



Issues paper: Exempt service provider status assessment of T-Ports Pty Ltd's bulk grain terminal at Lucky Bay

Assessment under the Port Terminal Access (Bulk Wheat) Code of Conduct

17 April 2019

Summary

The Australian Competition and Consumer Commission (ACCC) is seeking views on whether it would be appropriate for the ACCC to determine T-Ports Pty Ltd (T-Ports) to be an exempt service provider of port terminal services provided by means of a port terminal facility at Lucky Bay (Eyre Peninsula, South Australia), once it is covered by the Port Terminal Access (Bulk Wheat) Code of Conduct (the Code).

The purpose of the 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'.¹

The Code defines a port terminal service provider (PTSP) as the owner or operator of a port terminal facility that is used, or is to be used, to provide a port terminal service.² Port terminal facility is in turn defined as a ship loader that is at a port and capable of handling bulk wheat.³

The ACCC notes that construction of T-Ports' facility is not yet complete and that therefore T-Ports is not yet formally covered by the Code. T-Ports submits that construction of its facility is likely to be complete in Q4 2019. Bulk grain export services are expected to be commercially provided from 1 January 2020.

The ACCC has commenced the process for assessing T-Ports' application for exempt service provider status at this time to ensure that the new entrant service provider is subject to the appropriate level of regulation from the time they commence operations. This process is also intended to provide certainty to both T-Ports and potential access seekers regarding the obligations that T-Ports will be required to comply with in the course of providing services at Lucky Bay.

If the ACCC completes its assessment of T-Ports' application prior to construction of T-Ports' facility being complete, it will release a 'position' document indicating the ACCC's view, based on the available information, on whether T-Ports should be exempt once its facility is covered by the Code. In the event that the ACCC considers that it will be appropriate to determine T-Ports to be an exempt service provider of services provided by means of its facility at Lucky Bay, it will issue a final determination to that effect once T-Ports' facility is formally covered by the Code. If there is a material change in circumstances between the time that T-Ports submitted its application and the time that T-Ports' facility is covered by the Code, the ACCC will consider that information prior to making any final determination.

The ACCC adopted this approach in its assessment of Quattro Ports' facility at Port Kembla. In that assessment process, the ACCC released a position document in October 2015 stating its intention to provide exempt service provider status to Quattro once its facility was covered by the Code, and released a final determination on the exemption in April 2016.⁴

Exempt service providers are not required to comply with Parts 3 to 6 of the Code in the course of providing port terminal services via a specified port terminal facility.⁵ Accordingly, exempt service providers are not required to (among other things) have their process for allocating access to their port terminal services approved by the ACCC, allocate capacity in

¹ Competition and Consumer (Industry Code—Port Terminal Access (Bulk Wheat)) Regulation 2014, s.2.

² Competition and Consumer (Industry Code—Port Terminal Access (Bulk Wheat)) Regulation 2014, s.3.

³ Competition and Consumer (Industry Code—Port Terminal Access (Bulk Wheat)) Regulation 2014, s.3.

⁴ The position and final determination documents regarding Quattro's application are available at: <https://www.accc.gov.au/regulated-infrastructure/wheat-export/wheat-export-projects/port-kembla-wheat-ports-exemption-assessments>.

⁵ Competition and Consumer (Industry Code—Port Terminal Access (Bulk Wheat)) Regulation 2014, s.4(8).

compliance with the Code's non-discrimination and no hindering obligations, or publish information on expected port capacity, performance indicators, or stocks at port.

The Code states that in making a determination that a 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 the matters in subclause 5(3), along with views received in the course of its consultation process, prior to making any final determination.

T-Ports has provided a submission in support of exempt service provider status at Lucky Bay. Parts of this submission are set out in section 2 of this issues paper. T-Ports' full submission is available on the ACCC's website.⁶

The ACCC invites comments in response to this issues paper by **5.00pm AEST on Friday 17 May 2019**.

Submissions can be emailed to: transport@acc.gov.au and michael.eady@acc.gov.au.

