



Australian
Competition &
Consumer
Commission

Draft determination

WA Chip & Pulp Co Pty Ltd at Bunbury

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

2 September 2015

1. Introduction

The Australian Competition and Consumer Commission (ACCC) has made a draft determination that WA Chip & Pulp Co Pty Ltd (WAPRES) should be an exempt service provider of port terminal services at its Bunbury port terminal facility.

This draft determination relates to an exemption under the Port Terminal Access (Bulk Wheat) Code of Conduct (Code). The Code was made under section 51AE of the *Competition and Consumer Act 2010* (Cth) (CCA). It commenced on 30 September 2014 and regulates the conduct of bulk wheat port terminal service providers (PTSPs). For PTSPs that were not required to have access undertakings under the previous regime (including WAPRES), the obligations in the Code will apply from 1 October 2015.¹

Following consultation, if the ACCC makes a final determination consistent with this draft determination WAPRES will only be subject to Parts 1 and 2 of the Code from 1 October 2015. Exempt service providers face a lower level of regulation as they are not required to comply with Parts 3 to 6 of the Code.

The ACCC's reasons for making this draft determination are set out at section 2 of this document.

Consultation on this draft determination

The ACCC is seeking views on its draft determination that WAPRES should be an exempt service provider of port terminal services at its Bunbury facility. The ACCC welcomes views on all aspects of its draft determination.

Submissions are due by 5:00pm EST on **14 September 2015**. If a party intends to make a submission and is concerned about meeting this timeframe they may contact the ACCC before the due date to discuss an extension. Further information on how to make a submission is in the Appendix.

1.1. Exempt service providers

Exempt service providers are still obliged to comply with Parts 1 and 2 of the Code. These parts of the Code place a number of obligations on service providers including requirements to deal with exporters in good faith and publish information about how demand for capacity is allocated and the current shipping stem. Exempt service providers must also comply with general competition law.

Exempt service providers are not required to comply with Parts 3 to 6 of the Code which means they are not required to, among other things:

- provide access according to the non-discrimination and no hindering obligations contained in the Code
- resolve access agreement negotiation disputes through the Code-prescribed dispute resolution process, which includes arbitration
- have their capacity allocation system approved by the ACCC if it allocates capacity more than 6 months into the future
- publish information about expected port capacity, performance indicators and stocks as required under part 5 of the Code.

¹ See subclause 4(6) of the Code.

The ACCC can determine a PTSP to be an exempt service provider under subclause 5(2) of the Code. In deciding whether or not to determine a PTSP is an exempt service provider, the ACCC must have regard to the matters listed at subclause 5(3) of the Code:

- (a) the legitimate business interests of the port terminal service provider;
- (b) the public interest, including the public interest in having competition in markets;
- (c) the interests of exporters who may require access to port terminal services;
- (d) the likelihood that exporters of bulk wheat will have fair and transparent access to port terminal services;
- (e) the promotion of the economically efficient operation and use of the port terminal facility;
- (f) the promotion of efficient investment in port terminal facilities;
- (g) the promotion of competition in upstream and downstream markets;
- (h) whether the port terminal service provider is an exporter or an associated entity of an exporter;
- (i) whether there is already an exempt service provider within the grain catchment area for the port concerned;
- (j) any other matters the ACCC considers relevant.

The ACCC's assessment of WAPRES' Bunbury facility against each of these matters is set out in section 2 of this document.²

Exemption granted to CBH by the Minister for Agriculture

The Minister for Agriculture may also determine that a PTSP is an exempt service provider if the PTSP is a cooperative meeting certain criteria set out in subclause 5(1) of the Code. The ACCC does not have any role in exemptions for cooperatives under subclause 5(1).

On 17 November 2014 the Minister for Agriculture determined that Co-operative Bulk Handling Limited (CBH) is an exempt service provider at its Albany, Esperance, Geraldton and Kwinana port terminal facilities. Accordingly, CBH is not required to comply with Parts 3 to 6 of the Code when providing port terminal services from those facilities.

1.2. Exemption application by WAPRES

In July 2015 WAPRES wrote to the ACCC seeking to be determined an exempt service provider of port terminal services at its Bunbury facility. This exemption application is available on the ACCC's website at <https://www.accc.gov.au/regulated-infrastructure/wheat-export/wheat-export-projects/bunbury-wheat-port-exemption-assessment>.

