Draft Determination

Port of Portland

GrainCorp and Riordan Grain Services

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

Date 16 August 2019

Executive Summary

Under the Port Terminal Access (Bulk Wheat) Code of Conduct (the Code), the ACCC has made a draft determination that Riordan Grain Services (RGS) is an exempt service provider of port terminal services provided by means of its port terminal facility at Portland.

If the ACCC makes a final determination to grant RGS an exemption, RGS will be subject to a lower level of regulation, as parts 3 to 6 of the Code will not apply in relation to the port terminal services provided by means of its Portland port terminal facility.

The ACCC has also made a draft determination not to grant GrainCorp Operations Ltd (GrainCorp) an exemption for port terminal services provided by means of its port terminal facility at Portland.

In making these draft determinations, the ACCC has had regard to the matters listed at subclause 5(3) of the Code. The ACCC has formed the preliminary view that:

- RGS' Portland port terminal facility faces significant competition from GrainCorp's Portland facility. If an exemption is granted to RGS, the ACCC considers that it is likely that exporters of bulk RGS' Portland port terminal facility will have fair and transparent access.
- However there is not sufficient competitive constraint on GrainCorp's Portland port terminal facility. As such, an exemption may lead to risk of detriment to the interests of third party exporters and their ability to obtain fair and transparent access to GrainCorp's Portland port terminal facility, particularly if export volumes and demand for capacity were to increase in subsequent years. The ACCC considers that given the variability of bulk export volumes, at the current time it would not be appropriate to grant an exemption while there is no permanent competitive constraint on GrainCorp at its Portland facility.

These preliminary views are based on the ACCC's analysis of capacity constraints and usage at the port terminal facilities and the extent to which each of the port terminal facilities compete with each other and compete with any other port terminal facilities.

The ACCC has also considered the extent of any competitive constraint imposed by container exports and domestic demand for wheat.

The ACCC's full assessment of the matters at subclause 5(3) of the Code is set out in chapters 4 to 6 of this document.

The ACCC invites public submissions on the draft determinations set out in this document. Submissions must be received before **5:00pm (AEST), Friday 13 September 2019**.

Further details about making a submission can be found in section 1.5 of this document.

1. Introduction

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

The Code provides that the Australian Competition and Consumer Commission (the ACCC) or the Minister for Agriculture (the Minister) may exempt a PTSP from the application of Parts 3 - 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.

1.1. Exempt service providers

PTSPs that are not exempt are required to comply with Parts 1 to 6 of the Code (that is, the entire Code). Riordan Grain Services (RGS) and GrainCorp are PTSPs at the Port of Portland (Portland).

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 all PTSPs to:

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

1.2. Riordan's exemption application

Currently, Parts 1 to 6 of the Code apply to RGS's provision of port terminal services at its Portland bulk grain port terminal facility.

RGS is an exempt service provider in respect of its port terminal facility at Port of Geelong.

On 4 October 2018 RGS submitted an application to the ACCC seeking to be an exempt service provider of port terminal services provided by means of its Portland facility.

Further details of RGS's exemption application are set out as relevant throughout this document. RGS's full submission in support of its exemption application is available on the ACCC's website at: https://www.accc.gov.au/regulated-infrastructure/wheat-export/wheat-export-projects

1.3. GrainCorp's exemption application

Currently, Parts 1 to 6 of the Code apply to GrainCorp's provision of port terminal services at its Portland bulk grain port terminal facility.

Following the removal of the single desk wheat exporting arrangements and prior to the Code commencing, from September 2009 access arrangements at all of GrainCorp's facilities were governed by an access undertaking. Under this regime, GrainCorp's port terminal facilities were subject to a range of provisions, some of which are similar to those contained in the Code. From 30 September 2014 the Code has applied to GrainCorp's provision of port terminal services at its facilities.[1] The ACCC has since determined GrainCorp to be an exempt service provider by means of its port terminal facilities at Port of Newcastle, Port of Brisbane, Port Kembla and Port of Geelong.

On 5 December 2014 GrainCorp submitted an application to the ACCC seeking to be an exempt service provider of port terminal services provided by means of its Geelong and Portland facilities. In June 2015 the ACCC decided to exempt GrainCorp for services provided by means of its Geelong port terminal facility. The ACCC decided that at the time it was not appropriate to exempt GrainCorp for services provided by means of its Portland port terminal facility.

On 29 November 2018 GrainCorp submitted another application to the ACCC seeking to be an exempt service provider of port terminal services provided by means of its Portland facility. GrainCorp's application was made in response to RGS' application.

Further details of GrainCorp's exemption application are set out as relevant throughout this document. GrainCorp's full submission in support of its exemption application is available on the ACCC's website at: https://www.accc.gov.au/regulated-infrastructure/wheat-export/wheat-export-projects

[1] As GrainCorp had an access undertaking regarding its Geelong and Portland facilities in place immediately before the Code commenced, the transitional arrangements outlined in clause 4(6) of the Code dido not apply these facilities. Clause 4(6)(b) of the Code specifies that the Code does not apply until 1 October 2015 to those operators who were providing services before the Code commenced if there was no undertaking in force in relation to those services provided by means of that facility.

1.4. Public consultation undertaken to date

The ACCC released an issues paper on 26 October 2018 seeking public submissions on RGS's exemption application. Following receipt of GrainCorp's application, the ACCC released an issues paper on 7 February 2019 seeking public submissions on GrainCorp's application and on key issues relating to the ACCC's assessment.

The ACCC received two submissions from the following parties in response to both of its two issues papers:

- Victorian Farmers Federation (VFF).
- Grain Producers Australia (GPA).

The ACCC also received a supplementary submission (confidential) from GrainCorp responding to issues raised in these public submissions.

Public submissions are available on the ACCC's website at https://www.accc.gov.au/regulated-infrastructure/wheat-export/wheat-export-projects

1.5. Consultation on these draft determinations

The ACCC invites public submissions on the draft determinations set out in this document. The ACCC asks submitting parties to clearly identify the draft determination/s that their submission relates to. Please include detailed reasons to support the views put forward in submissions.

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

transport@accc.gov.au

michael.eady@accc.gov.au

Please address submissions to:

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

Due date for submissions

Submissions must be received before **5:00pm (AEST), Friday 13 September 2019**.

Confidentiality of information provided to the ACCC

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

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

For further information about the collection, use and disclosure of information provided to the ACCC, please refer to the ACCC publication *ACCC & AER Information Policy: collection and disclosure of information*, available on the ACCC website.

Further information

If you have 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
Ph: 03 9290 1945
Email: michael.eady@accc.gov.au

1.6. Outline of this document

In its Issues Papers the ACCC sought industry comment on issues which would assist the ACCC in assessing GrainCorp and RGS' exemption applications against the matters specified in subclause 5(3) of the Code.

Chapters 2 and 3 of this document present the ACCC's analysis and preliminary views on these issues.

- Chapter 2 considers the characteristics of GrainCorp and RGS' respective port terminal facilities, including their capacity and the demand for their services.
    - Analysis of capacity and demand indicates whether there is spare capacity or capacity constraints at the port terminals and to what extent this would facilitate fair and transparent access if parts 3 to 6 of the Code did not apply.
- Chapter 3 considers the level of competition in upcountry storage and handling as well as the competitive pressures on each of the facilities from alternative port terminal facilities. This chapter also examines competitive constraints on bulk grain export from containerised exports and domestic demand.
    - Analysis of these issues informs the ACCC of whether a port terminal facility faces a sufficient degree of competitive constraint to promote fair and transparent access to port terminal services if parts 3 to 6 of the Code did not apply.

Chapters 4 to 6 use the analysis and preliminary findings from both chapters 2 and 3 to set out the ACCC preliminary assessment of the matters in subclause 5(3) of the Code for each of GrainCorp and RGS' port terminal facilities.

Chapter 7 sets out the ACCC's draft determinations regarding each of these port terminal facilities.

2. Portland bulk grain port terminal services

This section discusses the ACCC's analysis of the market for port terminal services. sets out the ACCC's preliminary views on the availability of and demand for bulk grain port terminal services at Portland.

The ACCC has considered the characteristics of GrainCorp's and RGS's port terminal facilities and capacity available at each facility. The ACCC's consideration of the availability of and demand for port terminal services at Portland is relevant to the ACCC's assessment of the exemption application, having regard to the matters specified in subclause 5(3) of the Code.

2.1. Port terminal facilities and capacity

Figure 1 below provides an overview of the features of GrainCorp's and RGS's respective port terminal facilities at Portland.

Figure 1: Overview of port terminal facilities at Portland

Port terminal facility	GrainCorp's Portland facility	RGS's Portland facility
Rail receival	Standard gauge 1,000 tonnes per hour 1 hopper	Standard gauge Currently does not utilise rail receival
Road receival	250 tonnes per hour 1 hopper	200 tonnes per hour
Storage capacity	60,000 tonnes	20,000 tonnes
Ship loader	< 1 400 tonnes per hour (Max vessel tonnage 60,0000)	200 tonnes per hour (Max vessel tonnage estimate 30,000)

Sources: GrainCorp submission, GrainCorp maximum vessel tonnages 2016/2017, GrainCorp website, RGS submission

RGS's port terminal facility at Portland is a mobile ship loader. RGS transports the mobile ship loader by road between Portland and Geelong in order to carry out shipments at each port. RGS's port terminal facility is able to load 200 tonnes per hour and services vessels up to 30,000 tonnes.

GrainCorp's port terminal facility at Portland is a fixed loader capable of loading grain at a rate of greater than 1,400 tonnes per hour. GrainCorp's port terminal facility services vessels up to 60,000 DWT [2] through one ship loader.