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

⁶ See <https://www.accc.gov.au/regulated-infrastructure/wheat-export/wheat-export-projects>.

Table of Contents

Summary	1
1. Introduction	4
1.1. How the ACCC will assess whether it is appropriate to determine T-Ports to be an exempt service provider	4
1.2. Why the ACCC is conducting this assessment prior to T-Ports' facility being completed	5
1.3. What a determination of a port terminal service provider as an exempt service provider means	6
1.4. Consultation.....	7
2. Issues for comment.....	9
2.1. Legitimate business interests of the service provider	9
2.2. Access to port terminal services.....	10
2.3. Grain catchment area	11
2.4. Competition in bulk wheat port terminal services	12
2.5. Competition in upstream, downstream and related markets.....	13
2.6. Other matters.....	15
Appendix A: Exemption assessments under the Code	16
Port terminal service providers must comply with the Code.....	16
Obligations on port terminal service providers	16
How a port terminal service provider can be determined an exempt service provider...	17
How the ACCC will conduct its assessment process.....	18

1. Introduction

The Code commenced on 30 September 2014 and regulates the conduct of port terminal service providers to ensure that exporters of bulk wheat have fair and transparent access to port terminal services. It was prescribed by regulation under section 51AE of the *Competition and Consumer Act 2010* (Cth) (CCA).

The Code provides that the ACCC or the Minister for Agriculture may exempt a port terminal service provider from the application of Parts 3 to 6 of the Code in relation to port terminal services provided at 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 Code's obligations are discussed in section 1.3.

1.1. How the ACCC will assess whether it is appropriate to determine T-Ports to be an exempt service provider

The ACCC is assessing whether it would be appropriate 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 on the Eyre Peninsula of South Australia.

In deciding whether to determine a PTSP to be an exempt service provider, the ACCC is required to consider the 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.

To inform its consideration of these matters, and consistent with the ACCC's exemption guidelines,⁷ the ACCC considers that it is appropriate to seek the views of interested parties.

The ACCC is therefore conducting a public consultation process during which interested parties are invited to comment on specific questions and matters relating to the appropriateness of T-Ports receiving exempt service provider status at Lucky Bay.

⁷ ACCC, Guidelines on the ACCC's process for making and revoking exemption determinations, October 2014. Available on the ACCC's website at <http://accc.gov.au/publications/process-guidelines-for-making-revoking-exemption-determinations>.

Following a consideration of the matters listed at subclause 5(3) and the views expressed by interested parties in the course of the ACCC's public consultation process, the ACCC will decide whether to exempt or not exempt.

1.2. Why the ACCC is conducting this assessment prior to T-Ports' facility being completed

Construction of T-Ports' facility at Lucky Bay is not yet complete and therefore T-Ports is not yet formally covered by the Code, or capable of being formally determined an exempt service provider.

However, the ACCC considers that there are a number of reasons why it is appropriate to assess T-Ports' application at this time. These include:

- **certainty** – establishing the level of regulation that a new entrant service provider will be subject to prior to them commencing operations provides certainty to both PTSP and industry regarding the obligations that the PTSP will have to comply with in providing access to its services. The ACCC considers that it is appropriate to provide this certainty where possible.
- **potentially avoiding unnecessary Code compliance measures** – PTSPs that are not determined exempt are required to comply with a series of obligations, some of which require the development of specific mechanisms and documents. For example, Part 3 requires that a PTSP's standard terms must include a dispute resolution mechanism and Part 4 requires that a PTSP's port loading protocol must include a capacity allocation system.

The ACCC considers that where possible it is appropriate to assess whether a new entrant will be an exempt service provider prior to that new entrant being covered by the Code. This approach:

- (in the event that the new entrant will be subject to Parts 3 to 6) provides the new entrant with sufficient time to develop relevant documents and ensure that it will be compliant with the Code's obligations once its facility is covered, or
- (in the event that the new entrant will not be subject to Parts 3 to 6) will ensure that the new entrant will not expend time and resources developing compliance documents that it will not be obliged to use.

