AUSTRALIAN COMPETITION & CONSUMER COMMISSION

Final Determination
Port of Portland
Riordan Grain Services

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

Date 30 March 2020

Executive Summary

Under the Port Terminal Access (Bulk Wheat) Code of Conduct (the Code), the Australian Competition and Consumer Commission (the ACCC) has made a final determination to grant Riordan Grain Services (RGS) an exemption for port terminal services provided by means of its port terminal facility at Portland. This means that 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.

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

- RGS' Portland port terminal facility faces significant competition from GrainCorp's Portland facility.
- The ACCC also 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.
- The ACCC considers that following the granting of an exemption to RGS, it is likely that exporters at RGS' Portland port terminal facility will have fair and transparent access.
- These views are based on the ACCC's analysis of the extent to which each of the port terminal facilities compete with each other and compete with any other port terminal facilities, capacity constraints and usage at the port terminal facilities.

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

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

1. Introduction

The Port Terminal Access (Bulk Wheat) Code of Conduct (the Code) was prescribed by clause 4 of the Competition and Consumer (Industry Code – Port Terminal Access (Bulk Wheat)) Regulation 2014 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 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) is a PTSP 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. RGS's exemption application

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

The ACCC notes that following the release of the issues paper relating to RGS's application for exemption, GrainCorp also submitted an application seeking to be an exempt service provider of port terminal services provided by means of its Portland facility. The ACCC made a draft determination relating to both the RGS and the GrainCorp applications in the same document. GrainCorp has since withdrawn its application for exemption and this final determination document therefore relates only to RGS. A summary of the GrainCorp process is set out below:

- On 29 November 2018 GrainCorp submitted an application to the ACCC seeking to be an exempt service provider at Portland. GrainCorp's application was made in response to the ACCC issues paper in relation to RGS's 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. On 16 August 2019 the ACCC released a draft determination on the GrainCorp exemption application.
- On 19 December 2019 GrainCorp withdrew its application for exemption. The ACCC is therefore not proceeding to make a final determination on GrainCorp's application.
- GrainCorp's application and subsequent withdrawal of its application are available on the ACCC's website at: https://www.accc.gov.au/regulated-infrastructure/wheat-export/wheat-export-projects

1.3. Public consultation process

The ACCC released an issues paper on 26 October 2018 seeking public submissions on RGS's exemption application. An issues paper seeking submissions on GrainCorp's application was released on 7 February 2019.

The ACCC received submissions from the following parties:

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

The ACCC notes that these submissions were made in response to both the RGS application and the GrainCorp application (which has since been withdrawn).

On 16 August 2019 the ACCC released a draft determination on the RGS exemption application. The ACCC's preliminary view was to grant an exemption to RGS at its Portland port terminal facility. The ACCC also released a draft determination on the GrainCorp exemption application and the ACCC's preliminary view was to not grant an exemption to GrainCorp at its Portland port terminal facility.

The ACCC invited comments and any further information from interested parties on its draft determinations. Public submissions were provided by the following parties:

- GPA; and
- VFF.

The ACCC notes that these submissions were made in response to both the draft determination on RGS and the draft determination on GrainCorp, and prior to GrainCorp's withdrawal of its application.

Public submissions are available on the ACCC's website at https://www.accc.gov.au/regulated-infrastructure/wheat-export/wheat-export-projects/graincorp-port-of-portland-wheat-port-exemption-assessment/draft-determination

1.4. ACCC exemption assessment process

In making an exemption determination under the Code, the ACCC must have regard to the matters specified in subclause 5(3) of the Code. These matters are:

(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.

1.5. Outline of this document

In its issues paper the ACCC sought industry comment on issues which would assist the ACCC in assessing RGS's exemption application against the matters specified in subclause 5(3) of the Code. In its draft determination the ACCC presented the ACCC's preliminary analysis and views on these matters.

Chapter 2 of this document presents stakeholder views in response to the ACCC's draft determination.

Chapter 3 of this document presents the ACCC's analysis and views on these issues.

- Section 3.1 to 3.2 considers the characteristics of RGS's port terminal facility, including its capacity and the demand for its 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.
- Section 3.3 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 uses the analysis and findings from both chapters 2 and 3 to set out the ACCC assessment of the matters in subclause 5(3) of the Code for RGS's port terminal facility.

Further information

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

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2. Industry response to the ACCC's draft determination

On 16 August 2019 the ACCC released a draft determination on RGS's exemption application. The draft determination proposed to grant an exemption to RGS for the provision of port terminal services by means of its port terminal facility at Portland.

The ACCC also released a draft determination proposing to not grant an exemption to Graincorp for the provision of port terminal services by means of its port terminal facility at Portland.

Stakeholder views

GPA provided a submission in response to the ACCC draft determinations:

- GPA submits that the RGS services provided at Portland are neither a permanent competitor to GrainCorp at the site, nor are they of the scale that GrainCorp is.
- GPA submits the current poor season should also be taken into consideration as a reason to consider the importance of Portland as an export port during more productive years. During years of higher production all port terminal facilities become highly valuable assets and PTSPs with the capacity to streamline the use of ports through their control of the up country handling system have a substantial advantage.
- The importance of Portland as a grain export facility should not be underestimated. It is the only deep water port in Victoria - the only port capable of fully loading Panamax vessels (55,000 tonne cargo).
- GPA submits the permanent ship loading and storage capacity of the GrainCorp Portland site should be vastly superior [to RGS] for the loading of the Panamax vessels. Faster loading is highly sought after by shipping companies as it reduces the risks of demurrage. GPA submits that *"[t]he RGS facility doesn't provide permanent or equivalent capability therefore it is not true competition to the GrainCorp facility."*
- Portland offers access seekers key export facilities during peak export periods. The ability to access innovative, competitive services is vital to the ongoing viability of Victorian grain producers. GPA considers that the original VFF submission (in response to the ACCC issues paper) clearly outlined the importance of the port and the clear arguments in favour of ensuring the use of the port continues to be supported by all the provisions of the Code.