GrainCorp's Portland facility does on occasion receive two-port loading vessels and is usually the second port loading and receiving vessels from East or West.

GrainCorp's superior loading rate may therefore make it a more attractive proposition to exporters. The location of grain production and where it is stored, as well as the quality of

[2] Dead weight tonnes - the number of tonnes that a vessel can carry.

available capacity (i.e. peak or non-peak) will also contribute to an exporter's decision to use either PTSP's port terminal facility at Portland. This is discussed further below.

2.1.1. Receivals

Grain for bulk export is received into Portland by both rail and road, with rail receival into Portland is via standard rail gauge. For comparison the ports of Melbourne and Geelong are connected to parts of Central and North east Victoria by broad rail gauge.

GrainCorp submits that its terminal's catchment is not clearly linked with established rail lines. The terminal has relatively poor rail access compared with alternate options, due to weight restrictions on its feeder rail lines, and the fact that rail freight to the port travels a circuitous route via Ararat.[3] Grain is received into GrainCorp Portland port terminal facility via rail at a rate of up to 1,000 TPH or road at a rate of up to 250 TPH.

RGS operates a road-based delivery system. RGS has storage and handling agreements in place with a range of private storage sites that are primarily road based and RGS uses the transport capabilities of the storage operator. Grain is received from sheds or silos near Portland (approximate storage capacity 20,000 tonnes) where it has been pre-accumulated (approximately 30 to 50 per cent has been accumulated) and the balance delivered direct from up country origins.[4]

2.1.2. Storage at port terminal facility

GrainCorp's total grain storage capacity at its Portland port terminal facility is approximately 60,000 tonnes vertical storage and 80,000 tonnes horizontal storage.[5]

RGS submits that approximately 30-50 per cent of RGS's cargo is pre-accumulated at sheds or silos near the Geelong or Portland ports with the balance of tonnes delivered direct from up country origins to the port for loading.[6]

2.1.3. Capacity

Determining the level of capacity available at each port terminal facility is relevant to assessing the relationship between supply and demand and identifying capacity constraints which, in the absence of a competing facility, could lead to the exercise of market power in the provision of port terminal services.

PTSPs generally publish available shipping capacity at the start of each shipping year. The level of capacity released at a port terminal facility is determined by the PTSP and is the total amount of grain in tonnes that can be loaded during each shipping window. In addition to long term contract and short term contract agreements entered into at the start of the seasons, PTSPs release additional capacity during the season, particularly in peak periods.

The level of capacity available at each port terminal facility is relevant to assessing the relationship between supply and demand and to identify capacity constraints that could lead to the exercise of market power in providing access. A port terminal facility may have spare capacity over the year as a whole but still may be capacity constrained during the peak shipping period.

[3] GrainCorp submission, p3.

[4] RGS submission, p8.

[5] GrainCorp Ports Brochure, https://www.graincorp.com.au, viewed on 16 July 2019.

[6] RGS submission, p8.

An annual capacity of 150,000 tonnes is anticipated at RGS's Portland facility. RGS anticipates loading a maximum of 300,000 tonnes per year across both Geelong and Portland, being approximately 10 vessels, at 30,000 tonnes each. The tonnage would be split in half between Geelong and Portland, however this will depend on seasonal and subsequent market conditions in each port zone. RGS submits that deliveries and loading onto vessel are restricted to approximately 200 tonnes per hour. The movement of the loader between the two ports (Geelong and Portland) takes about 8 hours by road but is subject to road movement constraints at the time of transit. In addition to moving the loader RGS relocates equipment required for the bulk loading between ports, for example sample stand and testing equipment, and grain loaders.[7]

GrainCorp's published available capacity for 2018-19 is 840,000 tonnes capacity at Portland.[8] GrainCorp submits that its Portland facility's theoretical annual loading capacity is well over 2 million tonnes, however the terminal has loaded an average of 280,000 tonnes of grain across the last three shipping years (ranging from 98,000 to a maximum of 544,000 tonnes).[9]

2.2. Exports and exporters

2.2.1. Exports and capacity utilisation

The ACCC considers that where there is spare export capacity at a port terminal facility, a non-vertically integrated PTSP will have an incentive to provide access to exporters to increase throughput.

A vertically integrated PTSP has incentive to increase exports by its own trading business but in relation to spare capacity that cannot be filled by its own trading business, it will have incentive to provide access to third party exporters.

Conversely, where there are capacity constraints, the ACCC considers that a vertically integrated PTSP may have an incentive to exclude other exporters and preference its own trading business.

The ACCC considers the relationship between supply and demand and identifying capacity constraints which, in the absence of a substitute facility, could lead to the exercise of market power in the provision of port terminal services.

RGS' nominal capacity is 150,000 tonnes. It has exported three shipments from its Portland port terminal facility in 2017-18 and none in 2018-19. Exports have been significantly below RGS' published capacity. Exports from GrainCorp Portland have also been below GrainCorp's current published available capacity over the previous three shipping years.

GrainCorp submits that grain loading capacity is substantially underutilised with an average capacity utilisation of 33 per cent over the past three shipping years.[10] GrainCorp submits that its facility is increasingly used as a niche terminal or used to 'top-up' vessels from Geelong or other ports.[11] There are currently no grain vessels booked to load at Portland for the 2018-19 shipping year and GrainCorp considers this situation is unlikely to change.[12] Capacity utilisation from 2014-15 to 2017-18 at GrainCorp's Portland facility is shown in Figure 2 below.

[7] RGS submission, p8

[8] GrainCorp submission, p4.

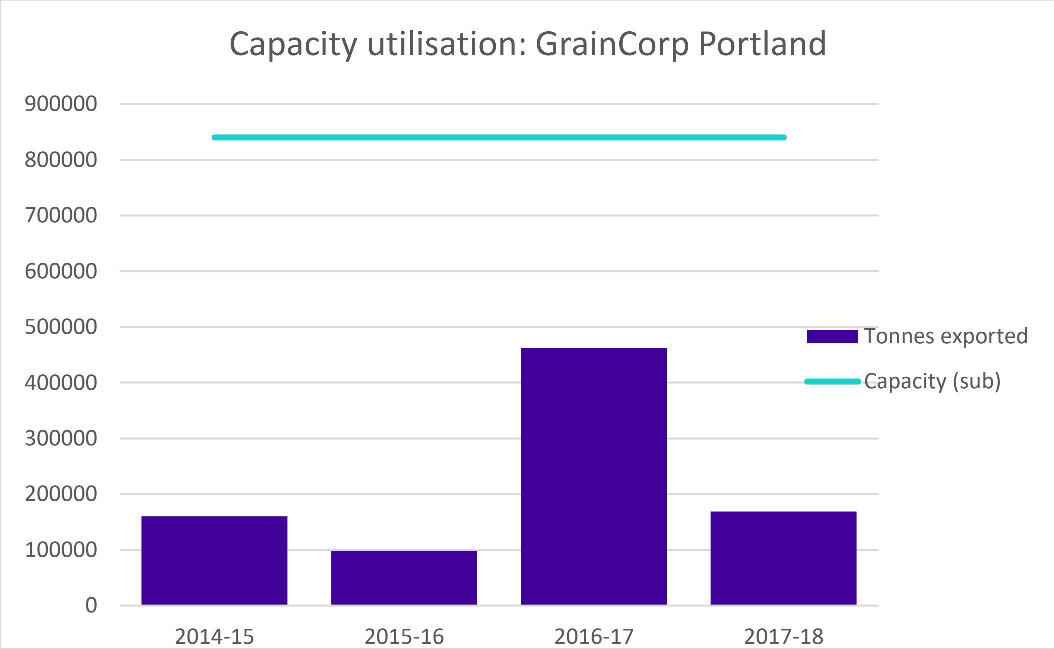
[9] GrainCorp submission, p3.

[10] GrainCorp submission, p3-4.

[11] GrainCorp submission, p3.

[12] GrainCorp submission, p3.

Figure 2: Capacity utilisation at GrainCorp's Portland facility, 2014-15 to 2017-18



Source: Loading statement data provided under section 7 of the Port Terminal Access (Bulk Wheat) Code of Conduct

Historically, exports from Portland have varied but generally been below GrainCorp's available capacity with the exception of the 2011-12 season where exports from Portland were approximately 1.02 million tonnes. [13]

The ACCC considers there is currently spare capacity at both GrainCorp and RGS' port terminal facilities at Portland and there has been varying levels of spare capacity at GrainCorp's Portland facility over the past three shipping years.

2.2.2. Capacity in peak periods

A key concern from the ACCC's perspective when considering whether to exempt a PTSP is therefore the extent to which a vertically integrated service provider can discriminate in favour of its own trading business by allocating itself the majority of peak period capacity and allowing it to obtain the best prices.