The ACCC also notes that:

- the exemption assessment process may commence prior to the completion of the construction of the specified port terminal facility. A PTSP can be determined as exempt once the port terminal facility is able to be specified, and is capable of handling bulk wheat (it need not be operating)
- if the ACCC releases a position document proposing to exempt a new entrant and its facility never becomes operational, a final determination to exempt would not be required and the assessment would have no impact
- if the ACCC releases a position document proposing to exempt and the commencement of operations is substantially delayed, the ACCC retains the ability to request and consider further information prior to making any final determination (e.g. requesting confirmation that the information provided in an application remains current)

- as with all exemptions, the ACCC has the ability to review and if appropriate revoke an exemption it has made if it considers that the reasons for making an exemption no longer apply.⁸

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

Unless exempt, PTSPs are required to comply with Parts 1 to 6 of the Code (that is, all of the Code's obligations).

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

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

in relation to the specified port terminal facility.⁹

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 publically available on their website.

Part 3 of the Code requires a PTSP:

- not to discriminate in favour of itself or its trading business or hinder third party exporters' access to port terminal services,
- to enter into an access agreement or negotiate the terms of an access agreement with an exporter to provide services if an exporter has applied to enter into an access agreement and certain criteria are satisfied, 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 at port information and key performance indicators.

Part 6 requires retaining records such as access agreements and variations to those agreements.

Exempt service providers are still required to comply with general competition law.

⁸ Competition and Consumer (Industry Code—Port Terminal Access (Bulk Wheat)) Regulation 2014, s.5(6).

⁹ Competition and Consumer (Industry Code—Port Terminal Access (Bulk Wheat)) Regulation 2014, s.4(8).

1.4. Consultation

The ACCC invites interested parties to provide their views on whether it would be appropriate for T-Ports to be determined an exempt service provider of port terminal services provided by means of a port terminal facility at Lucky Bay.

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 T-Ports in support of exemption.¹⁰

The ACCC invites interested parties to respond to these questions, comment on the information provided by T-Ports, and provide any additional information they consider relevant to the ACCC's assessment.

1.4.1. 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 format (although other text readable document formats will be accepted). Submissions should be sent to both of the following email addresses:

transport@acc.gov.au

michael.eady@acc.gov.au

1.4.2. Due date for submissions

Submissions must be received before **5.00pm AEST on Friday 17 May 2019**.

1.4.3. 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 – collection and disclosure of information*, available on the ACCC website.

¹⁰ T-Ports' submission is available on the ACCC's website at: <https://www.acc.gov.au/regulated-infrastructure/wheat-export/wheat-export-projects>.

1.4.4. Further information

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

Mr Michael Eady
Director
Infrastructure & Transport – Access & Pricing Branch
ACCC
GPO Box 520
MELBOURNE VIC 3001
Phone: 03 9290 1945
Email: michael.eady@acc.gov.au

or

Mr Scott Sanderson
Senior Analyst
Infrastructure & Transport – Access & Pricing Branch
Phone: 03 9658 6527
Email: scott.sanderson@acc.gov.au

2. Issues for comment

On 28 March 2019, T-Ports provided a written application to the ACCC seeking to be determined an exempt service provider of port terminal services provided by means of a port terminal facility at Lucky Bay.

The ACCC will consider whether T-Ports should be an exempt service provider in relation to services provided by means of the port terminal facility it is constructing at Lucky Bay, having regard to the matters listed in subclause 5(3) of the Code.

This section lists a series of issues for comment. In order to assist interested parties in their consideration of these matters, the following are listed under each issue:

- any specific matters listed in subclause 5(3) of the Code that are relevant to that issue
- extracts of T-Ports' submission in support of exemption that are relevant to the issue, or relate to a specific matter listed in subclause 5(3)
- ACCC questions.

Interested parties are encouraged to reference the Code matters in their response.

2.1. Legitimate business interests of the service provider

Subclause 5(3)(a) of the Code requires the ACCC to have regard to:

- (a) the legitimate business interests of the port terminal service provider
- (e) the promotion of the economically efficient operation and use of the port terminal facility

The ACCC is therefore seeking views on how exempting T-Ports from having to comply with Parts 3 to 6 of the Code in the course of providing port terminal services at Lucky Bay, would impact on T-Ports' legitimate business interests and the efficient operation and use of its Lucky Bay facility.