The exemption application relates to the port terminal facility owned and operated by WAPRES at Berth 3, South Inner Harbour, Bunbury, including a fixed ship loader connected by a belt conveyer to adjacent facilities owned by Bunge Agribusiness Australia Pty Ltd (Bunge).³

² Further details about the ACCC's process for making and revoking exemption determinations under the Code are in the ACCC's guidelines, available at <http://www.accc.gov.au/regulated-infrastructure/wheat-export/accc-role-in-wheat-export>.

³ See WAPRES website at <http://www.wapres.com.au/page.php?id=14>, accessed 25 August 2015.

1.3. Further information

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

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2. ACCC assessment having regard to the matters in subclause 5(3) of the Code

This section sets out the ACCC's assessment, having regard to the matters at subclause 5(3) of the Code, of whether it should determine WAPRES to be an exempt service provider at its Bunbury port terminal facility.

2.1. Legitimate business interests of WAPRES

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.

WAPRES submits that unless it is granted an exemption, 'an uneven playing field will be in place that favours CBH to the disadvantage of WAPRES' given that CBH is already an exempt service provider. WAPRES submits that being subject to parts 3 to 6 of the Code, while CBH is exempt, will impact its commercial viability, its ability to compete and limit its commercial asset returns.⁴

The ACCC considers that exempting WAPRES at its Bunbury facility would:

- increase its operational flexibility
- reduce its Code compliance costs, particularly noting that WAPRES is currently not regulated under the Code and would otherwise be required to develop an entirely new compliance program
- place it on a level regulatory playing field with the exempt CBH port terminal facilities at Kwinana and Albany.

The ACCC considers it is generally in a PTSP's legitimate business interests to reduce (or not impose additional) regulatory compliance costs and maintain operational flexibility.

As such the ACCC's draft view is that exempting WAPRES at its Bunbury port terminal facility would be in its legitimate business interests. The ACCC considers that the legitimate business interests of WAPRES should be considered against the reasons for having regulation in place and the level of competitive constraint faced by WAPRES. The level of competitive constraint faced by WAPRES and other matters relevant to an exemption are considered further below at sections 2.2-5.

⁴ WAPRES, Submission in support of exemption, 10 July 2015, p. 14.

2.2. The public interest and competition in markets

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 considers these matters all relate to the degree of competitive constraint faced by the PTSP in the provision of port terminal services, and the likely effect of an exemption on competition in bulk wheat port terminal services and related markets. The ACCC also considers that having different regulatory arrangements for competing PTSPs may lead to distortions in competition and efficiency. Where one PTSP has already been granted an exemption, this may support an exemption for a competing PTSP if the level of competitive constraint is sufficient to prevent that PTSP exerting market power.

The WAPRES facility is located in Bunbury, on the south west coast of WA between CBH's Kwinana and Albany port terminals. WAPRES submits that its Bunbury terminal exports grain drawn from the southern part of the Kwinana Port zone and the northern part of the Albany Port zone.⁵ The grain catchment area for the WAPRES facility may also be limited by the fact that, unlike other bulk wheat facilities in WA, all intake of commodities to the port is by road and there is no rail access. It is likely that grain exported from Bunbury would previously have been transported for export from the Albany or Kwinana facilities. The ACCC considers it is likely to remain a viable option for grain grown in the Bunbury catchment area to be transported to Kwinana or Albany (especially given that rail transport is available for these facilities), and these facilities will therefore compete with the Bunbury terminal for grain export volumes.

Prior to WAPRES commencing operations at Bunbury in 2014, CBH was the only provider of bulk wheat port terminal services in WA. Exporters seeking to export bulk grain from WA had no choice other than to use one of CBH's four bulk port terminal facilities. For the 2014/15 shipping year volumes from the Bunbury terminal represented less than 3 per cent of the Albany, Kwinana and Bunbury volumes combined. As the much larger incumbent, CBH is likely to remain the dominant provider of port terminal services in WA even after the entry of new competitors such as WAPRES.

CBH is also the dominant player in upcountry storage and handling across WA. AEGIC notes that CBH receives, stores and transports 90-95 per cent of export grain in WA.⁶

CBH has already been granted an exemption under the Code by the Minister for Agriculture. If WAPRES was not also granted an exemption under the Code at its Bunbury facility prior to 1 October 2015 it would be subject to a higher level of regulation than its main competitor.