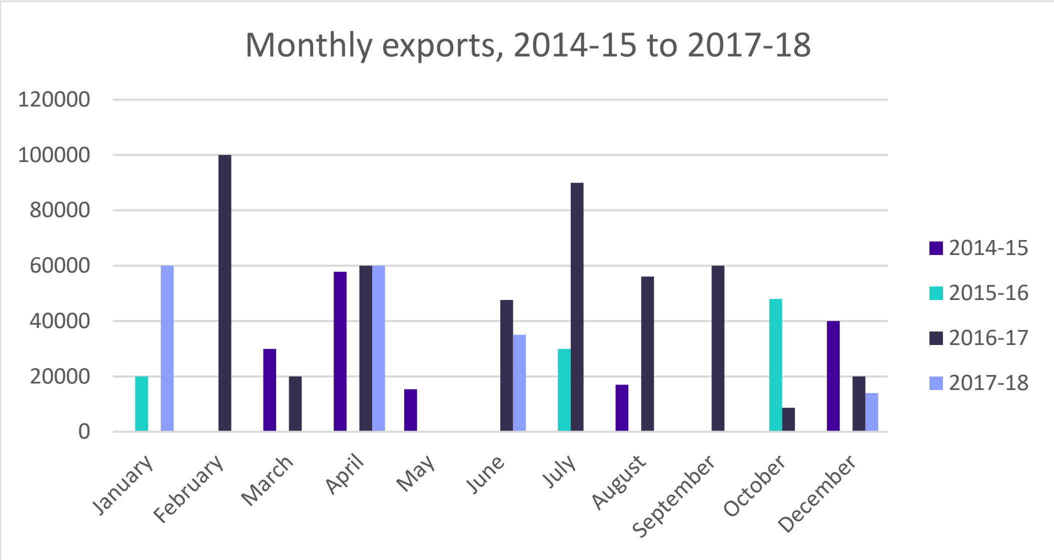
It is traditionally regarded that there is a peak period in the shipping year when exporters can receive the best prices internationally and during this period there is more demand by exporters for shipping capacity at port terminal facilities. This period has generally been February to May and is the period when the most grain is exported from Australia.

While there is this annual peak period of demand for capacity, exporters can and do spread their capacity requirements over the other months of the year. Further, the timing of the peak period itself may vary from year to year depending on the harvest.

As shown in Figure 3 below, in the high volume 2016-17 season GrainCorp Portland's peak months were February, July, and September. In 2017-18 the months with the highest export levels were January, April and June. Accordingly a peak period for GrainCorp's Portland port terminal facility over the past three years is not clearly identifiable and has been variable in the previous three shipping years.

[13] ACCC Final Determination, Exemption in respect of GrainCorp's Portland Port Terminal Facility, 25 June 2015, p21.

Figure 3: Monthly exports from GrainCorp Portland, 2014-15 to 2017-18



Source: Loading statement data provided under section 7 of the Port Terminal Access (Bulk Wheat) Code of Conduct

Historically, exports from GrainCorp's Portland facility and capacity utilisation levels have varied from year to year. The ACCC has previously noted that historical monthly exports from GrainCorp's Portland facility in peak periods have sometimes been higher than GrainCorp's current published available capacity (0.99 million tonnes per annum).[14] However, this has generally only been the case for a few months each year.

In 2017-18 RGS's Portland facility only loaded shipments in February and June. RGS does not currently have any shipments booked for 2018-19. RGS's commencement of operations does not significantly increase the amount of spare capacity available at Portland in both peak and non-peak periods. However RGS's Portland facility does provide exporters with an alternative to GrainCorp Portland. The viability of this alternative is further informed by the bargaining power of exporters as discussed below.

2.2.3. Exporters and bargaining power

The ACCC has considered the bargaining power of exporters and whether exporters have viable alternatives to export or market grain. This is relevant to the ACCC's assessment of the exemption application, having regard to the matters unner subclause 5(3) of the Code.

GrainCorp currently publishes port loading protocols setting out its policies and procedures for managing demand as required by the Code. The Code requirement to publish these policies and procedures will continue to apply whether an exemption is granted or not.[15]

GrainCorp has operated an annual first-in-first-served capacity allocation model at its Victorian ports since 2009. Since 2013 it has also operated a longer term capacity allocation model where exporters can sign long term 'take or pay' agreements for port capacity over

[14] ACCC Final Determination, Exemption in respect of GrainCorp's Portland Port Terminal Facility, 25 June 2015, p21.

[15] Part 2 of the Code requires all PTSPs deal with exporters in good faith, publish and make available a port loading statement, publish 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.

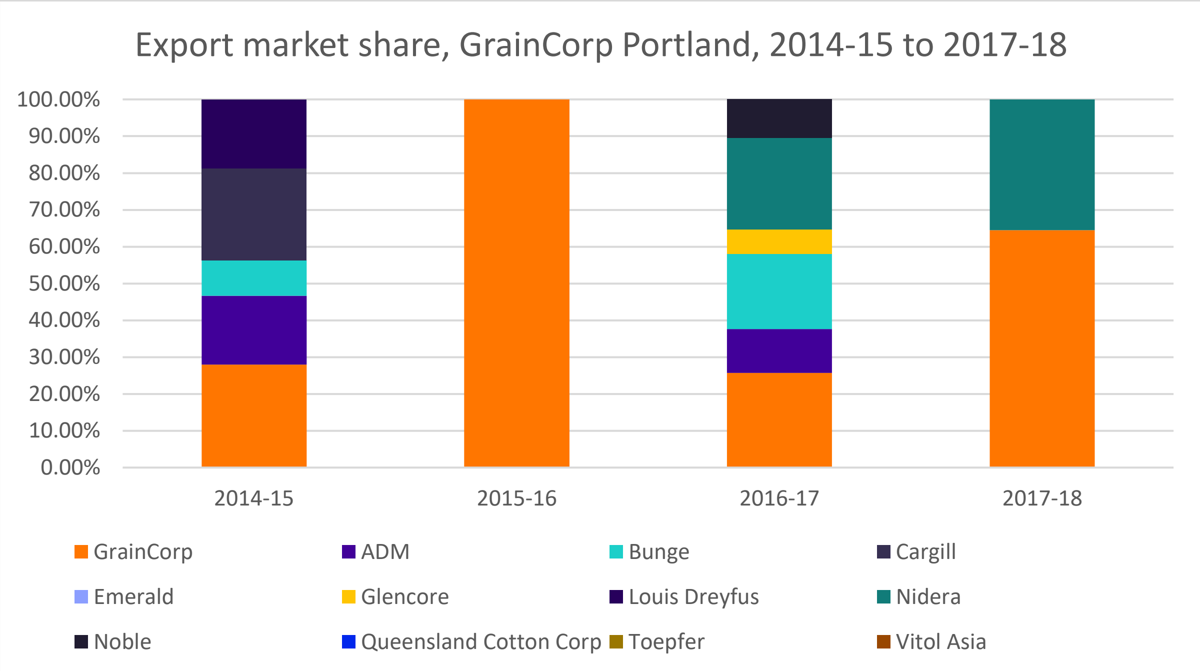
three years.[16] GrainCorp's most recent long term capacity release was 90,000 tonnes for a 3 year term from 1 October 2019 to 30 September 2022.[17]

GrainCorp provides services to its vertically integrated trading arm that competes for access with third party exporters. RGS is not a grain exporter or an associated entity of an exporter, however RGS does trade domestically

Over the past three shipping years, GrainCorp's trading arm has on average shipped 40 per cent of all grain exported from GrainCorp's Portland facility. However for any given shipping year this proportion has varied between 25 per cent and 100 per cent. In lower volume seasons, third party exports have been lower and GrainCorp has been the main exporter at Portland. In the 2018-19 season so far, no bulk grain has been shipped through GrainCorp Portland.[18]

Figure 4 below illustrates exporter market share at GrainCorp Portland from 2014-15 to 2017-18 based on loading statement data provided to the ACCC under section 7 of the Code.

Figure 4: Export market share at GrainCorp's Portland facility, 2014-15 to 2017-18



Source: Loading statement data provided under section 7 of the Port Terminal Access (Bulk Wheat) Code of Conduct

In 2015-16 export volumes through GrainCorp's Portland facility decreased significantly to 98,000 tonnes and there were no third party exports until October 2016.19 The 2016-17 shipping year was another relatively high volume season (462,355 tonnes shipped), of which GrainCorp shipped 25 per cent, and 74 per cent of exports was elevated by third party

[16] https://www.accc.gov.au/media-release/accc-allows-graincorp-to-introduce-long-term-port-access-agreements; GrainCorp Long Term Agreement Capacity Allocations 1 October 2013 – 30 September 2016, http://www.graincorp.com.au/storage-and-logistics/ports-and-shipping/ viewed 16 July 2019.

[17] GrainCorp Long Term Capacity Announcement, 6 June 2019.

[18] Loading statement data provided under section 7 of the Port Terminal Access (Bulk Wheat) Code of Conduct.

[19] Loading statement data provided under section 7 of the Port Terminal Access (Bulk Wheat) Code of Conduct.

exporters (Nidera/Cofco, Bunge Agribusiness Australia, ADM Trading, Noble (now Australian Grain Export) and Glencore Agriculture). However in 2017-18 when export volumes fell to 169,000 tonnes, third party exporters elevated only 35.5 per cent of exports. In the ACCC's 2017-18 monitoring report, the ACCC noted that exporters who had historically been the major users of the GrainCorp Portland facility did not export in 2017–18. For example, ADM and Glencore did not use the Portland port terminal facility at all in 2017–18, in comparison to 2016-17 when they collectively shipped 115000 tonnes through Portland. The evidence from 2015-16 and 2017-18 suggests that other exporters may not consider Portland a priority facility in low yield years.[20]

Overall there is some evidence that third party exporters are able to get access to capacity at GrainCorp's Portland facility, however the extent of this access depends on the year. GrainCorp may be more likely to provide fair and transparent access at times of small harvests in order to attract throughput as it will have incentive to continue to utilise its fixed asset. Conversely, in high yield years when third party exporters are more likely to seek capacity at Portland, GrainCorp will have incentives to favour its own marketing arm to secure the most profitable shipping slots, although Figure 4 suggests that other users have been able to get capacity.

RGS' Portland facility commenced operations in June 2018 and all of the few shipments have been exported by third party exporters. As RGS is a new entrant at Portland, the ACCC considers that third party exporters have a level of bargaining power in accessing required capacity at RGS' Portland facility.

2.3. Competition across the bulk wheat supply chain, container exports and domestic demand

This section sets out the ACCC's analysis of the bulk grain supply chain services such as upcountry storage and grain transportation services. In particular, the ACCC has considered the extent to which each of the port terminals draw grain from overlapping catchment areas or geographic areas, and therefore the extent to which port terminal facilities compete with each other for bulk grain export volumes.