VFF provided both a submission and a supplementary submission in response to the ACCC draft determination:

- VFF considers that Portland is critical exporting infrastructure for Victorian grain. It is the only deep water port in Victoria capable of fully loading a Panamax vessel. Such vessels deliver significant sea freight efficiencies and lower unit costs which result is higher returns for growers. These efficiencies are also maximized by the faster loading speeds achieved at GrainCorp's terminal compared with RGS.
- RGS's competition is not permanent and the service offered, in terms of tonnes loaded per hour, blending, cargo accumulation, etc., is not comparable to that offered by GrainCorp.
- Other ports provide minimal competition at the margin of their catchment.
- In relation to the RGS's and GrainCorp's facilities at Portland, VFF submits that exporters consider various costs and in general when all these are considered there still tends to be a natural terminal port based on distance or freight costs to port.

- VFF submits that there is some competition between the bulk and container export supply chains, but only for smaller consignments and generally for grain sourced closer to the Melbourne container port.
- The VFF would like to see adherence to the Code extended to all bulk grain export facilities, including RGS.

3. Portland bulk grain port terminal services

This section discusses the ACCC's analysis of the availability of and demand for bulk grain port terminal services at Portland.

The ACCC has considered the characteristics of RGS's port terminal facility and available capacity. 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.

3.1. Port terminal facilities and capacity

Prior to RGS commencing as a PTSP at Portland, GrainCorp was the only PTSP operating at Portland.

Portland is the only deep water port in Victoria capable of loading Panamax vessels (55,000 tonne cargo). Figure 1 below, provided in RGS' submission, shows the location at Portland of GrainCorp's port terminal facility and Riordan's port terminal facility (at Berth 5).

GPA submits that the importance of Portland should not be underestimated as it is the only deep water port in Victoria capable of fully loading Panamax vessels, [1] and VFF also considers that Portland is critical exporting infrastructure for Victorian grain. [2]

[1] GPA, Submission in response to ACCC draft determination, 1 November 2019, p.2.

[2] VFF, Submission in response to ACCC draft determination, 31 October 2019, p.1.

Figure 1: Port of Portland

Source: RGS submission

RGS's port terminal facility at Portland is a mobile ship loader that is able to load 200 tonnes per hour (TPH) and services vessels of up to 30,000 DWT.[3] RGS transports the mobile ship loader by road between Portland and Geelong in order to carry out shipments at each port. RGS is currently exempt from the Code in relation to its port terminal facility at Geelong. RGS currently uses its Portland and Geelong facilities to carry out its own shipments of bulk barley and also facilitates third party exports of various bulk grains including wheat.

In comparison, 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 through one ship loader. GrainCorp is vertically integrated, operating as a PTSP and also operating a related trading arm that carries out exports of various bulk grains including wheat.

Figure 2 below provides an overview of the features of GrainCorp's and RGS's respective port terminal facilities at Portland.

Figure 2: 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 (at port)	20,000 tonnes (near port)
Ship loader	> 1,400 tonnes per hour (Max vessel tonnage 60,000)	200 tonnes per hour (Max vessel tonnage estimate 30,000)

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

GPA submits that the permanent ship loading and storage capacity of the GrainCorp Portland site should be superior for the loading of the Panamax vessels, whilst the RGS facility *"does not provide permanent or equivalent capability therefore it is not "true competition to the GrainCorp facility."*[4] VFF considers that Panamax vessels deliver significant sea freight efficiencies and lower unit costs which result in higher returns for growers, and these efficiencies are also maximized by the faster loading speeds achieved at GrainCorp's terminal compared with RGS.[5]

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, ownership of storage facilities, as well as the quality of available capacity (i.e. at peak or non-peak periods) at port will also contribute to an exporter's decision to use either PTSP's port terminal facility at Portland. In addition, network effects associated with a PTSP having a strong or dominant

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

[4] GPA, Submission in response to ACCC draft determination, 1 November 2019, p.2.

[5] VFF, Submission in response to ACCC draft determination, 31 October 2019, p.1.

presence in upcountry storage may be expected to influence an exporter's choice of port, particularly an exporter is already using that upcountry storage network. Accordingly the overall network effect arising from GrainCorp's dominant incumbent position may result in exporters preferring to remain within the GrainCorp network. This may make it more difficult for RGS to enter the market and compete at port. This is discussed further below at 3.3.1 'Upcountry storage and handling'.

3.1.1. Receivals

Grain for bulk export is received into Portland by both rail and road, with rail receival into Portland being 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, which is able to transport larger loads of grain.

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 is delivered direct from up country origins to the port.[6]

In comparison, grain is received into GrainCorp's 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.

3.1.2. Storage at port terminal facility

RGS does not currently have storage capacity at its port terminal facility at Portland. In comparison, 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.[7]

3.1.3. Capacity

The level of capacity available at each port terminal facility at Portland is relevant to the relationship between supply and demand and the identification of 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. As such these issues are relevant to the ACCC's consideration of the extent to which RGS is constrained in its ability to prevent fair and transparent access to port terminal services.

PTSPs generally publish available shipping capacity at the start of each shipping year.[8] 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 agreements (LTAs) and short term agreements (STAs) entered into at the start of the seasons, PTSPs release additional capacity during the season, particularly in peak shipping periods.[9]

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

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[6] RGS submission, p.8.

[7] GrainCorp Ports Brochure, https://www.graincorp.com.au, viewed on 3 February 2020.

[8] Shipping year: the period from 1 October to 30 September the following year.

[9] Peak shipping period: the period where demand for bulk grain shipment port terminal services is highest, typically from 1 February until 31 May.

capacity over the year as a whole but still may be capacity constrained during the peak shipping period.

RGS submits an annual capacity of 150,000 tonnes will be available at its 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.[10] 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.[11]

In comparison the ACCC understands GrainCorp's annual capacity significantly exceeds that of RGS. GrainCorp's published available capacity for 2018-19 was 840,000 tonnes at Portland.[12]

3.2. Exports and exporters

3.2.1. 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.