The ACCC's view is that exempting WAPRES at its Bunbury facility is in the public interest and will not be detrimental to competition in markets because:

- CBH is currently the dominant provider of port terminal services in WA and is already exempt; placing WAPRES on a level regulatory playing field with CBH is likely to promote competition between the PTSPs.
- In the absence of full regulation under the Code, WAPRES will continue to face a significant competitive constraint from CBH's facilities at Albany and Kwinana, and the threat of further competition from other new entrants. WAPRES is therefore very unlikely to be able to exert market power in the provision of port terminal services.

⁵ WAPRES, Submission, p. 13.

⁶ AEGIC report, Supply Chains Report, 2014, p. 11.

- While there is currently little competition in upstream markets, granting an exemption to WAPRES is unlikely to reduce competition below current levels.

The ACCC's consideration of these matters supports granting an exemption to WAPRES at its Bunbury facility.

2.3. Interests of exporters and access to port terminal services

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

This is also related to subclause 5(3)(h) of the Code, which requires the ACCC to have regard to whether the PTSP is an exporter or an associated entity of an exporter. If a PTSP is vertically integrated in the export market it may favour its own trading division to the detriment of other exporters seeking access to port terminal services.

WAPRES is not itself an exporter of bulk wheat, but is owned by Marubeni Group which does have activities in the global grain business. However, WAPRES submits that 'other than a common parent there is no operational nor management relationship between the two groups'.⁷ The ACCC understands that Marubeni closed its Australian grain business in 2015.⁸

Bunge has invested in storage facilities on land adjacent to the WAPRES ship loading facility and connected to that ship loader by a belt conveyer. The ACCC considers that the interests of Bunge, as an exporter who may require access to port terminal services provided by WAPRES, are relevant to this exemption assessment. The interests of exporters other than Bunge are also relevant, and are discussed below. WAPRES submits that it has committed capacity for export of bulk grains to Bunge.⁹ Given that these arrangements are already in place, Bunge is likely to be able to access port terminal services regardless of an exemption. To the extent that an exemption will improve WAPRES' efficiency and competitiveness (as discussed in sections 2.1 and 2.2 above) the ACCC considers that granting an exemption to WAPRES is in the interests of Bunge as an access seeker.

However, the ACCC notes that the WAPRES facility may not provide similar access arrangements to exporters other than Bunge, and may therefore be of limited direct benefit to them. This is chiefly due to the practical reason that in order to use WAPRES's ship loader for bulk wheat, exporters would also need access to receival and storage facilities which are provided independently by Bunge and which are not covered by the Code.

Bunge may decide to provide receival and storage services to third party exporters. Given that it is not vertically integrated with Bunge, WAPRES is unlikely to have incentives to discriminate or hinder access when providing ship loading services if third party exporters are able to obtain the requisite access to Bunge's receival and storage services. In these circumstances, requiring WAPRES to provide access to third party exporters in accordance with the full obligations in the Code is likely to be of limited practical benefit.

Third party exporters may also continue to obtain access to port terminal services at CBH's Kwinana and Albany facilities. To the extent that the WAPRES facility frees up additional capacity at these CBH facilities, exporters' ability to obtain access to port terminal facilities

⁷ WAPRES, Submission, p. 17.

⁸ Queensland Country Life, 'Marubeni Australia confirms closure', accessed at <http://www.queenslandcountrylife.com.au/news/agriculture/cropping/grains/marubeni-australia-confirms-closure/2728543.aspx> on 17 August 2015

⁹ WAPRES, Submission, p. 16.

overall may be improved regardless of whether an exemption is granted to WAPRES. Given that granting an exemption to WAPRES will place it on a level regulatory playing field with CBH and is therefore likely to improve its ability to compete, exporters using CBH's facilities may also benefit from the increased competitive discipline provided by WAPRES.

The ACCC considers that granting an exemption to WAPRES at its Bunbury facility is likely to be in the interests of Bunge and any third party exporters obtaining access to Bunge's storage facility. The ACCC also considers that deciding not to grant an exemption and applying the full level of regulation under the Code to WAPRES is likely to provide little practical benefit to other potential access seekers.

