Australian Competition & Consumer Commission

# **Final determinations:** GrainCorp Operations Limited and Queensland Bulk Terminals at the Port of Brisbane

## Exemption assessments of bulk wheat port terminal facilities under the Port Terminal Access (Bulk Wheat) Code of Conduct

24 September 2015

# Contents

# Summary

The Australian Competition and Consumer Commission (ACCC) has made final determinations that Queensland Bulk Terminals Pty Ltd (QBT) and GrainCorp Operations Limited (GrainCorp) are exempt service providers of port terminal services provided by means of their respective port terminal facilities at the Port of Brisbane under the Port Terminal Access (Bulk Wheat) Code of Conduct (Code).

These final determinations are consistent with the ACCC's draft determinations regarding these facilities published on 27 August 2015.

The decisions mean that both QBT and GrainCorp will be subject to the lower level of regulation under the Code at their respective Brisbane port terminals, as Parts 3 to 6 of the Code will not apply to QBT and/or GrainCorp at those facilities.

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

- QBT's Brisbane bulk wheat port terminal faces strong competition from GrainCorp's Brisbane bulk wheat facility, both located at the Port of Brisbane. QBT also faces significant competition from the large amount of containerised wheat exports also shipped out of the same port as well as competition from strong domestic demand for grain in southern Queensland.
- GrainCorp's Brisbane bulk wheat port terminal faces a level of competition from QBT's bulk export terminal, despite the fact that QBT's facility has a relatively lower level of capability. Additionally, GrainCorp faces significant competitive pressures from containerised wheat exports which are also shipped from the Port of Brisbane. GrainCorp also faces competition from strong domestic demand for grain.
- The competing Brisbane port terminals appear to have significant spare export capacity across peak and non-peak shipping times of the year which create incentives for both port operators to provide access to third party customers to increase the use of their facilities.

The ACCC's views are based on analysis of current and expected capacity constraints and usage of the two Brisbane facilities and the extent to which the Brisbane port terminals compete with each other. In doing so the ACCC has taken into account the capabilities of the two Brisbane facilities and the extent to which they can be substitute port terminals for exporters. The ACCC has also considered competitive constraints imposed by container exports in particular, as well as domestic demand for wheat.

The ACCC's final assessments and reasons for making these final determinations are consistent with its draft assessments and are based on its industry analysis presented in its draft determinations document, available at [https://www.accc.gov.au/regulated-infrastructure/wheat-export/](https://www.accc.gov.au/regulated-infrastructure/wheat-export/).

**ACCC monitoring**

The ACCC intends to undertake monitoring of the two Brisbane bulk wheat port terminal services to continue to assess the level of competition at these facilities into the future.

The ACCC would be concerned if it saw evidence that there had been significant increases in market concentration in the grain export market that may reduce the level of competition for grain grown by Australian farmers.

The ACCC can monitor the level of shipping activity and market concentration at QBT and GrainCorp's Port of Brisbane terminals through examining daily ship loading statements

provided to the ACCC. The ACCC also intends to monitor reference prices published by port terminal service providers and intends to periodically consult with industry to seek information about exporters' ability to access port terminal services at the Port of Brisbane.

# 1. Introduction

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).

Under the Code, the ACCC or the Minister for Agriculture may exempt a PTSP from the application of Parts 3 to 6 of the Code at a specified port terminal facility. Exempt service providers face a lower level of regulation and are only subject to Parts 1 and 2 of the Code. See the Appendix for more information on the Code and exemption processes.

## 1.1. Final determinations

### 1.1.1. Legislative framework

In deciding whether or not to determine a PTSP 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 final exemption assessments of QBT's and GrainCorp's respective Port of Brisbane facilities considering each of these matters are set out in chapters 2 and 3 of this document.

Consistent with the ACCC's draft assessments released on 27 August 2015,[1] the ACCC has made the following final determinations regarding QBT's and GrainCorp's Brisbane facilities.

### 1.1.2. Queensland Bulk Terminals' terminal at the Port of Brisbane

The ACCC's final determination is that QBT is an exempt service provider of port terminal services provided by means of its Brisbane port terminal.

### 1.1.3. GrainCorp's terminal at the Port of Brisbane

The ACCC's final determination is that GrainCorp is an exempt service provider of port terminal services provided by means of its Brisbane (Fisherman Islands) port terminal.

[1] ACCC, *Draft determinations: GrainCorp Operations Limited and Queensland Bulk Terminals at the Port of Brisbane*, 27 August 2015.

## 1.2. Monitoring

Similar to the ACCC's approach to monitoring competition following exemption determinations regarding port terminals in other port zones, the ACCC considers that it is important to examine the future competitive outcomes at this port following exemptions to both bulk wheat PTSPs at the Port of Brisbane.