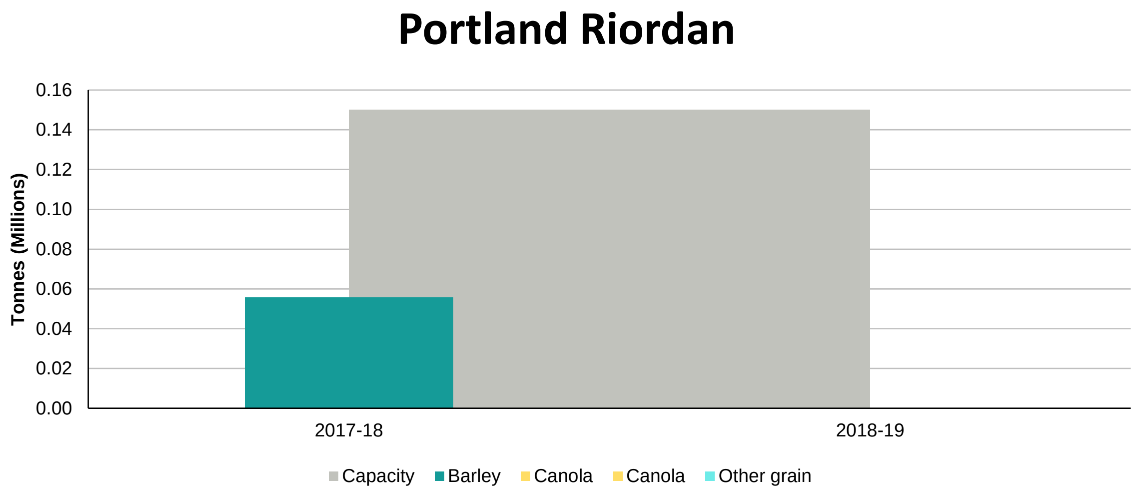
RGS's nominal capacity is 150,000 tonnes. It has exported three shipments from its Portland port terminal facility in 2017-18 and none in 2018-19. Exports have been significantly below RGS's published capacity, as shown in Figure 3. Exports from GrainCorp Portland have also been below GrainCorp's current published available capacity over the previous three shipping years, as shown in Figure 4 below.

[10] RGS submission, p.8

[11] RGS submission, p.8

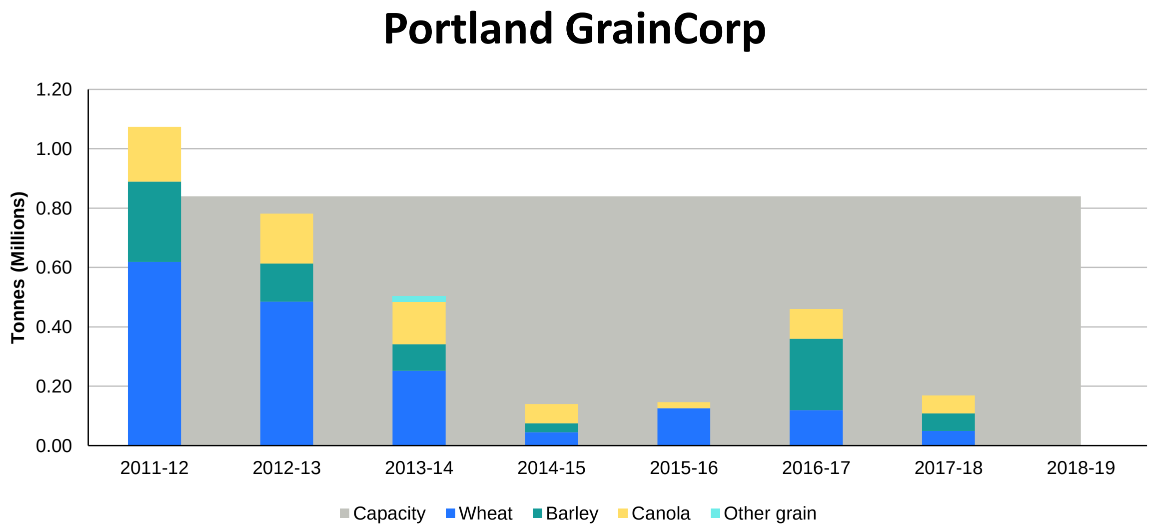
[12] GrainCorp submission, p.4.

Figure 3: Capacity utilisation at Riordan's Portland facility, 2017-18 to 2018-19



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

Figure 4: Capacity utilisation at GrainCorp's Portland facility, 2014-15 to 2018-19



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

Capacity utilisation from 2014-15 to 2017-18 at GrainCorp's Portland facility is shown in Figure 4. 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 RGS's and GrainCorp's port terminal facilities at Portland.

[13] ACCC Final Determination, Exemption in respect of GrainCorp's Portland Port Terminal Facility, 25 June 2015, p.21.

3.2.2. Capacity in peak periods

The ACCC recognises that exporting grain, including bulk wheat, during the peak period (in the first half of the calendar year) will generally provide the best returns for exporters.

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.

In Australia typically 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.

GPA submits that Portland offers key export facilities during peak export periods, and the ability to access innovative, competitive services is vital to the ongoing viability of Victorian grain producers.[14]

As RGS has only been operating at Portland since 2018, a trend for the peak period for RGS' Portland port terminal facility is not clearly identifiable. In 2017-18 RGS's Portland facility only loaded shipments in February and June and did not facilitate any shipments in 2018-19.

RGS's commencement of operations at Portland 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 in 3.2.3.

3.2.3. Exporters and bargaining power

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

RGS's Portland facility commenced operations in June 2018 and since then only one of the few shipments from its facility has been exported by a third party exporter (the other shipments have been of RGS's own bulk barley).

As RGS is a new entrant at Portland and needs to drive throughput at its facility, the ACCC considers that third party exporters have a level of bargaining power in accessing required capacity at RGS's Portland facility.

Part 2 of the Code requires all PTSPs to deal with exporters in good faith and to publish policies and procedures for managing demand. These requirements will continue to apply to RGS whether an exemption is granted or not.

[14] Grain Producers Australia, Submission in response to ACCC draft determination, 1 November 2019, p.3.

3.3. 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, including bulk wheat.

