



Final Determination (Variation of Determination) Port of Geelong Riordan Grain Services

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

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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) (the **CCA**). 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 PTSPs face a lower level of regulation as they remain subject to only Parts 1 and 2 of the Code.

1.1. Exempt service providers

Port Terminal Service Providers are required to comply with Parts 1 to 6 of the Code (that is, the entire Code). Riordan Grain Services (RGS) is a PTSP at Geelong Port (Geelong) and the Port of 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 Grain Services' exemption application

On 28 July 2017, the ACCC determined RGS to be an exempt service provider of port terminal services provided by means of its facility at Geelong Port, which at the time was located at Berth 3, Lascelles Wharf, Geelong Port.

On 30 January 2018 RGS wrote to the ACCC stating that it would be relocating its mobile ship loading facility from Lascelles Wharf to Corio Quay at Geelong, and requested that the ACCC determine RGS to be an exempt service provider of port terminal services provided by means of its facility located at the new berth at Geelong Port.

The ACCC's determination made on 28 July 2017 means that RGS is currently an exempt service provider of port terminal services provided by means of its facility at Geelong. That determination names the facility at Geelong as "Berth 3, Lascelles Wharf". The ACCC's variation of its determination will remove reference to "Berth 3, Lascelles Wharf" and will mean that RGS is an exempt service provider of port terminal services provided by means of its port terminal facility located at Geelong, irrespective of the exact location within Geelong Port. In varying the existing determination, the ACCC has had regard to the matters listed in subclause 5(3) of the Code.

1.3. Public consultation process

The ACCC released an Issues Paper on 26 October 2018 seeking public submissions on the proposed variation of the ACCC's determination. The ACCC did not receive any public submissions in response to its Issues Paper.

1.4. Further information

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

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2. ACCC's exemption assessment of Riordan Grain Services' Geelong port terminal facility

Riordan Grain Services (RGS) is currently an exempt service provider of port terminal services provided by means of its port terminal facility at Geelong. At the time the exemption was granted, RGS's port terminal facility was located at Berth 3, Lascelles Wharf, Geelong Port. The ACCC will vary the determination to remove the words "Berth 3, Lascelles Wharf". In removing the reference to the berth, RGS will still have exempt status at Geelong Port irrespective of the exact location of the port terminal facility within Geelong Port.

In varying its determination the ACCC has had regard to the matters in subclause 5(3)(a) to (j) of the Code.

The ACCC considers that the exact location of RGS' port terminal facility within Geelong Port does not impact the matters in subclause 5(3)(a) to (j) of the Code. These matters are discussed further below.

(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 it is generally in a PTSP's business interests to reduce regulatory compliance costs and maintain operational flexibility. The ACCC accepts that RGS being an exempt PTSP in respect of its port terminal facility at Geelong increases its operational flexibility and reduces its Code compliance costs, particularly noting that RGS is currently not regulated under the Code and would otherwise be required to develop a compliant capacity allocation system amongst other things. The ACCC considers that the exact location of RGS' port terminal facility within Geelong Port does not materially impact this matter.

Overall, the ACCC's final view is that RGS being an exempt PTSP by means of its Geelong port terminal facility is in its legitimate business interests.

(b) the public interest, including the public interest in having competition in markets; (g) the promotion of competition in upstream and downstream markets; and (i) whether there is already an exempt service provider within the grain catchment area for the port concerned

In deciding whether to grant an exemption, subclauses 5(3)(b) and (g) of the Code require the ACCC to have regard to the public interest, including the public interest in having competition in markets, and the promotion of competition in upstream and downstream markets. Subclause 5(3)(i) also requires the ACCC to have regard to whether there is already an exempt service provider within the grain catchment area for the port concerned.

The ACCC notes that it considers the exact location of RGS' port terminal facility within Geelong does not impact each of these matters.

The ACCC has considered these matters and its view is that:

- GrainCorp (Geelong) and Emerald Grain (Melbourne) are currently the dominant providers of port terminal services in Victoria and are already exempt at their respective Geelong and Melbourne facilities. GrainCorp and Emerald Grain also have significant upcountry storage and handling assets across Victoria. The RGS operation will promote further competition in the market and along the supply chain by providing grain exporters with a further option of port terminal service providers.
- RGS will continue to face a significant competitive constraint from the GrainCorp and Emerald Grain facilities, the strong domestic and container market in Victoria and the threat of further competition from other new entrants.

The ACCC considers that circumstances have not changed in relation to whether there is already an exempt service provider within the grain catchment area for the port concerned this matter and both Graincorp at Geelong Port and Emerald Grain at Melbourne Port are still exempt service providers and are in the catchment area for RGS' Geelong port terminal facility.

The ACCC's final view is that varying its determination (such that RGS remains an exempt service provider at Geelong Port, irrespective of the exact location of the port terminal facility within Geelong) will be in the public interest and is likely to promote competition in the upstream and downstream markets.

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

The ACCC considers that the exact location of RGS' port terminal facility within Geelong does not impact upon the assessment of the matters in 5(3)(c), (d) and (h).

RGS is not an exporter or an associated entity of an exporter and does not have incentive to favour any related exporter entity. RGS' port terminal facility at Geelong provides exporters with additional choice in port terminal service providers, and exporters are likely to be able to obtain fair and transparent access.

The ACCC considers that varying the determination (such that RGS remains an exempt service provider by means of its facility at Geelong Port, irrespective of the exact location of the port terminal facility within Geelong Port) is likely to be in the interests of exporters in the market.

(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's view is that the circumstances in relation to these matters have not changed and varying its determination to exempt RGS at Geelong Port will continue to promote the economically efficient operation of and use of its facility, and efficient investment in port terminal facilities.

(j) any other matters the ACCC considers relevant

The ACCC does not consider that there are any other matters relevant to its decision to vary its determination in respect of RGS's exemption at Geelong Port.

2.1. Final Determination

The ACCC has made a final determination to vary its determination to remove the words "Berth 3, Lascelles Wharf" from the determination. This will mean that RGS is an exempt service provider of port terminal services provided by means of its port terminal facility located at Geelong Port, irrespective of the exact location within Geelong Port.