On the potential impact that compliance with Parts 3 to 6 would have on its business, T-Ports submits:

T-Ports is a start-up business entering as the smaller player in the monopolized grain export market on the Eyre Peninsula in South Australia. T-Ports will face significant challenges in entering this market place and it would be detrimental to the business to be burdened by onerous regulatory controls.¹¹

Key questions and issues

1. *How and to what extent do you think that the legitimate business interests of T-Ports would be affected by having to comply with Parts 3 to 6 of the Code when providing port terminal services at Lucky Bay?*
2. *In what way would an exemption for T-Ports impact on the efficient operation and use of its port terminal facility at Lucky Bay?*

¹¹ T-Ports, Submission in support of exemption, March 2019 (T-Ports submission), p. 6.

2.2. Access to port terminal services

Subclause 5(3)(c) and (d) of the Code requires the ACCC to have regard to:

(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

The ACCC is therefore seeking views on how the interests of access seekers would be impacted by exempting T-Ports from having to comply with Parts 3 to 6 of the Code in the course of providing services at Lucky Bay, including the access seekers' ability to secure fair and transparent access.

T-Ports submits that it is committed to providing flexible and fair access at Lucky Bay:

Shipping services will be offered on a first in first served basis, with no plans to implement long term agreements or selling of operational capacity.¹²

Any exporter who wishes to utilize the services of T-Ports will be welcomed. No preference in shipping slots/bookings will be given to those who have grain stored in T-Ports facilities, nor any discrimination against those bringing grain from third party storages. All services are offered and charged on a commercial basis.¹³

Subclause 5(3)(h) requires the ACCC to have regard to:

(h) whether the port terminal service provider is an exporter or an associated entity of an exporter

T-Ports submits that it is not affiliated with any grain export business:

T-Ports is not an exporter, nor is it an associated entity of an exporter. T-Ports owns and operates bulk handling facilities and the Trans-Shipment Vessel. Grain handling and loading services are offered to grain traders and exporters.

T-Ports is a 100% privately owned company with 53% of shares held by Sea Transport Solutions (own, operate and construct marine vessels) and the balance held by a consortium of private investors.

The ACCC notes however that grain growers may acquire a small ownership interest in T-Ports through the delivery of grain. To the extent that growers decided to export grain in their own right, they may also be acting as exporters. Alternatively, third party exporters may, as is common elsewhere in Australia, acquire and market this grain themselves.

Key questions and issues

- 3. If T-Ports 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), would exporters still expect to be able to secure fair and transparent access to port terminal services at Lucky Bay? That is, would exporters be able to negotiate access on reasonable commercial terms?*

¹² T-Ports submission, p. 5.

¹³ T-Ports submission, p. 5.

2.3. Grain catchment area

Subclause 5(3)(b) of the Code requires that the ACCC must have regard to:

(b) the public interest, including the public interest in having competition in markets

In order to assess the level of competition between providers of port terminal services, the ACCC considers that it is necessary to examine the grain catchment area or port zone that will feed the port, and the substitutability of different ports (whether bulk or containerised), or the domestic market.