The ACCC considers that a PTSP's ownership of upcountry storage may limit the ability of other PTSPs (which do not operate upcountry storage) from competing at port. 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 its upcountry storage 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, including bulk wheat. 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 application are also included as relevant in this section.

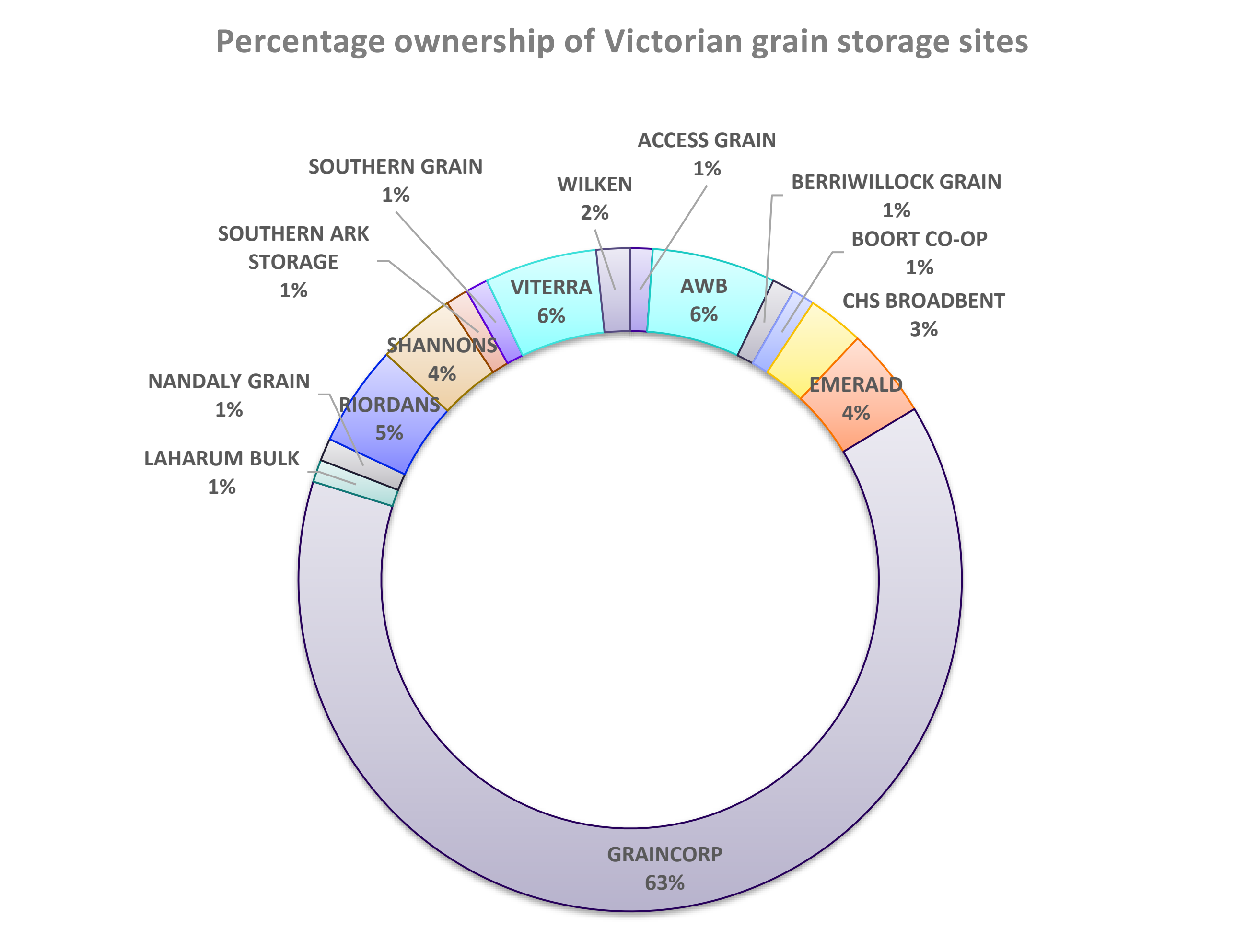
3.3.1. Upcountry storage and handling

The upcountry storage and handling market is a relevant consideration in the ACCC's assessment of exemption applications. If there is a sufficient degree of competition in upcountry services, this may limit the ability of a port operator to leverage the advantage or market power from its upcountry networks for the benefit its port terminal services.

The ACCC has considered the extent to which the presence of RGS's port terminal facility at Portland may promote the use of alternate storage operators.

Figure 8 below illustrates the percentage ownership of Victorian grain storage sites.

Figure 8: Percentage ownership of Victorian grain storage sites



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

In the Australia Export Grains Innovation Centre's (AEGIC) 2019 report *Australia's grain supply chains*, AEGIC notes that GrainCorp has 44 receival sites in Victoria (as noted above this number has decreased to 42 in the 2017-18 year), compared to Cargill Grainflow's 4 sites, Emerald Grain's 7 sites, and Viterra's 3 sites.[15]

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).[16]

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

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

[16] RGS submission, p.4.

pre-accumulation for bulk vessel loading.[17] 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.[18]

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 understands that on-farm storage presents growers with an alternative to bulk storage sites (and an alternative to GrainCorp's storage network which is 63 per cent of total sites in Victoria). AEGIC states that industry experts estimate that over the past five years the amount of grain stored in good-quality steel silos in NSW, Qld and Vic has doubled.[19] The ACCC considers that while on-farm storage and road transport from farm to port provides alternatives to bulk storage, it is not necessarily clear that they provide a viable alternative in all circumstances. For example, access to at-port storage is of particular importance during higher production seasons, when grain volumes may exceed on-farm storage capacity and grain movements place pressure on transport availability.

The ACCC's considers that given GrainCorp's majority ownership of storage sites, there may be limited alternative options outside of this network for grain accumulation for bulk export, particularly at sites located geographically closest to Portland. The ACCC notes that, while GrainCorp has storage at its facility at Portland, RGS does not and it instead delivers to its facility from on-farm or from smaller storage operators. In addition, exporters that typically move grain using the GrainCorp storage network may be reluctant to move out of the network to deliver grain to RGS's port terminal facility for a range of reasons, including the need to establish new arrangements. RGS's operations at Portland and agreements with upcountry storage providers (to enable RGS to deliver grain direct to port for loading) may provide a competitive alternative for growers to other storage networks such as GrainCorp's network. The distance and transport differences from storage site to port are discussed further below in section 3.3.2 in relation to grain catchment areas and location differentials.