The ACCC considers that ownership of upcountry storage provides an alternate way in which a vertically integrated PTSP can limit the ability of non-vertically integrated PTSPs to compete. There is the potential for this to occur if the vertically integrated PTSP is able to prevent a third party exporter from getting grain from upcountry to the non-vertically integrated PTSP's facility.

This section also discusses the competitive effect of container export services and the domestic demand for grain. In particular, containerised exports and domestic demand are alternative options for grain marketers, and therefore potentially provide a competitive constraint on the PTSPs.

The ACCC's consideration of the extent to which the PTSPs compete with each other and are constrained by containerised exports and domestic demand is relevant to the ACCC's assessment of the exemption application, having regard to the matters under subclause 5(3) of the Code.

Stakeholder views from the ACCC's consultation process on the exemption applications are also included as relevant in this section.

[20] ACCC Bulk Grain monitoring report 2017-18, p80.

2.3.1. Upcountry storage and handling

The upcountry storage and handling market is a relevant consideration in the ACCC's assessment of the exemption applications. GrainCorp has vertically integrated operations in Victoria and the ACCC has considered whether it is able to use its position in upcountry markets to limit the ability of competing exporters to access port terminal services. The ACCC has also considered the extent to which the presence of RGS's port terminal facility at Portland may promote the use of alternate storage operators.

Grain Trade Australia (GTA) produces 'Location Differentials', which are attributed to each upcountry grain bulk storage and handling facility.[21] The value is representative of transport costs to move grain from an upcountry site to a port terminal facility. Location differentials are not actual freight rates. However the ACCC considers that they do provide an indication of the costs to move grain from a specific upcountry site to port. Accordingly they can assist consideration of the extent to which port terminal facilities compete with each other for bulk grain export volumes.

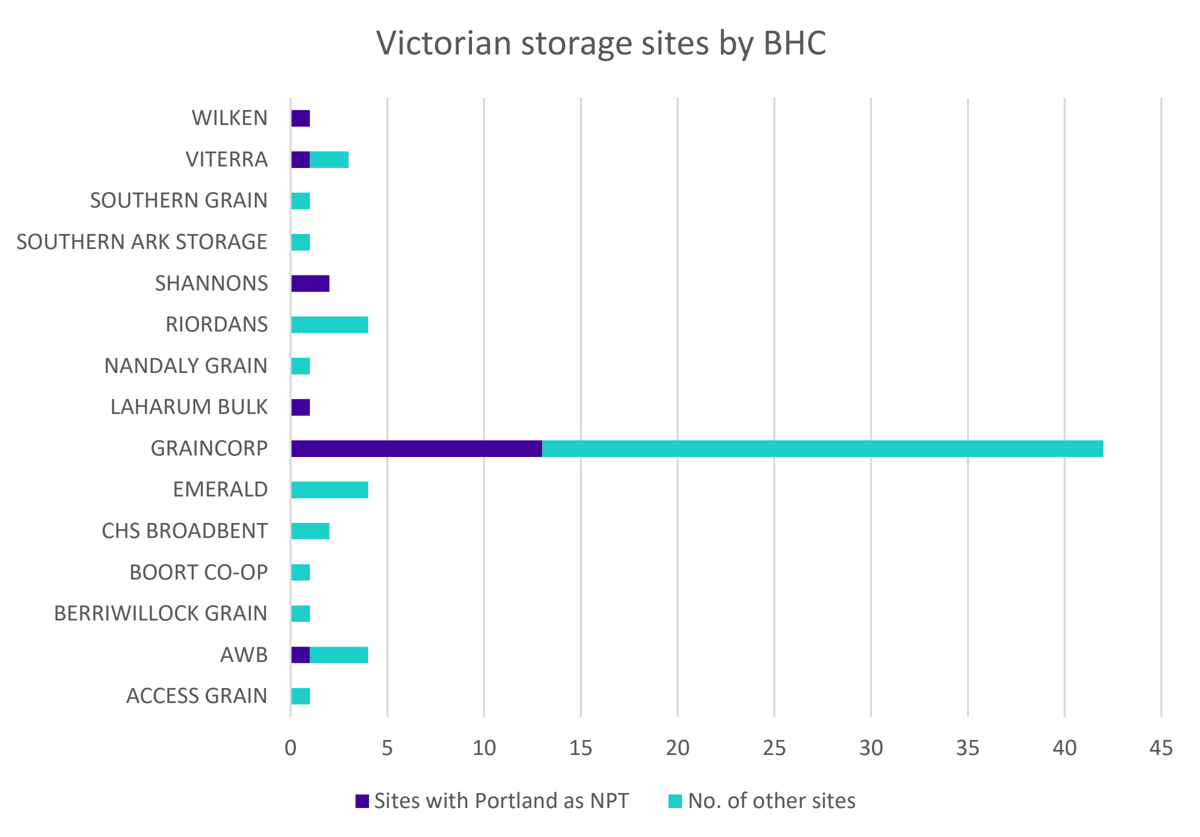
Figure 5 below illustrates the ownership of storage sites in Victoria and the extent to which sites have Portland as their natural port terminal. GrainCorp currently operates 42 storage sites in Victoria, which account for approximately 63 per cent of total number of storage sites in Victoria.[22] GrainCorp currently owns approximately 13 or 68 per cent, of the Victorian sites which have been assessed by GTA as having Portland as their natural port terminal.[23] No other storage operator owns more than 2, or 11 per cent of, sites with Portland as the NPT. For the 13 sites that have Portland as a NTP, there is only competition at 2 of these sites from an alternative storage provider. As such, there is a significant number of sites where GrainCorp will remain the logical upcountry storage provider. The only storage location in SA that has Portland as its natural port terminal is Naracoorte (which has storage facilities owned by GrainCorp and TE Storage and Logistics).

[21] According to Grain Trade Australia Fact Sheet Series No.005 20 April 2018, a Location Differential is the "value" attributed to a specific up-country grain bulk storage and handling facility to an export port terminal facility. They are produced by the GTA Commerce Committee for the purpose of valuing upcountry grain on a 'port basis'. For the determination of the Natural Terminal Port for a site, rail transportation to a port takes precedence over road transportation to that same port. For sites with only road access, the natural port terminal for a storage site is the port with the lowest location differential.

[22] Grain Trade Australia location differentials 2018/19

[23] Grain Trade Australia location differentials 2018/19

Figure 5: Ownership of Victorian storage sites



Source: GTA Location differentials 2018/19, Victoria, effective as of 1 October 2017

In Australia Export Grains Innovation Centre's (AEGIC) 2019 report *Australia's grain supply chains*, AEGIC notes that GrainCorp has 44 receival sites in Victoria, compared to Cargill Grainflow's 4 sites, Emerald Grain's 7 sites, and Viterra's 3 sites. [24] In addition there are 14 sites owned by various smaller businesses. AEGIC notes that combined with the rapid move to on farm storage in eastern Australia, GrainCorp now receives less than 50 per cent of the harvest, and AEGIC notes that this proportion continues to decline each year.[25] GrainCorp submits that over the past three completed seasons, the share of Victorian production received into GrainCorp's network has ranged between 36 to 39 per cent, however this share can reasonably be expected to be significantly lower this year, due to the severe drought conditions in eastern Australia and strong domestic demand for grain.[26]

RGS owns 3 storage sites in Victoria (Lara, Balliang, Stawell) and one site in NSW (Lismore), with a collective storage capacity of 112,000 tonnes. The grain accumulated at these sites is used for domestic sales, container exports and bulk exports. Geelong is the natural port terminal for all of these sites according to GTA location differentials. RGS also leases sheds and silos at Lara, Corio, Balliang and Lismore. The total capacity of these storage sites is approximately 130,000 tonnes and is currently utilised for storage of alternate products (fertiliser, imported meals etc.), storage of grain for domestic customers and storage for export pathways (containers and mobile bulk loading at Geelong).[27]

[24] AEGIC, Australia's grain supply chains, Costs, risks and opportunities, 2019, p 41.

[25] AEGIC, Australia's grain supply chains, Costs, risks and opportunities, 2019, p41.

[26] GrainCorp submission, p3.

[27] RGS submission, p4.

Around Portland, RGS has access to sheds that it can lease at various locations with an approximate storage capacity of 20,000 tonnes. This capacity is currently utilised solely for pre-accumulation for bulk vessel loading.[28] In other locations, RGS has storage and handling agreements in place with a wide range of up country private storage sites with the potential to accumulate up to 400,000 tonnes in multi-use private stores. RGS may not own tonnes in these sites every year. In any given year RGS will carry up to 150,000 tonnes of grain out of harvest and is a buyer of grain throughout the year from growers and the trade.[29]

In Victoria on-farm storage is also available in silos, bunkers and silo bags. The ACCC does not have specific on-farm storage capacity figures but understand that on-farm storage presents growers with an alternative to GrainCorp's storage sites.

The ACCC considers the RGS' operations at Portland and agreements with upcountry storage providers may provide an alternative for growers to GrainCorp's storage network. The ACCC's preliminary view is that given GrainCorp's dominant position there is currently a lack of competition in upcountry storage and handling, particularly those sites located geographically closest to Portland, which would provide a strong constraint on GrainCorp's ability to exercise market power while it remains a dominant PTSP at Portland. The ACCC considers on-farm storage and road transport from farm to port provides some alternative but that it isn't clear it is not necessarily an alternative in all circumstances.

2.3.2. Grain catchment area

Port terminals may be in competition with each other if, for instance, grain from one area could practically move to either of the two (or more) terminals. The relevant catchment area for each terminal is likely to be related to established transportation links to each port including rail networks and road pathways that connect the port terminals to growing regions and the associated upcountry storage infrastructure.