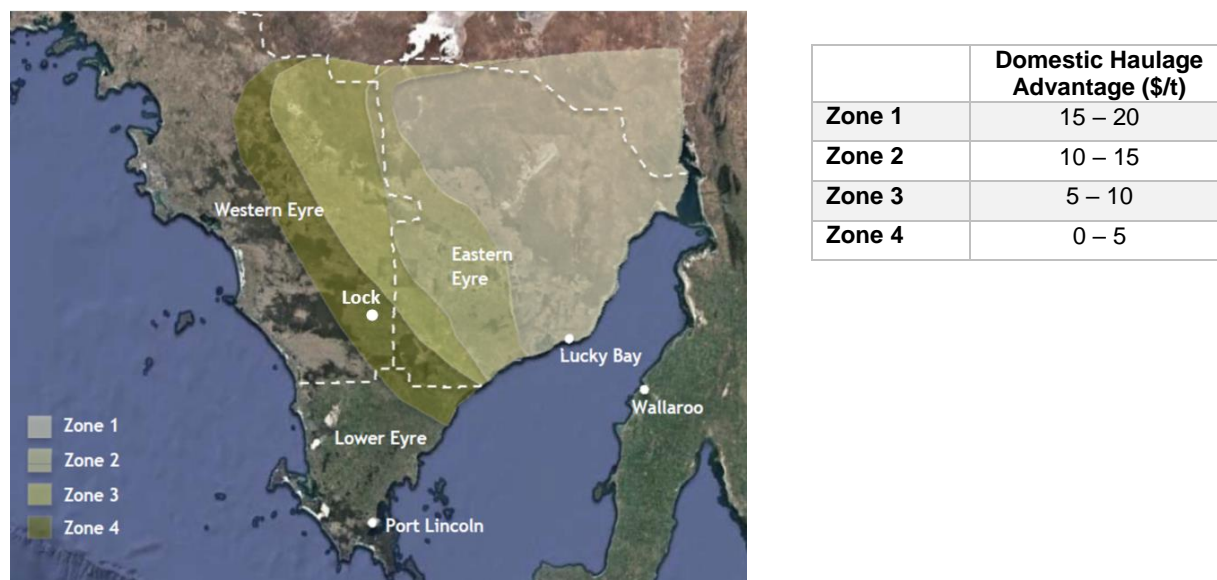
T-Ports describes the Lucky Bay catchment area in the following way:

The catchment zone area is estimated to include the entire Eastern Eyre region where the cost of transporting grain from farm to Lucky Bay would be notably less than transporting to Port Lincoln (Noting that the vast majority est. 95% of any deliveries to Viterria up-country sites will ultimately be moved to Port Lincoln (at grower cost)). The zone extends into Western Eyre region as far west as Cungena / Poochera at which point the freight advantage to northern sites begins favouring the Thevenard port and southern sites begins favouring Port Lincoln. The Lower Eyre region freight advantage primarily favours Port Lincoln, however on the northern most parts of this region there will be farms that are physically closer to Lucky Bay and as such would be freight advantaged to deliver to Lucky Bay.¹⁴

T-Ports also provides its estimate of the Lucky Bay freight advantage:

Lucky Bay export facilities represent a freight advantage for local growers compared to the cost of haulage to Port Lincoln. The map below identifies 4 zones and estimated freight advantage of Lucky Bay over Port Lincoln.¹⁵

Figure 1: Estimated freight advantage Lucky Bay harbour



Source: T-Ports submission in support, p. 3.

¹⁴ T-Ports submission, p. 3.

¹⁵ T-Ports submission, p. 3.

Key questions and issues

4. *What regions should be considered part of the Lucky Bay zone? That is, where will bulk grain exported from Lucky Bay typically be sourced from?*

2.4. Competition in bulk wheat port terminal services

Subclause 5(3)(d) and (i) requires the ACCC to have regard to:

- (d) the likelihood that exporters of bulk wheat will have fair and transparent access to port terminal services
- (i) whether there is already an exempt service provider within the grain catchment area for the port concerned

The ACCC therefore seeks to assess the reasonably anticipated levels of competition in port terminal services at Lucky Bay. In particular, the ACCC is considering the anticipated levels of capacity, demand and spare capacity at Lucky Bay.

The ACCC also is seeking to assess the extent to which T-Ports' facility will compete for grain with other facilities and the extent to which its services will provide a genuine alternative to other services.