Under subclause 5(6) of the Code, the ACCC can revoke an exemption determination 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 will pursue two main monitoring activities, industry analysis and industry consultation.

### 1.2.1. Industry analysis

Industry analysis may include examining the shipping activity at each port terminal. From 1 October 2015, all PTSPs will have an obligation under Part 2 of the Code to publish and provide to the ACCC daily ship loading statements. The Code also requires that all port terminal service providers publish reference prices. The ACCC intends to monitor trends in these prices for both exempt and non-exempt ports as part of its general industry monitoring.

The ACCC will monitor the market concentration of exporters shipping wheat from the Port of Brisbane. As part of these monitoring activities, the ACCC will consider the market concentration of exporters shipping wheat from the two terminals at the Port of Brisbane. The ACCC would be concerned if the port terminals operators' associated export trading divisions, in the future, increase their export market shares at their respective port facilities at the expense of other exporters seeking access. Doing so may lead to a reduction in competition in the acquisition of grain for export and affect the ability for farmers to achieve adequate returns when selling their grain.

The ACCC does not consider that market shares are a sole determinant of the competitive situation in a port zone. However, it considers that this information would give some indication of whether third party exporters continue to be able to access the Port of Brisbane facilities.

The ACCC also notes that analysis of market shares and industry concentration do not replace the ACCC's obligation to consider the full range of matters under subclauses 5(3) and 5(6) of the Code in assessments of whether to make or revoke an exemption.

### 1.2.2. Consultation with industry

Industry consultation may include periodically approaching industry participants, such as exporters and farmer groups, to gauge the effect of granting any exemptions. Industry participants will also be encouraged to approach the ACCC directly with any concerns they may have in securing fair and transparent access to Port of Brisbane bulk wheat port terminals.

If the ACCC's monitoring reveals that there is a reduction in the level of competition or there are concerns about the ability of third party exporters to access the facilities at the Port of Brisbane, the ACCC may conduct further market inquiries.

The ACCC could also consider whether to conduct a public process to assess whether to revoke an exemption for the relevant port terminal facility.

## 1.3. ACCC exemption assessments timeline

The ACCC's Guidelines on the ACCC's process for making and revoking exemption determinations (Guidelines) set out that, when a PTSP submits an exemption application, the ACCC will seek to conduct its exemption assessment and decide whether to make an exemption determination within 12 weeks.

Each exemption assessment process may be different and may include requests for information, consultation with interested parties, and the release of a draft view before the ACCC makes any final determinations. The timeframe for assessment may vary where the ACCC consults on the exemption application, and/or requests information from the PTSP. Generally, the length of any consultation period(s) will extend the ACCC's timeframe for assessment. A timeline of the ACCC's assessment of GrainCorp's and QBT's exemption applications is shown in Table 1 below.

**Table 1: ACCC assessment timeline for the Port of Brisbane**

| Date | Action |
|---|---|
| **29 May 2015** | QBT lodged an exemption application for its Brisbane terminal. |
| **1 June 2015** | GrainCorp lodged an exemption application for its Brisbane terminal. |
| **23 June 2015** | The ACCC published its Issues Paper and invited public submissions by 15 July 2015. |
| **3 August 2015** | The ACCC published three public submissions on its website. |
| **27 August 2015** | The ACCC published draft determinations on the exemption applications and invited public submissions on its draft views by 10 September 2015. |
| **15 September 2015** | The ACCC published one public submission in response to its draft determinations on the ACCC website. |
| **24 September 2015** | The ACCC published final determination on the exemption applications. |

### 1.3.1. GrainCorp's exemption application for its Brisbane facility

GrainCorp's Brisbane (Fisherman Islands) bulk wheat port terminal is located at the Port of Brisbane in Queensland, and includes the following facilities – road and rail intake/receival facility, grain storage facility, weighing facilities, and one ship loader. The ACCC's analysis and exemption assessments throughout this document refer to this GrainCorp facility.

GrainCorp also has a former grain port terminal at Pinkenba. According to GrainCorp this terminal is only used for the import and export of non-grain commodities such as sugar, meal and fertiliser, and stores barley for GrainCorp's Pinkenba malt house.[2] Accordingly, the ACCC is not considering GrainCorp's Pinkenba terminal and does not refer to this facility in the remainder of this document.

On 1 June 2015 GrainCorp provided a submission in support of it being an exempt service provider at the Port of Brisbane. GrainCorp submits that, despite being vertically integrated, it has no market power and is commercially incentivised to maximise grain throughput at its terminal given:

- strong competition from competing domestic and container packing markets

[2] GrainCorp, Submission in support, p. 8.