GrainCorp and RGS are the only two port terminal operators that operate facilities at Portland. The potential alternative port terminal facilities are Emerald's Melbourne facility, GrainCorp's and RGS' facilities in Geelong, and Viterra's port terminal facilities and Semaphore Container Service's facilities in Adelaide.

RGS submits that GrainCorp Geelong and Emerald Melbourne (both exempt service providers) and Viterra Adelaide are in the same catchment area.[30] GrainCorp also submits that its port terminal facility at Portland shares the same catchment area as the facilities at Geelong, Melbourne and Adelaide.

The VFF submits that for growers in the 'Portland Zone', the increased cost associated with transporting grain the additional distance to other ports such as Geelong and Port Adelaide limits the potential of any real competition between Portland and the other ports.[31] Rail infrastructure into Portland is inferior to Geelong, and road transport is regularly used to transport grain to Portland. VFF submits that grain prices in the Portland zone also typically trade under the Geelong zone.[32]

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[28] RGS submission, p4.

[29] RGS submission, p4.

[30] RGS submission, p7.

[31] Victorian Farmers Federation submission, p1.

[32] Victorian Farmers Federation submission, p2.

AEGIC has noted that in 2014–15 the overall relationship between GrainCorp execution rates and distance was similar to the GTA location differentials, but was more variable.[33] Depending on the location, the rate was slightly higher, lower or the same as the location differential. AEGIC's report states that the rates quoted for 2017–18, while still more variable than the GTA location differential, were mostly lower (on average about 9 per cent), and the trend for a reduction in overall rates remains. AEGIC reported that GrainCorp states some of the reasons for the reduced rates are related to investment in rail infrastructure by the NSW and Victorian governments together with complementary investments by GrainCorp in its receival sites.[34]

The ACCC considers that GTA's Location Differentials indicate that across a number of site locations, the cost (based on distance) is likely to be higher to move grain from Western Victoria to a port other than Portland. There can be a difference up to 18.25 in value for some locations. For example, transporting grain from Hamilton (South Western Victoria) to Portland is a lower theoretical cost than transporting grain to Melbourne and Geelong. This is reflected in a location differential of 14 from Hamilton to Portland, whereas to Melbourne and Geelong it is 32.25 and 25.75 respectively. Another example considered is Lillimur in Western Victoria which has a location differential of 27.75 for transport to Portland, in contrast to a location differential of 32.25 to Outer Harbour and an even higher theoretical cost to transport to Melbourne and Geelong (location differentials of 41.25 and 40.25 respectively).

The ACCC notes that of the 19 sites whose NPT is Portland, 9 of those sites are not on the rail line and are required to utilise road transport to move grain to port. As such greater distances in these instances are generally associated with higher costs to move grain to an alternate port instead of Portland.

The ACCC considers that, while the Portland facilities' grain catchment area may have some overlap with Geelong and Melbourne or Adelaide ports, there is a lack of a clear alternative port which would facilitate competition for grain and provide a significant competitive constraint on GrainCorp's Portland facility. In particular, for the storage facilities in Western Victoria not located on the rail line and which utilise road to move grain to port, the ACCC considers viable alternative port options may be limited.

2.3.3. Containerised exports and domestic demand for grain

GrainCorp submits that for most grain growing areas, the road distance (and cost) to sell grain to the domestic market or to Melbourne Container Terminals is comparable to that of moving it to alternative destinations, including ports in Melbourne, Geelong and – for some growers in North West Victoria – Adelaide.[35]

GrainCorp submits that bulk grain exports are generally restricted to the surplus remaining after domestic and container demand is satisfied. It is submitted that this means that bulk exports from Victoria are highly volatile, ranging from 990,000-4.85 million tonnes over the past three years.36 GrainCorp submits that the domestic market consumes on average 40 per cent of Victorian grain production, and that the container market generally has first call

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[33] Australian Export Grains Innovation Centre, Australia's grain supply chains, Costs risks and opportunities, October 2018, p59.

[34] Australian Export Grains Innovation Centre, Australia's grain supply chains, Costs risks and opportunities, October 2018, p59.

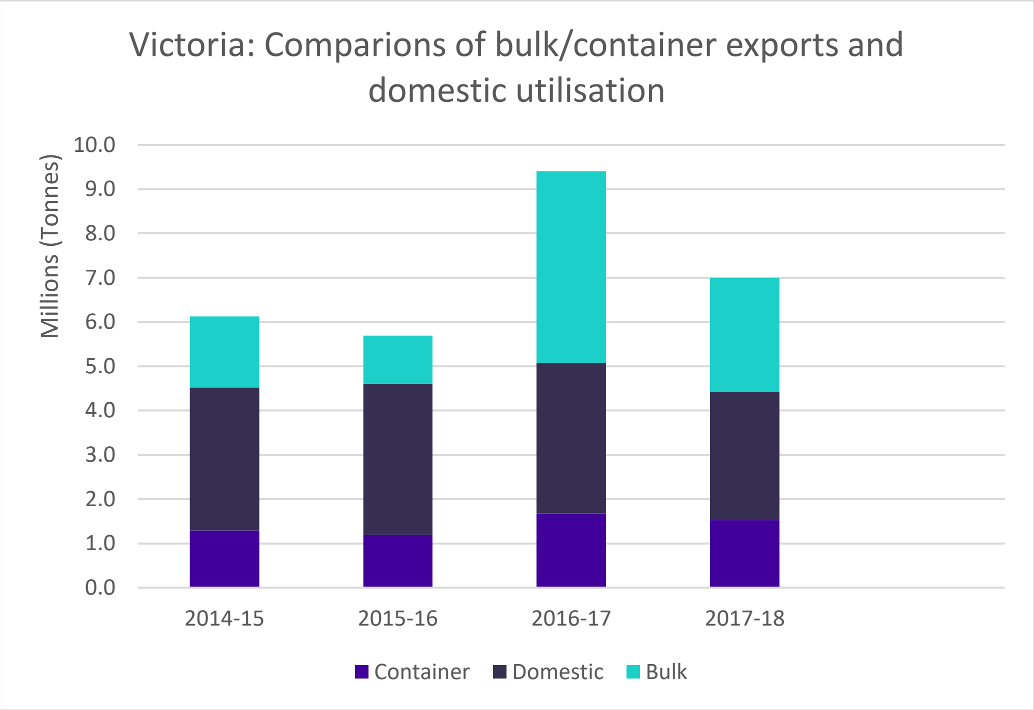
[35] GrainCorp Submission, p3.

[36] GrainCorp Submission, p2.

on export grain and has grown rapidly, averaging 1.4 million tonnes per annum in the past three completed export seasons.[37]

As would be expected, the proportion of bulk exports has been generally higher following periods of higher production. The proportion has also been more variable than container exports. Figure 6 illustrates the proportion of bulk export, container exports and domestic utilisation. Over the past three completed shipping years (2015-16 to 2017-18), container exports out of Victoria have ranged from 2.8 million to 3.2 million tonnes. Container exports remained a large proportion of grain usage relative to bulk exports. Container exports made up 37 per cent of all grain exports from Victoria in 2017–18, and 28 per cent in 2016–17.[38]

Figure 6: Victorian bulk exporters, container exports and domestic utilisation



Source: PTSP loading statements, Australian Crop Forecasters, Supply and Demand report; and Australian Crop Forecasters, Export report

The ACCC's view is that 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. Containers also generally are considered to have first call on export grain.

Domestic consumption for Victoria in the 2017–18 shipping year was nearly 2.9 million tonnes, 15 per cent below the 2016–17 figure of 3.4 million tonnes. With the exception of 2016–17, domestic consumption of grain has been higher than bulk exports over the last four years, particularly following lower harvest years. This may provide some constraint on bulk exports during these low yield periods however the domestic market is not a directly interchangeable market.

[37] GrainCorp submission, p2.

[38] ACCC Bulk Grains Monitoring Report 2017-18, p75.

The ACCC considers that domestic consumption and container exports volumes are generally stable whereas bulk exports are more variable, picking up the remainder of the grain that is available after the demand for domestic consumption and container exports have been met.

3. ACCC's preliminary exemption assessment of Riordan's Portland port terminal facility

This section sets out the ACCC's preliminary assessment of whether it should determine under clause 5(2) of the Code that RGS is an exempt service provider of port terminal services provided by means of its Portland port terminal facility.

In making a determination under clause 5(2), clause 5(3) provides that the ACCC must have regard to the following matters:

(a) the legitimate business interests of the port terminal service provider;

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

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

(d) the likelihood that exporters of bulk wheat will have fair and transparent access to port terminal services;

(e) the promotion of the economically efficient operation and use of the port terminal facility;

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

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

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

(i) whether there is already an exempt service provider within the grain catchment area for the port concerned;

(j) any other matters the ACCC considers relevant.

The ACCC's preliminary assessment below is set out against the matters which the ACCC must have regard to in subclause 5(3)(a) to (j) of the Code.

(a) the legitimate business interests of the PTSP

Subclause 5(3)(a) of the Code requires the ACCC to have regard to the PTSP's legitimate business interests in deciding whether to grant an exemption.

The ACCC considers that an exemption will be in a PTSP's legitimate business interests where there are reasons why it is not necessary for the PTSP to be subject to all of the Code's obligations. For example, obligations in the Code intended to prevent a PTSP exercising market power may not be necessary where competition already provides sufficient constraint on the PTSP's ability to exercise market power. The ACCC considers that removal of unnecessary regulatory obligations is in a PTSP's legitimate business interests.

