⁶ Ibid, p. 13.

³⁷ Ibid, p. 16.

2.5. Competition in upstream, downstream and related markets

The bulk grain export market interacts with various other industries in the broader grain supply chain. These include the domestic grain market, upcountry grain storage facilities, road and rail transportation services (freight), and the grain export container market. Grain exporters also acquire grain from growers and sell to international buyers in a downstream export market. Subclauses 5(3)(b) and 5(3)(g) of the Code require the ACCC to have regard to 'the public interest, including the public interest in having competition in markets' and 'the promotion of competition in upstream and downstream markets'.

The ACCC therefore considers it appropriate to seek information on and assess the level of competition in the relevant bulk export supply chain, as well as the container export and domestic markets, and the extent to which these affect the level of competition of port terminal services at Portland.

Storage and transport services

A bulk grain exporter's access to transport and/or storage services may have an impact on the exporter's ability to access port terminal services. Accordingly, the ACCC considers the level of competition in the upcountry supply chain relevant to the level of competition in the market for port terminal services. The ACCC's examination of competition in the upcountry supply chain in this assessment process is limited to the extent to which it impacts on fair and transparent access to port terminal services.

In relation to the market for upcountry storage, POPL submits it does not own any upcountry storage,³⁸ but that it owns 18,000 tonnes of at-port storage.³⁹ POPL also submits that GrainCorp has 60,000 tonnes of at-port storage and that Riordan has 20,000 tonnes of near port storage.⁴⁰

In relation to the market for transport services to Portland, POPL relies on road deliveries and does not currently use rail receival facilities. POPL submits that GrainCorp can receive grain via rail receival facilities, while Riordan (like POPL) is reliant on road transport for their grain loading operations.⁴¹

POPL submits that an exemption would increase demand for its capacity and support POPL to invest in additional storage, rail and port infrastructure.⁴²

Domestic and container markets

The ACCC considers that the domestic and container export markets compete to some extent with the bulk export market for grain. The level of competition will vary subject to production levels and shipping costs.

Domestic market

POPL submits that total grain production in its catchment area (Victoria and Southern NSW) is estimated to be approximately 15 million tonnes.⁴³ As per below POPL submits the domestic market consumes approximately 6 million tonnes of this grain annually:

³⁸ Ibid, p. 16.

³⁹ Ibid, pp. 3-4.

⁴⁰ Ibid, p. 5.

⁴¹ Ibid, p. 5.

⁴² Ibid, p. 16.

⁴³ Ibid, p. 5.

As previously identified to the ACCC by RGS, domestic consumption in this region is approximately 6mmt so in any given year there is around 9mmt of potential exportable surplus from the ports of Port Kembla (NSW), Melbourne (Emerald), Geelong and Portland (both GrainCorp ports). However, this exportable surplus can vary depending on seasonal variation, crop quality, global market conditions and Australian competitiveness, and domestic factors such as local demand.⁴⁴

On average, annual Victorian grain production is 6.6 million tonnes and domestic consumption accounts for 3.4 million tonnes of total usage.⁴⁵ Victorian domestic consumption therefore represents 52% of the total grain produced in Victoria on average.⁴⁶ In relation to NSW, average annual grain production is 10 million tonnes and domestic consumption accounts for 4.6 million tonnes of total usage.⁴⁷ However, the ACCC does not have data on where production and domestic consumption occurs within NSW. The ACCC is therefore not aware of how much production and domestic consumption occurs in Southern NSW (which POPL has submitted is relevant to the amount of grain exported at Portland).

Container market

Containerised grain exports are not a direct substitute for bulk grain exports, but they may provide a viable alternative export path for some growing regions, niche and high-quality products, or for particular destinations. The ACCC's *Bulk grain ports monitoring report 2019-20* noted container exports represent an average of 42% of all grain shipments from Victoria over the 2014-15 to 2019-20 seasons (with bulk shipments making up the other 58%).⁴⁸ The proportion of Victoria's grain exported in containers is higher than the national average of 13% for the same period.⁴⁹

In Victoria, Port of Melbourne continues to be the primary origin of containerised grain exports. Melbourne was responsible for 92% of all containerised grain exports from Victoria in the 2020-21 season, followed by Geelong at 6% and Portland at 2%. This represents a shift from the trends seen over the 2014-2015 to 2019-2020 seasons, where Melbourne exported 99% of all containerised grain in Victoria.⁵⁰

POPL submits that containerised export provides constraint on POPL's bulk grain programme at Portland:

If POPL were to offer bulk shiploading services on unreasonable or uncommercial terms, exporters could readily seek to export surplus grain as containerised exports via GrainCorp. In the context of the GrainCorp application, the ACCC noted that containerised grain exports from Victoria are significant, as shown by its growth and its consistent presence as a viable alternative export path for grain over the past 10 years. Accordingly, the ACCC considered that containerised exports provide a level of constraint on the bulk export programme at Portland.⁵¹

⁴⁴ Ibid, p. 6.