On the level of competition that T-Ports will provide, T-Ports submits:

T-Ports commercial estimates are based on securing a loading capacity of up to 600,000 metric tonnes per annum.¹⁶

The Lucky Bay port is expected to have an impact on the demand for services at Viterra Port Lincoln, but less so at Viterra Thevenard. It is estimated that 85% of grain exported from EP is exported from Port Lincoln and 15% from Thevenard.¹⁷

The development of the port at Lucky Bay is expected to provide an alternative choice within the SA grain handling supply chain and provide grain growers in the region with significant cost benefits.¹⁸

T-Ports will offer competition in grain export services and also in grain receipt and storage services offered at harvest.¹⁹

On the level of competition that T-Ports will face, T-Ports submits:

The only other operator of bulk grain export on the Eyre Peninsula is Viterra Ltd, operating grain terminals at Port Lincoln and Thevenard. Viterra Ltd is not an exempt service provider.²⁰

Exporters will have the choice of 2 export supply chains for a significant portion of EP grain (85% currently exported through Pt Lincoln) – with T-Ports offering a commercially viable alternative to the entrenched provider.²¹

¹⁶ T-Ports submission, p. 2.

¹⁷ T-Ports submission, p. 5.

¹⁸ T-Ports submission, p. 4.

¹⁹ T-Ports submission, p. 5.

²⁰ T-Ports submission, p. 6.

²¹ T-Ports submission, p. 5.

Key questions and issues

5. *For grain produced in the Lucky Bay port zone, to what extent would other ports be a genuine alternative destination to T-Ports' facility (i.e. to what extent will T-Ports at Lucky Bay compete against other PTSPs for services)?*
6. *What characteristics or factors are relevant in comparing the services to be provided at Lucky Bay against other port terminal facilities? How do these characteristics or factors affect the level of competition between Lucky Bay and other port terminal facilities? To what extent would T-Ports and any competitors provide substitutable services (i.e. will transshipment impact on the quality of the service that will be provided)?*
7. *Are there capacity constraints on the Eyre Peninsula or is capacity underutilised? If capacity is constrained, when and how often does this occur, and what factors affect this?*

Subclause 5(3)(f) requires the ACCC to have regard to:

- (f) the promotion of efficient investment in port terminal facilities

The ACCC is also seeking to assess how a decision to exempt or not exempt T-Ports' facility will impact investment in port terminal facilities.

Key questions and issues

8. *In what ways and to what extent would T-Ports receiving exempt service provider status at Lucky Bay impact on the efficient investment in port terminal facilities?*

2.5. Competition in upstream, downstream and related markets

Subclause 5(3)(g) requires the ACCC to have regard to:

- (g) the promotion of competition in upstream and downstream markets

In order to assess whether determining T-Ports to be an exempt service provider at Lucky Bay would promote competition in upstream and downstream markets, the ACCC considers that it is relevant to consider the level of competition in the bulk export supply chain, and the extent to which these would impact the level of competition for port terminal services at Lucky Bay.

Storage and transport services

A bulk grain exporter's access to storage and/or transport services may have an impact on the exporter's ability to access port terminal services. Accordingly, the ACCC considers that the level of competition in the upcountry supply chain is relevant to the level of competition in the market for port terminal services.

The ACCC notes, however, that its interest in competition in the upcountry supply chain when conducting a Code exemption assessment is limited to the extent to which it impacts on fair and transparent access to port terminal services.

Regarding the nature, level and location of storage it plans to offer, T-Ports submits:

T-Ports operations will be supported by the development and operation of grain receipt and storage facilities at Lock (132km from Lucky Bay) and bunker facilities at Lucky Bay (2km from berth). Lock facilities include sampling, weighbridge and 150,000mt of bunker storage. Lucky Bay facilities include sampling, weighbridges and 360,000mt of bunker storage.²²

Regarding the impact that this storage will have on competition in the upcountry supply chain, T-Ports submits:

The development of an alternative supply chain from farm gate to ship loading provides competition in the upstream market. Growers will now have the choice between two bulk storage providers and two export ship loading providers. In addition to storage facilities at Lock and Lucky Bay, T-ports will also offer an off-farm accumulation service, direct to ship loading service, supporting the development of effective on-farm storage options. The proximity of the port to the growing areas enables such a service to be viable. This service completes the link of providing competition in provision of services in the entire length of the supply chain for a significant portion of eastern EP growers.²³