The ACCC considers when having regard to the legitimate business interests of the PTSP (as required under subclause 5(3)(a) of the Code), the following may be relevant:

- The ongoing commercial viability of services provided from the relevant port terminal facility.

- The likely impact that obligations to comply with Parts 3 to 6 of the Code may have on any investment decisions made by the PTSP.

- The likely impact of the costs incurred by the service provider if it were subject to the requirements of Parts 3 to 6 of the Code, including any opportunity costs arising from having to comply with these Parts of the Code.

- The likely impact of greater regulation (through the application of Parts 3 to 6 of the Code) on the PTSP's ability to compete in the provision of port terminal services or other upstream and downstream markets.

The ACCC will consider the legitimate business interests of a PTSP against the other matters under subclause 5(3)(a) of the Code, including the interests of exporters.

The ACCC considers it is in a PTSP's legitimate business interests to promote the ongoing commercial viability of its business, and this may involve efforts to reduce its regulatory compliance costs (or to not incur additional costs). The ACCC recognises that regulation does impose some cost on the regulated business, and where regulation is not necessary (such as where there are sufficient competitive constraints) then it would be appropriate to reduce that cost.

The ACCC acknowledges that an exemption will enable further operational flexibility and that operational flexibility is likely to always be in the business interests of a PTSP. However the ACCC considers that business interests will not be 'legitimate' business interests if it prevents access seekers from obtaining fair and transparent access to port terminal services. Operational flexibility is to be balanced against the extent of whether, in the absence of Parts 3 to 6 of the Code, there is constraint on the exercise of market power in the provision of port terminal services.

RGS submits that an exemption will encourage not only RGS but others to pursue innovative supply chain solutions for export of grain out of Australia.[39]

Under the existing regulatory arrangements RGS has an existing level of flexibility to manage its legitimate business interests in relation to its Portland facility. Under the full coverage of the code, RGS can set prices, terms and conditions for elevation and can negotiate non-standard terms for different exporters.

Regarding the impact that complying with Parts 3 to 6 of the Code will have on RGS's costs, the ACCC acknowledges that parties subject to a higher level of regulation will likely have a higher level of compliance costs. However these costs are generally at their highest prior to and during the initial phase of regulation, where compliance documents and procedures need to be developed.

The ACCC considers that compliance costs may be particularly significant for a smaller player only operating a single port terminal facility, given that compliance costs will be proportionately higher compared to overall costs and revenue. A larger player operating multiple port terminal facilities may be able to spread compliance costs over its facilities. RGS is a smaller operator and therefore its compliance costs may be proportionally higher for its operations.

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[39] RGS submission, p7.

Given the above factors, and the ACCC's following analysis, overall the ACCC is satisfied that an exemption for RGS's Portland facility would be in the legitimate business interests of RGS due to a reduction in regulatory costs and the extent to which RGS could provide more competitive port terminal services.

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

The ACCC considers that subclauses 5(3)(b) and 5(3)(g) of the Code relate to the promotion of competition in markets, including the market for bulk wheat port terminal services as well as for upstream, downstream and related markets.

Relevant upstream markets include the grain acquisition market, where grain is acquired prior to it being exported or on-sold, as well as other markets such as the grain storage and handling services market and the transport of grain to port market. Related markets also include container grain exports and domestic demand for grain.

The following factors are relevant when having regard to subclauses 5(3)(b) and (g):

- Whether there is a sufficient competition in the market for bulk wheat export port terminal services, such that the full application of the Code may not be required to promote competition for those services or in upstream and downstream markets.

- Whether reducing regulation will allow the PTSP to better compete in upstream or downstream markets such that it would also promote competition. This consideration overlaps with the ACCC's consideration of legitimate business interest (subclause 5(3)(a) discussed above).

- Whether there is sufficient competition in upstream and downstream markets such that there is a constraint on the exercise of market power in the provision of port terminal services in the absence of Parts 3 to 6 of the Code applying.

Grain Producers Australia (GPA) supports RGS's application for an exemption. It is GPA's view that while the industry is still not functioning as a truly competitive market should, there is a need to provide incentive for smaller operators to challenge the status quo.[40] In relation to the promotion of competition in upstream and downstream markets, GPA submits that having all exporters able to negotiate port access on a fair and transparent basis, reinforced by the Code, allows smaller players to compete for export opportunities and therefore offer competitive prices up country.[41]

The ACCC considers that RGS' port terminal facility provides certain exporters with an alternative service. Granting an exemption will allow RGS as a new entrant to more easily compete for potential customers. RGS as the new entrant at Portland has little market power in the provision of port terminal services and is constrained by the presence of GrainCorp Portland. The ACCC's view is that exempting RGS at Portland is in the public interest and will promote competition in the market and along the supply chain.

The ACCC considers that granting an exemption to RGS will enable it to better compete as an alternative port terminal facility and that this may support investment in upcountry storage. There is currently some level of competition in upstream markets however, as

[40] GPA submission, p2.

[41] GPA submission, p3.

discussed above in Section 2, GrainCorp has market power in the operation of storage facilities in Victoria and in the supply chain path to Portland. Granting an exemption to RGS may promote competition in encouraging the development of alternative storage facilities and on farm storage, including where an exporter operates its own storage facility or facilities. The ability to use alternate pathways to export will allow new entrants (both in storage and export of grain) to more easily compete.

The ACCC considers that if an exemption were granted to RGS, it would promote competition in the port terminal services market and grain acquisition market, and may promote competition in the upcountry storage market.

(c) the interests of exporters who may require access to port terminal services; and (d) the likelihood that exporters of bulk wheat will have fair and transparent access to port terminal services

In deciding whether to exempt a PTSP, subclauses 5(3)(c) and (d) of the Code require the ACCC to have regard to the interests of exporters who may require access to port terminal services and the likelihood that exporters will have fair and transparent access to port terminal services.

The ACCC generally considers that granting an exemption will promote the interests of exporters requiring access to port terminal services if exporters can access port terminal services on a fair and transparent basis and compete in the grain export market on their relative merits. The ACCC will also consider the bargaining power of exporters and whether exporters have a viable alternative to export grain.

RGS provides third party exporters additional choice where previously GrainCorp was the sole bulk grain provider at Portland. The ACCC notes that that RGS currently only exports intermittently from Portland and does not have storage facilities at the port. RGS's operations may be more attractive to smaller exporters, as in a peak season the capacity offered by RGS may be insufficient to provide elevation for numerous exporters and larger tonnages. However the ACCC considers that RGS still offers some exporters a viable alternative to the incumbent service provider and it is in the interests of exporters to have a viable alternative for export.

RGS is not vertically integrated and is a new entrant to the market, so it is unlikely to have incentives to discriminate or hinder access to third party exporters. RGS may offer access to exporters on favourable terms in order to attract them to use its facility rather than GrainCorp's, and thereby maximise throughput and profitability of RGS' facility. As such, it is likely that exporters will have fair and transparent access to port terminal services if RGS is granted an exemption from the full extent of the Code. In these circumstances, requiring RGS to comply with the full obligations in the Code is likely to be of limited practical benefit in relation to providing access to third party exporters.

The ACCC considers that granting an exemption to RGS is likely to be in the interests of exporters in the market. RGS will have incentives to provide access to its facility on fair and transparent terms in order to maximise throughput, and the full level of regulation under the Code is not necessary to ensure fair and transparent access for exporters to RGS' port terminal services.

(e) the promotion of the economically efficient operation and use of the port terminal facility; and (f) the promotion of efficient investment in port terminal facilities

In deciding whether to exempt a PTSP, subclauses 5(3)(e) and (f) of the Code require the ACCC to have regard to the promotion of the economically efficient operation and use of the port terminal facility and efficient investment in port terminal facilities.

The ACCC's preliminary view is that RGS faces a substantial level of competition from GrainCorp at Portland and this level is sufficient to drive RGS's efficient operation of its port terminal facility. The competition posed by GrainCorp will be sufficient to encourage RGS as a new entrant to make efficient investments in its facility. Granting RGS an exemption should lower RGS's compliance related operating costs and promote the efficient operation of its facility.

In terms of efficient investment, the ACCC considers that the removal of unnecessary regulation, will promote efficient investment in port terminal facilities more broadly. Exempting RGS's in relation to services provided through its mobile ship loader when it is located in Portland, may provide an incentive to other exporters or industry participants to invest in similar technology when it is economically efficient to do so.

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

Under subclause 5(3)(h) the ACCC will generally consider the degree to which the PTSP is vertically integrated in grain exportation. The extent to which a vertically integrated operator favours, or is likely to favour, its own trading arm will influence the ACCC's decision on whether it is necessary for the full extent of the Code to apply or whether an exemption should be granted. RGS is not an exporter or an associated entity of an exporter and therefore does not have this type of incentive.

(i) whether there is already an exempt service provider within the grain catchment area for the port concerned

The ACCC generally considers that, where there is already an exempt service provider within a grain catchment area, or where the Code does not otherwise apply to a service provider in a catchment area, this may support an exemption. The ACCC will, however, consider this matter on a case by case basis, taking into account the full extent of competitive constraint operating on each facility.

RGS submits that GrainCorp Geelong, and Emerald Melbourne (which are exempt service providers) and Viterra are in the catchment area for Portland. On the basis of distances required to transport grain as discussed above in Section 2, the ACCC does not consider that these ports share the same catchment RGS's Portland operations in order provide a sufficient competitive constraint.

The ACCC is assessing whether to grant GrainCorp exempt status in respect of its facility at Portland. At this time, the ACCC's preliminary decision is not to grant GrainCorp an exemption. The ACCC considers that GrainCorp's Portland port terminal facility provides a competitive constraint on RGS, regardless of whether GrainCorp is exempt or not exempt by means of its facility at Portland.