3.3.2. 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. Grain movement may be influenced by overall commercial incentives and costs of transportation.

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's 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.[20]

[17] RGS submission, p.4.

[18] RGS submission, p.4.

[19] AEGIC, Australia's grain supply chains, Costs, risks and opportunities, 2019, p.11.

[20] RGS submission, p.7.

Prior to withdrawing its application, GrainCorp submitted that

> "[I]n the years since deregulation of bulk wheat exports, grain flows have changed substantially and continue to evolve. In addition to the many exporters with global scale and presence who are looking to meet their customers' needs in the most efficient manner, farmers are increasingly vertically integrated and have invested significant amounts in on-farm storage. Grain flows to where its value is maximised."
>
> "These factors have resulted in a fundamental change to the market and have had a significant impact on grain flows. They effectively render redundant any analysis of a "natural port terminal" for up-country sites…Increasingly, [farmers] are choosing to keep their grain on-farm and deliver to where they get the best return. This will generally be on a just-in-time basis and will not necessarily be to the nearest bulk handler's country site. Often it is delivered direct to a domestic consumer or direct to port."[21]

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.[22] Rail infrastructure into Portland is inferior to Geelong, and road transport is regularly used to transport grain to Portland.[23]

VFF submits that exporters consider grain production location, localised cost of grain, land-based supply chain costs, ship loading costs, sea freight costs and shipping congestion when selecting an export port. In general when all these are considered there still tends to be a natural terminal port based on distance or freight costs to port. Other supply chain costs do vary to a small degree from port to port but can be easily outweighed by additional land freight costs in transporting grain from outside the natural terminal port catchment.

VFF's supplementary submission states that "Locations closer to Portland obviously have a greater freight advantage over freight to alternative ports. So competition from alternative ports is only for grain originating near the edges of the catchment." [24] VFF further submits:

> "The Portland catchment is generally defined as encompassing the silos on the Wimmera standard gauge lines that connect to Portland...The lowest cost freight option from these silos is generally Portland whether the freight is road or rail. Grain originating outside this zone has lower freight to an alternative port such as Port Adelaide on the western side and Geelong/Melbourne on the eastern side. Grain railed from silos on out-of-zone eastern broad gauge lines would need to transit the Maryborough - Ararat by rail (currently out of service) with a costly bogie exchange. The following table shows indicative additional costs for receiving grain at port from a couple of out of zone sites."[25]

Origin	NTP	Portland			Geelong			Melbourne		
		Road kms	Road freight	LD	Road kms	Road freight	LD	Road kms	Road freight	LD
Charlton	Melb	331	$ 39.72	$ 36.25	265	$ 31.80	$ 29.25	246	$ 29.52	$ 27.00
Donald	Geel	301	$ 36.12	$ 32.50	261	$ 31.32	$ 28.00	279	$ 33.48	$ 30.00
Warracknabeal	Port	276	$ 33.12	$ 28.75	312	$ 37.44	$ 33.50	337	$ 40.44	$ 34.50
Westmere	Geel	180	$ 21.60	$ 21.50	147	$ 17.64	$ 18.50	210	$ 25.20	$ 23.25

Source: VFF supplementary submission, 25 November 2019.

[21] GrainCorp, Response to ACCC draft determination, p.5.

[22] Victorian Farmers Federation submission, p.1.

[23] VFF submission, p. 2.

[24] VFF supplementary submission, 25 November 2019, p.1.

[25] VFF supplementary submission, p.2.

Location differentials

Grain Trade Australia (GTA) produces ‘Location Differentials’, which are a value attributed to each upcountry grain bulk storage and handling facility in relation to an export port terminal facility.[26] Location differentials are not actual freight rates, however the value is representative of transport costs to move grain from an upcountry site to a port terminal facility.

VFF submits that GTA Location Differentials are not actual land freight costs but do reflect freight costs. VFF submits:

> “Road freight costs can be estimated by multiplying $0.12/km by distance from origin to destination. Using this formula to calculate freight costs shows a very strong correlation with LDs – r = 0.99. Clearly there is variation from this formula based on supply and demand factors, particularly for spot market quotes. There is no public information on spot market rail freight costs. These tend to be negotiated with providers’ confidentiality on a case by case. Using this formula you can estimate road freight costs from any origin to any destination. However, the relativity between sites using this formula is similar to using relativity of LDs.”[27]

The ACCC considers that overall it is accepted by industry that transport costs are greater over longer distances and generally greater for road than rail. While acknowledging the limitations of location differentials, the ACCC considers that the locational differentials provide an indication of the costs to move grain from a specific upcountry site to port and are expressed as indicative costs on a dollars per tonne basis. They are indicative in an average year, as in general, in high production years the costs of rail will be more efficient and cost-effective as road transport costs tend to increase. Accordingly location differentials can assist consideration of the extent to which port terminal facilities compete with each other for bulk grain export volumes.

The ACCC considers that GTA’s Location Differentials indicate that across a number of site locations, the general costs (based on distance) are likely to be higher to move grain from Western Victoria to a port other than Portland. In respect of the location differential values, 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).

Upcountry site ownership and proximity to port

Figure 9 below illustrates the ownership of storage sites in Victoria and the extent to which sites have Portland as their ‘natural port terminal’ (NPTs), as defined by GTA location differential data. The ACCC considers that NPTs can be used as a general indicator of increased cost associated with transporting grain the additional distance to other ports.