On the impact of T-Ports' facility on the market for transport services, T-Ports submits:

Approximately 85% of all grain on the Eyre Peninsula is currently transported by truck. This presents limitations to efficiencies due to fixed tonne capacities (average load per truck is 31 mt) and load restrictions. By developing a port closer to the production of grain, there will be less need to transport grain longer distances, resulting in reduced traffic and carbon emissions. Reducing the total kilometres of heavy truck traffic will improve public safety and reduce road maintenance costs.²⁴

Key questions and issues

9. *What level of competition will there be between upcountry storage and handling facilities, and in the provision of transportation services, in the Lucky Bay grain port zone? How prevalent is on-farm storage in the region?*
10. *How would the level of competition in upcountry storage and transportation impact on an exporter's ability to secure fair and transparent access to port terminal services at Lucky Bay?*
11. *How would an exemption for T-Ports impact on competition in the upcountry and transportation markets, and the upcountry supply chain as a whole?*

Domestic and container markets

The ACCC also considers that the domestic and container export markets may compete with the bulk export market for grain.

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.

As noted in the ACCC's 2017-18 Bulk Wheat Ports monitoring report, relative to other states South Australia typically has comparatively low levels of domestic consumption (15 per cent of grain usage annually) and containerised exports (3 per cent).²⁵

²² T-Ports submission, p. 3.

²³ T-Ports submission, p. 6.

²⁴ T-Ports submission, p. 5.

²⁵ ACCC, 2017-18 Bulk Wheat Ports Monitoring Report, p. 61.

However, while the domestic and container markets are not as active in SA, the level of competition posed by these markets is a matter that the ACCC must have regard to.

Key questions and issues

12. *To what extent will domestic demand and containerised exports provide a competitive constraint on bulk grain exports at Lucky Bay?*

2.6. Other matters

Subclause 5(3)(j) requires the ACCC to have regard to:

- (j) any other matters the ACCC considers relevant

Key questions and issues

13. *Are there any other matters the ACCC should consider relevant to determining whether T-Ports is an exempt service provider of port terminal services provided by means of a port terminal facility at Lucky Bay once it is capable of handling bulk wheat?*

Appendix A: Exemption assessments under the Code

The Code, prescribed 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

PTSPs are required to comply with all six Parts of the 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 publically available on their website.

Part 3 of the Code requires a PTSP:

- not to discriminate in favour of itself or its trading business or hinder third party exporters' access to port terminal services,
- to enter into an access agreement or negotiate the terms of an access agreement with an exporter to provide services if an exporter has applied to enter into an access agreement and certain criteria are satisfied, 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 retaining records such as access agreements and variations to those agreements.

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

Exempt service provider determination by the ACCC

Subclause 5(2) of the Code provides that the ACCC can determine a PTSP to be an exempt service provider of port terminal services provided by means of one or more of its port terminal facilities. Subclause 5(3) of the Codes provides that the ACCC must have regard to a list of matters in making a determination under subclause 5(2) of the Code. The ACCC can subsequently revoke an exemption determination under subclause 5(6) of the Code.

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).

On 17 November 2014 the Minister for Agriculture found that Co-operative Bulk Handling Limited's (CBH) port terminal facilities located at the ports of Albany, Esperance, Geraldton and Kwinana satisfactorily meet the criteria for exemption under subclause 5(1) of the Code. The Minister therefore determined CBH to be an exempt service provider at those facilities and accordingly, CBH is not required to comply with Parts 3 - 6 of the Code when providing port terminal services from those facilities.

How the ACCC will conduct its assessment process

On 16 October 2014 the ACCC released its *Guidelines on the ACCC's process for making and revoking exemption determinations* (the Guidelines).²⁶

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 on this issues paper close on **5.00pm AEST on Friday 17 May 2019**.

Depending on views received in response to this issues paper, the ACCC may either release a draft decision seeking further views or proceed directly to a position document in relation to the application.

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

²⁶ The guidelines are available on the ACCC's website at <http://acc.gov.au/publications/process-guidelines-for-making-revoking-exemption-determinations>.