(j) any other matters the ACCC considers relevant

The ACCC does not consider that there are any other matters relevant to its preliminary assessment of RGS's application for exemption at Portland.

3.1. Draft Determination

The ACCC has made a draft determination that RGS should be an exempt service provider of port terminal services provided by means of its port terminal facility located at Portland.

4. ACCC's preliminary exemption assessment of GrainCorp's Portland port terminal facility

This section sets out the ACCC's preliminary assessment of whether it should determine under clause 5(2) of the Code that GrainCorp is an exempt service provider of port terminal services provided by means of its Portland port terminal facility.

In making a determination under clause 5(2), clause 5(3) provides that the ACCC must have regard to the following matters:

(a) the legitimate business interests of the port terminal service provider;

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

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

(d) the likelihood that exporters of bulk wheat will have fair and transparent access to port terminal services;

(e) the promotion of the economically efficient operation and use of the port terminal facility;

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

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

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

(i) whether there is already an exempt service provider within the grain catchment area for the port concerned;

(j) any other matters the ACCC considers relevant.

The ACCC's preliminary assessment below is set out against the matters which the ACCC must have regard to in subclause 5(3)(a) to (j) of the Code.

(a) the legitimate business interests of the PTSP

Subclause 5(3)(a) of the Code requires the ACCC to have regard to the PTSP's legitimate business interests in deciding whether to grant an exemption.

The ACCC considers when having regard to the legitimate business interests of the PTSP (as required under subclause 5(3)(a) of the Code), the following may be relevant:

- The ongoing commercial viability of services provided from the relevant port terminal facility.
- The likely impact that obligations to comply with Parts 3 to 6 of the Code may have on any investment decisions made by the PTSP.
- The likely impact of the costs incurred by the service provider if it were subject to the requirements of Parts 3 to 6 of the Code, including any opportunity costs arising from having to comply with these Parts of the Code.

- The likely impact of greater regulation (through the application of Parts 3 to 6 of the Code) on the PTSP's ability to compete in the provision of port terminal services or other upstream and downstream markets.

The ACCC will consider the legitimate business interests of a PTSP against the other matters under subclause 5(3)(a) of the Code, including the interests of exporters.

The ACCC considers it is in a PTSP's legitimate business interests to promote the ongoing commercial viability of its business, and this may involve efforts to reduce its regulatory compliance costs (or to not incur additional costs). The ACCC recognises that regulation does impose some cost on the regulated business, and where regulation is not necessary (such as where there are sufficient competitive constraints) then it would be efficient to reduce that cost.

The ACCC acknowledges that an exemption will enable further operational flexibility and that operational flexibility is likely to always be in the business interests of a PTSP. However the ACCC considers that business interests will not be 'legitimate' business interests if it prevents access seekers from obtaining fair and transparent access to port terminal services. Operational flexibility is to be balanced against the extent of whether, in the absence of Parts 3 to 6 of the Code, there is constraint on the exercise of market power in the provision of port terminal services.

Under the existing regulatory arrangements GrainCorp has an existing level of flexibility to manage its legitimate business interests in relation to its Portland facility. GrainCorp can set prices, terms and conditions for elevation and can negotiate non-standard terms for different exporters. GrainCorp can vary its capacity allocation arrangements by applying for approval from the ACCC.

As a publically listed company GrainCorp has an incentive to minimise costs and maximise the use of its infrastructure to provide returns to its shareholders. The ACCC recognises that regulation does impose some cost on the regulated business, and that it would be efficient to reduce that cost where regulation is not necessary, such as where there are sufficient competitive constraints.

Regarding the impact that complying with Parts 3 to 6 of the Code will have on GrainCorp's costs, the ACCC acknowledges that parties subject to a higher level of regulation will likely have a higher level of compliance costs. These costs are generally at their highest prior to and during the initial phase of regulation, where compliance documents and procedures need to be developed. The ACCC notes that GrainCorp has already incurred the initial compliance costs and the cost savings an exemption would provide would only relate to ongoing compliance costs. The ACCC considers that given the initial costs incurred already and therefore the ongoing commercial viability is not dependent upon the grant of an exemption.

The ACCC considers that compliance costs may be particularly significant for a smaller player only operating a single port terminal facility, given that these costs will be proportionately higher compared to overall costs and revenue. A larger player operating multiple port terminal facilities may be able to spread compliance costs over its facilities. GrainCorp has multiple port terminal facilities (although most are not covered by the full extent of the Code), hence these costs can be more easily absorbed in comparison to a smaller operator. The ACCC also notes that exempt PTSPs are still required to incur the costs of developing and maintaining standard terms and reference prices and to publish and make available loading statements and publish policies and procedures for managing demand for port terminal services.

GrainCorp has submitted that it is restricted operationally by being subject to the full coverage of the Code. The ACCC agrees that there would be some restrictions on GrainCorp from the Code, but that it is unclear that these provide a significant effect on GrainCorp's ability to compete legitimately in the provision of port terminal services or other upstream and downstream markets.

The ACCC is overall satisfied that it would be in the legitimate business interests of GrainCorp to be granted an exemption in respect to its Portland facility, if there is sufficient constraint on GrainCorp's ability to exercise market power. However, the ACCC considers the benefits of an exemption in terms of lower compliance costs would be reduced given the current level of regulation and the number of facilities these costs would be shared between. The ACCC also considers GrainCorp's legitimate business interests is to be balanced against the public interest and the interests of exporters.

The exemption assessment of GrainCorp's Portland facility, therefore, also depends on the consideration of other matters under subclause 5(3) of the Code, which are discussed below.

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

The following factors are relevant when having regard to subclauses 5(3)(b) and (g):

- Whether there is a sufficient competition in the market for bulk wheat export port terminal services, such that the full application of the Code may not be required to promote competition for those services or in upstream and downstream markets.
- Whether reducing regulation will allow the PTSP to better compete in upstream or downstream markets such that it would also promote competition. This consideration overlaps with the ACCC's consideration of legitimate business interest (subclause 5(3)(a) discussed above).
- Whether there is sufficient competition in upstream and downstream markets such that there is a constraint on the exercise of market power in the provision of port terminal services in the absence of Parts 3 to 6 of the Code applying.

Competition in bulk grain export operations

Competition in bulk grain export operations can come from within the same port zone or from neighbouring areas. The ACCC considers that GrainCorp has market power as the incumbent PTSP at Portland, as discussed in Section 2 above.

VFF submits that the competition referenced in GrainCorp's submission is not necessarily permanent, with RGS utilising mobile loading equipment, rather than the traditional fixed port terminal. This equipment does not have the same overhead costs as a fixed port terminal, meaning that RGS has the capacity to close their operations in low production years. An exemption could therefore risk creating a situation in certain years where GrainCorp's Portland facility has no direct competitors without any reporting and monitoring obligations.[42]

GPA submits that the granting of an exemption to RGS should not be considered enough of a reason to grant a similar exemption to GrainCorp. GPA submits that temporary grain

[42] VFF submission, p1.

loading facilities such as RGS's should not be considered as being able to provide permanent competitive pressure to a facility such as GrainCorp's Portland facility. RGS operates on a smaller scale, on a temporary basis without the benefit of an established upcountry grain receival and accumulation system, and all of the information GrainCorp is able to capture through the management of that system.[43]

GrainCorp has the advantage of a permanent port terminal facility in comparison to the new entrant RGS with its mobile ship loading operations. The ACCC considers that, while RGS is more likely to operate in competition with GrainCorp when there is a significant amount of grain, it is unclear whether that competition can be assured given the nature of the RGS operation. RGS may choose to operate its mobile loader at Geelong only. To date, given that there has been little recent grain in the Portland catchment, there has been limited evidence on the nature of competition between the two facilities.

While currently there is spare capacity at GrainCorp Portland, as there is little grain available for export, we are concerned that exporters may not be able to gain sufficient access to capacity during periods of peak demand. Whilst GrainCorp has market power, there is a continuing case for full regulation for GrainCorp's Portland facility.

At Portland the presence of RGS's port terminal facility offers exporters an alternative to GrainCorp Portland. RGS's facility has a significantly lower capacity than GrainCorp's facility, in part because it is a mobile ship loader that moves between Geelong and Portland and is less able to offer capacity to third parties.

The ACCC has also considered competition from other port zones or geographic areas. The ACCC considers that GrainCorp's Portland facility is subject to a degree of competition from other port terminals in Victoria and South Australia. However, the ACCC does not consider that is a sufficient degree of competitive constraint given the distances and transportation requirements involved. There is a large zone of sites in Victoria that have Portland as the most viable choice of destination port.

At this time the ACCC considers the level of competitive constraint faced by GrainCorp at Portland to be somewhat limited. This is largely due to the absence of a permanent alternative bulk terminal facility which provides a sufficient level of direct competition on the GrainCorp Portland facility.

Competition in upstream and downstream markets

The ACCC has considered whether the competitive situation in the upcountry storage and handling, and transport markets, might provide GrainCorp with market power that could be leveraged into its port services, if an exemption was granted, to limit the ability of exporters to participate in the upstream grain acquisition market.

As discussed above in Section 2, GrainCorp as a storage operator has a stronger presence than other storage providers in Victoria, and specifically in the areas most closely serving Portland. It faces some competition from the other storage providers but has the greater presence upstream. Once captured in GrainCorp's storage facilities upcountry, then the grain is held in the GrainCorp system and will tend to go to GrainCorp's facility for export.

While there is currently competition in the provision of storage and handling services, in the absence of a competing port terminal facility, this competition may not be promoted if GrainCorp were granted an exemption at its Portland facility.

[43] GPA submission, p1.