2.4. Economically efficient operation and efficient investment

In deciding whether to exempt a PTSP, subclause 5(3)(e) and (f) of the Code requires 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.

WAPRES submits that unnecessary regulation and an uneven playing field will result in increased costs, making it less efficient and less competitive, and affect the efficiency of its existing Bunbury investment. WAPRES also submits that it would 'stifle or dis-incentivise further investment' in smaller port terminal facilities (as well as other types of facilities).¹⁰

The ACCC considers that WAPRES will likely have incentives to operate, use, and invest in its Bunbury facility efficiently in order to compete with the already exempt CBH, even in the absence of full regulation under the Code.

Granting WAPRES an exemption will mean that its compliance related operating costs will be lower and it will have greater operational flexibility (as discussed in section 2.1 above), which will likely promote the efficient operation and use of the Bunbury facility.

The ACCC also recognises that unnecessary regulation may discourage investment in port terminal facilities. The ACCC considers that the competitive discipline provided by CBH will be sufficient to encourage WAPRES to make efficient investments, and deter inefficient investment, in its Bunbury facility. An exemption will also place WAPRES on a level regulatory playing field with CBH, which will enable it to compete with CBH more effectively. This may in turn create incentives for CBH to make efficient investments in its port terminal facilities, in order to compete with WAPRES.

The ACCC's draft view is that exempting WAPRES at its Bunbury facility will promote the economically efficient operation of and use of its facility, and the efficient investment in port terminal facilities.

2.5. Other matters

The ACCC does not consider that there are any other matters relevant to its assessment of an exemption for WAPRES at its Bunbury facility in accordance with subclause 5(3)(j) of the Code.

3. Monitoring

Having considered the matters under subclause 5(3) of the Code, including the level of competition WAPRES currently faces, the ACCC has formed the draft view that WAPRES

¹⁰ WAPRES, Submission, pp. 16-17.

should be exempt from Parts 3 to 6 of the Code. However, the ACCC recognises that it is not possible to ensure particular market outcomes following an exemption decision. Similar to the ACCC's approach to monitoring the level of competition following exemption determinations regarding port terminals in other port zones, the ACCC also considers it appropriate for it to monitor the bulk wheat terminals in WA.

The ACCC intends to pursue two main monitoring activities:

- *Industry analysis* – this may include examining the shipping activity at each WA port terminal. All PTSPs publish and provide to the ACCC daily ship loading statements under Part 2 of the Code.
- *Industry consultation* – this may include periodically approaching industry participants, such as exporters and farmer groups, to gauge the effect of the exemptions. Industry participants are also encouraged to approach the ACCC directly with any concerns they may have in securing fair and transparent access to WA bulk wheat port terminals.

The ACCC would be concerned if its monitoring revealed a reduction in the level of competition either across WA or within specific grain catchment areas. This may include significant increases in market concentration in the grain export market that may reduce the level of competition for grain grown by Australian farmers.

Under subclause 5(6) of the Code, the ACCC can revoke an exemption determination it has made if, after having regard to the matters in subclause 5(3), it is satisfied that the reasons for granting the exemption no longer apply. The ACCC cannot revoke an exemption determination made by the Minister under subclause 5(1) of the Code (including the exemptions granted to CBH on 17 November 2015).

Further details about the type of monitoring the ACCC will undertake following an exemption determination is available in the final determinations on the Port of Newcastle, available on the ACCC's website at <http://www.accc.gov.au/regulated-infrastructure/wheat-export/newcastle-wheat-ports-exemptions-assessments-nat-and-qube>.

4. Draft determination

The ACCC has made a draft determination that WAPRES should be an exempt service provider of port terminal services at its Bunbury port terminal facility.

Appendix: Making a submission

The ACCC invites public submissions on the draft determination set out in this document. Please include detailed reasons to support the views put forward in submissions.

Submissions should be addressed to:

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ACCC
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Melbourne VIC 3001

Email: transport@acc.gov.au

The ACCC prefers that submissions be sent via email in Microsoft Word format (although other text readable document formats will be accepted).

Submissions are due by 5:00pm EST on **14 September 2015**. The ACCC recognises this is a relatively short consultation period, and if a party intends to make a submission and is concerned about meeting this timeframe they may contact the ACCC before the due date to discuss an extension.

Confidentiality of information provided to the ACCC

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

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

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