⁴⁵ ACCC, *Bulk grain ports monitoring report 2019-20*, March 2021, p. 85; ACCC, *Bulk grain ports monitoring report 2019-20: Appendix 1 – Supplementary Spreadsheet – tables and charts*, March 2021. See: <https://www.accc.gov.au/publications/serial-publications/bulk-grain-ports-monitoring-reports/bulk-grain-ports-monitoring-report-2019-20>

⁴⁶ Ibid.

⁴⁷ ACCC, *Bulk grain ports monitoring report 2019-20*, March 2021, p. 70; ACCC, *Bulk grain ports monitoring report 2019-20: Appendix 1 – Supplementary Spreadsheet – tables and charts*, March 2021. See: <https://www.accc.gov.au/publications/serial-publications/bulk-grain-ports-monitoring-reports/bulk-grain-ports-monitoring-report-2019-20>

⁴⁸ ACCC, *Bulk grain ports monitoring report 2019-20*, March 2021, p. 39. See: <https://www.accc.gov.au/publications/serial-publications/bulk-grain-ports-monitoring-reports/bulk-grain-ports-monitoring-report-2019-20>.

⁴⁹ Ibid.

⁵⁰ Australian Crop Forecasters, Export report.

⁵¹ Port of Portland, *Application for exemption from Parts 3-6 of the Port Terminal Access (Bulk Wheat) Code of Conduct*, 3 September 2021, p. 15.

The ACCC notes that as a result of the COVID-19 pandemic the shipping of containers has become more challenging. The Commission welcomes stakeholder views on the level of constraint on POPL's port terminal facility at Portland from the container market.

Key questions and issues

14. *With regard to exporters' ability to obtain fair and transparent access to port terminal services, how would an exemption for POPL at Portland impact on competition in the upcountry and transportation markets, and the upcountry supply chain as a whole?*
15. *To what extent does domestic demand and containerised exports provide a competitive constraint on bulk grain exports at Portland? How relevant is the Southern NSW domestic market to exports at Portland?*

Appendix A: Exemption assessments under the Code

The Code, prescribed by the *Competition and Consumer (Industry Code – Port Terminal Access (Bulk Wheat)) Regulation 2014* under section 51AE of the *Competition and Consumer Act 2010* (CCA), commenced on 30 September 2014. The Code replaced the previous regulatory framework provided for by the *Wheat Export Marketing Act 2008* (WEMA), which required vertically integrated providers of port terminal services to provide the ACCC with access undertakings.

The purpose of the Code is defined at clause 2 as:

The purpose of this code is to regulate the conduct of port terminal service providers to ensure that exporters of bulk wheat have fair and transparent access to port terminal services.

Port terminal service providers must comply with the Code

The Code applies to PTSPs. A PTSP 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.

Obligations on port terminal service providers

Non-exempt PTSPs 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 of Agriculture to be exempt service providers are not required to comply with Parts 3 to 6 of the Code.

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

Part 2 of the Code requires all PTSPs to deal with exporters in good faith, publish 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 that they own or operate publicly available on their website.

Part 3 of the Code requires a PTSP:

- not to discriminate in favour of itself or its trading business or hinder an 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, and
- to deal with disputes during negotiation 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.

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

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

How a port terminal service provider can be determined to be an exempt service provider

Exempt service provider determination by the ACCC

Subclause 5(2) of the Code provides that the ACCC may determine a PTSP to be an exempt service provider of port terminal services provided by means of a specified port terminal facility. In making a determination under subclause 5(2) of the Code, the ACCC must have regard to the matters listed in subclause 5(3) of the Code.

The ACCC is now required by subparagraph 51AE(1D)(b)(i) of the CCA to make exemption determinations under the Code by notifiable instrument if the exemption relates to a particular entity. The notifiable instrument must be registered on the Federal Register of Legislation, and the ACCC will publish a final determination document setting out the reasons for its decision on the ACCC website.

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

Exempt service provider determination by the Minister for Agriculture

Subclause 5(1) of the Code provides that the Minister for Agriculture may determine that a PTSP 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).

How the ACCC will conduct its assessment process

On 16 November 2014 the ACCC released its *Guidelines on the ACCC's process for making and revoking exemption determinations* (the Guidelines).⁵²

The Guidelines state 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 conducts a public consultation process, 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. The Guidelines, which are available on the ACCC website, provide further detail around the ACCC's process for making and revoking exemption determinations.

Indicative timeline for assessment

Submissions in response to this Issues Paper close at 5.00pm AEDT on **26 November 2021**.

As noted above, it is likely that the ACCC will release a draft determination in relation to this exemption application. However, the ACCC may proceed directly to publish a final determination if it considers it appropriate to do so.

The ACCC notes that the timeframe for assessing the exemption application will depend on the nature and timeliness of information provided by interested parties.

⁵² The guidelines are available on the ACCC's website at <http://acc.gov.au/publications/process-guidelines-for-making-revoking-exemption-determinations>.