In the downstream market, GrainCorp's trading arm of its business exports a larger proportion grain out of Victoria in comparison to other exporters. The ACCC considers that GrainCorp as a vertically integrated PTSP has incentives to favour its marketing divison, and that if an exemption is granted there is the risk that GrainCorp may use any market power to gain an advantage in the export market.

The ACCC also considers that related markets, such as container exports and domestic demand, can also affect the promotion of competition in bulk wheat port terminal services as well as upstream and downstream markets. 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 ten years. The ACCC considers that containerised exports provide a level of constraint on the bulk export programme at Portland.

Although domestic demand is one option for grain growers to sell grain, the size of this demand is generally constant and limited each season. As such the level of constraint that domestic users place on bulk and container exports is generally restricted by the size of domestic demand.

Conclusion

There is a level of competition in upcountry storage and the related container export programme. However the ACCC does not consider that this places enough competitive constraint on GrainCorp's port terminal services at Portland in the absence of a permanent competing port terminal facility at this time.

(c) the interests of exporters who may require access to port terminal services; and (d) the likelihood that exporters of bulk wheat will have fair and transparent access to port terminal services

The ACCC did not receive any submission from exporters in response to its issues papers for GrainCorp's and RGS's applications.

The ACCC generally considers that granting an exemption will not be detrimental to the interests of exporters requiring access to port terminal services if they can still obtain fair and transparent access and compete in the grain export market on their relative merits. The ACCC will also consider the bargaining power of exporters and whether exporters have a viable alternative to export through the relevant port terminal facility.

The ACCC considers that where demand for port terminal services exceeds supply (i.e. capacity at the port terminal facility is constrained), vertically integrated PTSPs will not be subject to sufficient competitive constraint. On the other hand, the ACCC generally considers that, the greater the level of spare capacity, the greater the incentive for a vertically integrated PTSP to provide access on fair terms. In a lower production or export year, most port terminal operators generally demonstrate greater flexibility in their engagement with access seekers. At those times, GrainCorp will be inclined to facilitate third party access at its facility in order to maximise throughput. As noted, the GrainCorp Portland facility has had some significant spare capacity in some recent years.

As a vertically integrated terminal operator and exporter, GrainCorp has an incentive to favour itself over other exporters at its Portland facility. In particular, during peak times where there may be some capacity constraints (whether overall or at peak times), GrainCorp may have an incentive to provide its own trading arm with the opportunity to obtain the best possible prices for grain in downstream markets.

As larger exporters will be needed for throughput, these exporters may have some ability to bargain with GrainCorp and there is the potential for GrainCorp to favour larger exporters at Portland. Smaller exporters could be hindered at peak times without sufficient competitive constraint on GrainCorp at Portland. If an exemption is granted, some exporters may find it difficult to obtain fair and transparent access at GrainCorp's Portland facility.

RGS's Portland facility (as a mobile ship loader) moves between Portland and Geelong, and RGS offers much lower capacity at Portland in comparison to GrainCorp. The movement of the mobile ship loader between Geelong and Portland is not currently set and depends on grain availability in the two port zones. This may not be attractive to certain exporters. Some exporters may also prefer to use GrainCorp's larger fixed loader due to the larger loads and faster loading. Accordingly, although RGS provides a viable alternative export pathway for certain exporters, there is a lack of a permanent substitute facility to GrainCorp which could service a significant number of marketers from the same area that services Portland.

As noted in Section 2 above, in the past 3 years bulk export volumes have varied from GrainCorp's Portland facility, and in some years export volumes have been much higher. For example, in 2011-12 and 2016-17 GrainCorp's Portland facility experienced a much higher export volume. In the 2017-18 season and current 2018-19 season, there has been lower production levels leading to significantly lower volumes of grain available for bulk export. Third party exporters of bulk grain have not been seeking access, and GrainCorp's own use of the port has decreased. Accordingly there is currently excess available capacity at GrainCorp's Portland facility.

The ACCC considers that in the absence of full coverage of the Code, if production levels increase leading to an increase in demand for port capacity, there will not be enough competitive constraint on GrainCorp at Portland to ensure exporters will have fair and transparent access to port services. Although it is acknowledged GrainCorp would not likely foreclose access to its facility entirely, GrainCorp may have an incentive to alter the availability, terms and conditions of access for third party exporters to maximise profits for its own trading division.

The ACCC's preliminary view is that granting the exemption may lead to risk of detriment to the interests of third party exporters requiring access to GrainCorp's Portland port terminal facility, particularly if export volumes and demand for capacity were to increase in subsequent years. The ACCC considers that given the variability of bulk export volumes, at the current time it would not be appropriate to grant an exemption while there is no permanent competitive constraint on GrainCorp at its Portland facility.

(e) the promotion of the economically efficient operation and use of the port terminal facility; and (f) the promotion of efficient investment in port terminal facilities

The ACCC considers that when having regard to the matters listed at subclauses 5(3)(e) and (f) of the Code, the following will be relevant:

- Whether competition among PTSPs will drive efficient operation and use of the port terminal facility in the absence of full regulation under the Code.
- Whether a requirement to comply with Parts 3 to 6 of the Code would result in lesser uptake of the port terminal service than would otherwise be efficient.
- Whether efficient investment in port terminal facilities will be influenced by a reduction in regulation.

The ACCC considers that it is in GrainCorp's interests to operate its facility efficiently to provide a return to investors whether or not an exemption is granted. The ACCC notes that an exemption would promote GrainCorp's further economically efficient operation and use of its port terminal facility.

The ACCC notes that the level of regulation imposed by the Code (including the capacity allocation systems approved pursuant to it) should strike the right balance between certainty and flexibility. Relevantly, for GrainCorp, which is subject to the Code in full at its Portland facility, the ACCC considers that the Code does provide GrainCorp with flexibility to negotiate with exporters on key terms. The ACCC-approved capacity allocation system (that includes relevant timeframes for releasing a certain amount of capacity) can be amended by GrainCorp with ACCC approval. The Code requires that PTSPs publish standard terms and reference prices but does not provide restrictions on how a PTSP sets those terms and prices. The non-discrimination obligation in the Code is intended to prevent a PTSP from inappropriately providing more favourable terms to its related export business. It is not intended to, and does not, prevent a PTSP from providing different access seekers with different terms and conditions (however still on a fair and transparent basis). The ACCC has considered whether a requirement to comply with Parts 3 to 6 of the Code would result in lesser uptake of the port terminal service.

The ACCC considers there is the potential for more efficient and flexible use of the facility by GrainCorp if the exemption is granted. The ACCC considers that granting an exemption to GrainCorp would not have a significant impact on investment in port terminal facilities generally.

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

Under subclause 5(3)(h) the ACCC will generally consider the degree to which the PTSP is vertically integrated in grain exportation. The extent to which a vertically integrated operator favours, or is likely to favour, its own trading arm will influence the ACCC's decision on whether it is necessary for the full extent of the Code to apply or whether an exemption should be granted.

The ACCC has taken the level of vertical integration into account when considering subclause 5(3)(c) and (d) matters. GrainCorp is a vertically integrated port terminal service provider, with significant market share in bulk grain exports and dominant presence in upcountry storage operations in Victoria. Generally there is a stronger case for full regulation if the potential for a vertically integrated provider to exercise its market power is not constrained. Being vertically integrated, GrainCorp has an incentive to provide favourable terms to its own trading arm, potentially to the detriment of competition. Where there has historically been a significant reliance on other users of the facility for throughput, it seems unlikely that GrainCorp would act in a way that would completely exclude access by grain marketers who are of sufficient scale. However, in the absence of Parts 3 to 6 of the Code applying to GrainCorp's Portland facility, GrainCorp could more easily alter the terms and conditions of access for some or all third party exporters, increase prices or decrease the quality of service.

Accordingly, the ACCC considers that there would be some risks, in particular to smaller exporters, if an exemption were granted to GrainCorp at its Portland facility at this time without the presence of a countervailing market power.

(i) whether there is already an exempt service provider within the grain catchment area for the port concerned

The ACCC generally considers that, where there is already an exempt service provider within a grain catchment area, or where the Code does not otherwise apply to a service provider in a catchment area, this may support an exemption. The ACCC will, however, consider this matter on a case by case basis, taking into account the full extent of competitive constraint operating on each facility.

GrainCorp submits that Graincorp Geelong and Emerald Melbourne (which are exempt service providers) and Viterra Port Adelaide are in the catchment area for Portland. The ACCC does not consider that these alternate ports provide a sufficient competitive constraint on GrainCorp's Portland operations given the additional transport costs and limitations.

Since June 2018, RGS has been operating as a service provider at Portland utilising its mobile ship loader. RGS is not currently an exempt service provider at Portland but the ACCC is assessing whether to grant RGS exempt status in respect of its facility at Portland. RGS's facility is not permanently located at Portland for the entirety of the shipping season, but instead the mobile ship loader is transported by road between Geelong and Portland, dependent on seasonal and subsequent market conditions in each port zone. RGS has completed several shipments from Portland since it commenced operations in 2018, however does not anticipate any further shipments for the remainder of the 2018-19 season given the recent low harvest.

In its preliminary assessment, the ACCC is proposing to grant an exemption to RGS at Portland. Should the ACCC make a final determination to exempt RGS, this would still be unlikely to provide support for an exemption of GrainCorp's Portland facility at this time. This is on the basis of the smaller scale of RGS's operations and the transitory nature which the ACCC considers does not provide a sufficient competitive constraint on GrainCorp at Portland at this time.

(j) any other matters the ACCC considers relevant

The ACCC does not consider that there are any other matters relevant to its preliminary assessment of GrainCorp's application.

4.1. Draft Determination

The ACCC has made a draft determination that, at this time, GrainCorp is not an exempt provider of port terminal services provided by means of its port terminal facility located at Port of Portland.