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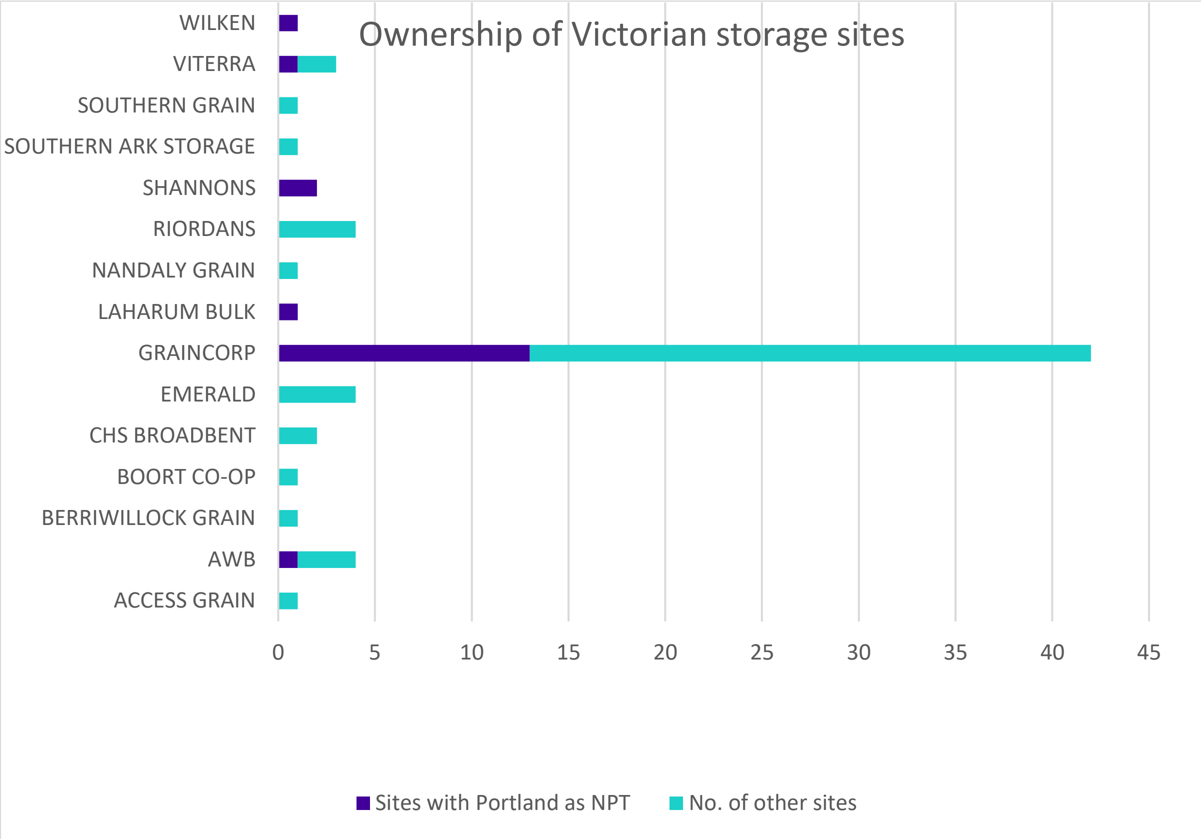
[26] According to Grain Trade Australia Fact Sheet Series No.005 20 April 2018, a Location Differential is the “value” attributed to a specific up-country grain bulk storage and handling facility to an export port terminal facility. They are produced by the GTA Commerce Committee for the purpose of valuing 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.

[27] VFF supplementary submission, p.1.

Figure 9: Ownership of Victorian storage sites, Portland as Natural Port Terminal and other sites



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

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 the ACCC accepts that greater distances in these instances are generally associated with higher costs to move grain to an alternate port instead of Portland.

Conclusion

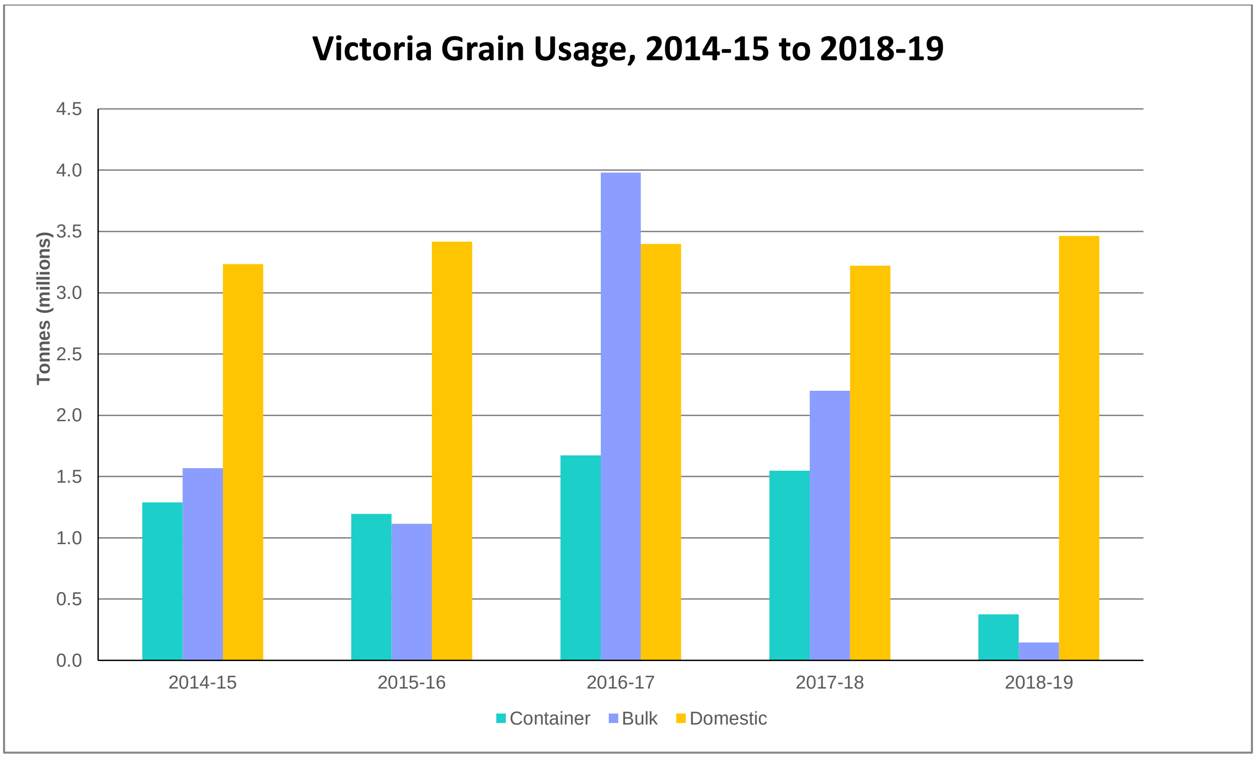
The ACCC considers that, while the Portland facilities' grain catchment area may have some overlap with Geelong and Melbourne or Adelaide ports, there is a lack of a clear alternative port which would facilitate competition for grain (including bulk wheat) and provide a significant competitive constraint on facilities at Portland. 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. Further, as Portland is the only deep water port in Victoria capable of fully loading Panamax vessels, this may limit the interchangeability of Portland with other ports for certain loading requirements.

3.3.3. Containerised exports and domestic demand for grain

The ACCC considers that typically the level of Australian production (and carryover from the previous shipping year) determines the amount of grain that is available for container and bulk export after domestic market demands in Australia have been met. In any year bulk exports are more variable, picking up the remainder of the grain that is available. As would be expected, the proportion of bulk exports has been generally higher following periods of higher production.

Figure 10 illustrates the proportion of Victoria's bulk export, container exports and domestic utilisation of grain from 2014-15 to 2018-19.

Figure 10: Victoria's bulk exports, container exports and domestic utilisation, 2014-15 to 2018-19



Source: PTSP loading statements, Australian Crop Forecasters, Supply and Demand report to October 2019; and Australian Crop Forecasters, Export report to October 2019

The ACCC has observed a slowdown in Australia's container volume growth in 2018-19, partially due to slowed economic activity and the drought in eastern Australia affecting grain volumes generally.[28] Amongst other factors, rising stevedore infrastructure charges may result in the decreasing viability of container exports.

The ACCC has observed from the Australian Crop Forecasters' Export report data on Victoria (to October 2019) that Victorian container export volumes have decreased in the last two years. However bulk exports from Victoria have decreased even more, so the proportion of container exports in comparison to bulk exports has increased. As shown in figure 10, Victoria exported 0.37 million tonnes in containers the 2018-19 season, compared to 1.5 million tonnes via containers in 2017-18, a 76 per cent decline. Whilst the volume of container exports has declined, the volume of bulk exports from Victoria has declined even further. Accordingly in Victoria container exports remained a large proportion of grain usage

[28] ACCC, Stevedoring monitoring report 2018-2019, p.15.

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.[29]

VFF submits there is some competition between the bulk and container export supply chains, but only for smaller consignments and generally for grain sourced closer to the Melbourne container port:

> "Wheat and barley produced within Portland's natural terminal port catchment are not regularly exported in containers through Melbourne whereas smaller consignments of pulses are. This is because most consignments or sales of pulses are of a smaller volume than wheat exports due to destination market requirements and the economies favour containerized over bulk exports. Containerized exports face additional constraints from limitations on available shipping capacity from shipping lines and limited availability of food grade 20' containers. The statistics for containerized grain through Melbourne do not evidence the origin or type of the grain. Not only are grains other than wheat exported in containers but also a lot of grain from southern NSW is exported through Melbourne due to the ports proximity to the grain's origin."[30]

The ACCC's view is that containerised grain exports are not a direct substitute for bulk grain exports. Certain destinations may prefer particular grain types or grades of grain which can mean that the bulk and container markets are not interchangeable. For example, the export of wheat in containers is more heavily weighted towards South-East Asia than bulk wheat exports.[31] Container exports may provide a viable alternative export path for some growing regions, niche and high quality products, or for particular destinations.

Victoria's domestic consumption volumes have been relatively stable over the last four years. 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. Despite Victoria's production in 2018-19 falling by 51 per cent to 3.8 million tonnes, domestic consumption in Victoria was relatively stable and increased slightly from 2017-18 to 2018-19. As a proportion of Victorian production, domestic consumption has increased from 37 per cent and 45 per cent in 2016-17 and 2017-18 respectively to up to 86 per cent in the 2018-19 season.[32]

The domestic market typically has the first call on grain and the ACCC considers that increases in domestic demand can provide some constraint on the level of bulk exports during these low yield periods. However given the differences in the type of grain required for each market, the domestic market is often not a directly interchangeable market with the bulk export market. For example the domestic feed market demands lower protein wheat compared to the overseas milling market's demand for the bulk export of high protein wheat. As noted in the ACCC's Bulk grain monitoring report 2018-19, the ACCC will continue to monitor trends in domestic consumption and levels of demand for bulk grain export port terminal services.[33]

The ACCC also notes the atypical emergence of coastal shipments which increased across Australia in the 2017–18 and 2018–19 shipping years related to the drought on the east coast of Australia. In the 2017–18 shipping year 0.12 million tonnes of grain were shipped from Victoria to NSW and Queensland, then in the 2018–19 shipping year Victorian ports

[29] ACCC bulk grains monitoring report 2017-18, p.75.

[30] VFF submission in response to ACCC draft determination, p.2.

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

[32] Australian Crop Forecasters, Supply and Demand report to October 2019; Australian Crop Forecasters, Export report to October 2019.

[33] ACCC bulk grain ports monitoring report 2018-19, p.24.

(Melbourne and Geelong only) received 0.36 million tonnes of grain shipments, all from WA. The ACCC notes that coastal shipments are facilitated by PTSPs using the same port terminal facilities used for bulk grain exports. Accordingly, the ACCC considers that the delivery of port terminal services for coastal shipments could in practice impact an exporter's ability to secure port terminal services for the purpose of bulk grain exports. The ACCC notes that it does not receive data for internal movements of grain from west to east and that there is limited data available on this within the market. The ACCC will also continue to monitor coastal shipments in relation to the extent to which they may impact access for the purpose of exporting bulk grain (including bulk wheat).[34]

[34] ACCC bulk grain ports monitoring report 2018-19, p.24.

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

This section sets out the ACCC's 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 assessment below sets out its findings in relation to the matters which it is required to consider under subclause 5(3)(a) to (j) of the Code, together with the reasons for its determination.

(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 considers 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 they involves PTSPs preventing 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 any 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.[35] However VFF submits that the provisions of the Code provide minimal if any restrictions to operational flexibility.[36]

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

Regarding the costs incurred by RGS in complying with Parts 3 to 6 of the Code if it is not exempt, 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 operator only operating a single port terminal facility, given that compliance costs will be

[35] RGS submission, p.7.

[36] VFF submission in response to ACCC draft determination, p.2.

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. However RGS is a smaller operator and therefore its compliance costs may be proportionally higher for its operations.

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.

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.[37] 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.[38]

VFF submits that access regulation should apply equally to other participants such as RGS.[39] However the ACCC considers a reduced level of regulation under the Code is appropriate in circumstances where there is sufficient competitive constraint, as is the case for RGS.

[37] GPA submission, p.2.

[38] GPA submission, p.3.

[39] VFF supplementary submission, p1.

The ACCC considers that RGS's port terminal facility provides certain exporters with an alternative service. The ACCC notes that given the temporary nature of RGS's facility and movement between Geelong and Portland, the service offered to exporters may be limited as it will depend when capacity is made available by RGS at Portland. It is acknowledged that 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 for port terminal services as well as 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. 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

In deciding whether to exempt a PTSP, subclause 5(3)(c) of the Code requires the ACCC to have regard to the interests of exporters who may require access to port terminal services.

The ACCC did not receive any submissions from exporters in response to either its issues paper or draft determination for RGS's application.

The ACCC has considered the bargaining power of exporters and exporters' access to viable alternative port terminal facilities. The ACCC considers that exporters requiring access to port terminal services will still be able to compete in the grain export market on their relative merits if an exemption is granted to RGS.

RGS provides third party exporters additional choice where previously GrainCorp was the sole PTSP at Portland. The ACCC notes 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 exporters seeking to export larger tonnages on a continual basis. However the ACCC considers that RGS offers exporters a viable alternative to the incumbent service provider, and it is in the interests of exporters to have a viable alternative for export.

The ACCC considers that granting an exemption to RGS will not adversely affect exporters in the market. In addition, the ACCC generally considers that granting an exemption to be in the interests of exporters requiring access to port terminal services, if exporters can continue to access port terminal services on a fair and transparent basis and therefore compete on their relative merits. As such the consideration of exporter's interests overlaps to an extent with consideration of subclause 5(3)(d), as discussed below.

(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, subclause 5(3) (d) of the Code requires the ACCC to have regard to the likelihood that exporters will have fair and transparent access to port terminal services.

The ACCC did not receive any submissions from exporters in response to either its issues papers or draft determination for RGS's application.

The ACCC considers that, as RGS is a new entrant PTSP into the market, it is reasonable to expect that RGS will need to seek throughput and attract customers and it is therefore unlikely RGS will have incentives to discriminate or hinder access to third party exporters. The ACCC notes that RGS does not currently export bulk wheat. Although RGS currently facilitates its own shipments of barley, it is not dominant in the export market and may be less likely than a larger vertically integrated PTSP to favour its own exports of grains over third party exports. 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 the profitability of RGS's facility. The ACCC considers that the competitive constraint provided by GrainCorp's facility provides incentive for RGS to provide exporters with fair and transparent access to services.

RGS will have incentives to provide access to its facility on fair and transparent terms in order to maximise throughput, and the ACCC considers that the full level of regulation under the Code is not necessary to ensure fair and transparent access for exporters to RGS's 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 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. This is balanced against the potential for RGS to exit the market given its limited sunk costs and the temporary nature of its mobile operations.

In terms of efficient investment, the ACCC considers that avoiding the application of unnecessary regulation will promote efficient investment in port terminal facilities more broadly. Exempting RGS 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 as an exporter. 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 currently carries out the export of bulk barley and there is a possibility that in future shipping years it may export bulk wheat. As a PTSP, RGS facilitates the shipment of various bulk grains including wheat. As the smaller PTSP operating at Portland, RGS is considered less likely to favour itself as an exporter compared to a vertically integrated PTSP with significant market share in the provision of port terminal facilities. As the new entrant, it is expected that RGS will need to seek throughput and build customer support for its services.

(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.

VFF submits that access regulation should apply equally to other participants such as RGS.[40]

The ACCC considers that RGS's Portland port terminal facility is competitively constrained by a currently non-exempt port terminal facility at Portland, being GrainCorp's port terminal facility.

(j) any other matters the ACCC considers relevant

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

4.1. Final Determination

Based on the findings and reasons outlined above, the ACCC has made a determination that RGS should be an exempt service provider of port terminal services provided by means of its port terminal facility located at Portland.

[40] VFF supplementary submission in response to ACCC draft determination, p.1.

ACCC monitoring and future assessments

The ACCC recognises that it is not possible to ensure particular market outcomes following an exemption decision. The ACCC therefore considers that it is appropriate for it to monitor the Victorian wheat port terminals after making the exemption determinations.

In 2015, the ACCC made a commitment to monitor and publicly report on bulk grain exports following decisions to reduce the level of regulation applying to a number of facilities along the east coast of Australia. The ACCC can reduce the level of regulation through exemption mechanisms in the Code. The ACCC's annual monitoring report examines bulk grain export data and undertakes stakeholder consultation. This analysis is used to inform the ACCC about whether there is a specific need to revisit individual determinations to exempt or not exempt a port terminal service provider.

The ACCC notes VFF's submission that VFF would like to stress the importance of ACCC being granted the ability to regularly re-assess exemptions, given the changing landscape of the Australian grains industry.

The ACCC has the ability under the Code to revisit or revoke exemptions once granted. Similar to the process for granting an exemption, the ACCC may revoke an exemption determination after having regard to matters (a) to (j) of subclause 5(3) of the Code, if it is satisfied that the reasons for granting the exemptions no longer apply. If the ACCC considers from its monitoring that competitive outcomes have not resulted after the exemptions, it may re-examine whether an exemption should be revoked.