- competition in the provision of port elevation services for bulk grain from the unregulated QBT facility
- excess country storage and packing capacity combined with excess port elevation capacity.[3]

GrainCorp also submits that an exemption for its Brisbane bulk wheat terminal will:

- place GrainCorp on a level playing field with competing alternative markets (the container export and domestic markets), neither of which are subject to regulation
- place GrainCorp on a level playing field with QBT's competing bulk grain port terminal, which has not been subject to regulation
- promote grain industry competition by allowing GrainCorp to provide competitive services to exporters for bulk grain exports
- support investment and lower supply chain costs by allowing GrainCorp to more flexibly operate its port terminals and supporting supply chain.[4]

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

### 1.3.2. Queensland Bulk Terminals' exemption application for its Brisbane facility

QBT is the operator of the QBT bulk grain terminal located at 156 Colmslie Road, Murrarie in the Port of Brisbane in Queensland. QBT is a wholly owned subsidiary of Wilmar Gavilon Pty Ltd, which is in turn co-owned by Wilmar International Limited and Marubeni Corporation.[5]

On 29 May 2015 QBT provided a submission in support of it being an exempt service provider at the Port of Brisbane. QBT submits that the ACCC should exempt it from Parts 3 to 6 of the Code because it has not previously been regulated and, despite having a degree of vertical integration with an affiliated exporter, its ability to influence the market is limited given:

- strong competition in the port zone from a large domestic consumer base and robust container packing market
- excess capacity at its facility and the bulk export market in general
- excess capacity in the container export market
- its disadvantage relative to GrainCorp due to its lack of upcountry storage facilities, inability to receive grain by rail, inability to load large Panamax vessels and limited upright storage.[6]

QBT submits that its activities to date have not been regulated and that the application of Parts 1 and 2 of the Code from 1 October 2015 will already impose more regulation on QBT than currently exists.[7] QBT also submits that an exemption will:

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[3] GrainCorp Operations Limited, Submission – Fisherman Islands (Brisbane): Exemption from Port Terminal Access (Bulk Wheat) Regulation (GrainCorp, Submission in support), June 2015, p. 3.

[4] GrainCorp, Submission in support, p. 3.

[5] Queensland Bulk Terminals (QBT), Submission – Queensland Bulk Terminals application for continued exemption from the Competition and Consumer (Industry Code – Port Terminal Access (Bulk Wheat)) Regulation 2014, (QBT, Submission in support), 29 May 2015, pp. 2, 12.

[6] QBT, Submission in support, pp. 2, 5-7, 10-11.

[7] QBT, Submission in support, p. 7.

- ensure it maintains its current flexibility to react to competitive market influences (the container export and domestic markets and GrainCorp's competing terminal)
- maintain its competitive offering to bulk grain exporters
- ensure the Code does not impose unnecessary administrative burden and costs
- support its continued investment and optimisation of port services to minimise costs and ensure a competitive and efficient supply chain for the grain industry.[8]

Further details of QBT's exemption application are set out as relevant throughout this document. QBT'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/.

### 1.3.3. Public consultation process

The ACCC released an Issues Paper on 23 June 2015 seeking public submissions on GrainCorp's and QBT's exemption applications and related key issues. The ACCC received three public submissions from the following parties in response to its Issues Paper:

- Australian Grain Exporters Association (AGEA)
- Glencore Grain Pty Ltd (Glencore)
- Co-operative Bulk Handling Limited's (CBH).

On 27 August 2015 the ACCC released draft determinations proposing to grant exemptions to both QBT's and GrainCorp's bulk wheat port terminals at the Port of Brisbane. The ACCC received one public submission, from AGEA, which supports the ACCC's draft determinations.[9]

Public submissions provided in response to the ACCC's Issues Paper and draft determinations are available on the ACCC's website at: https://www.accc.gov.au/regulated-infrastructure/wheat-export/.

## 1.4. ACCC final assessments

The ACCC notes that its final exemption assessments of QBT's and GrainCorp's Port of Brisbane port terminals draw on the ACCC's competition analysis of these facilities presented in the its draft determinations document. Specifically:

- the ACCC's analysis of the level of competition on QBT's and GrainCorp's port terminal services at their Port of Brisbane facilities can be found in chapter 2 of the draft determinations document. This includes the ACCC's views on the capacity, availability and demand for bulk wheat port terminal services at the Port of Brisbane. The chapter also considers the characteristics of QBT's and GrainCorp's facilities and the extent to which there are capacity constraints.
- the ACCC's analysis of competition in upcountry services and competition from related markets on QBT's and GrainCorp's facilities can be found in chapter 3 of the draft determinations document. This includes the ACCC's views on competition in bulk wheat supply chain services upstream from the port such as upcountry storage and grain transportation services. This chapter also discusses the competitive effect of container export services and the domestic demand for wheat.

[8] ibid, p. 3.

[9] AGEA, Submission on the ACCC's draft determinations, 10 September 2015.

As noted above, the ACCC received only one submission from industry in response to its recent draft determinations proposing to grant exemptions to QBT's and GrainCorp's Port of Brisbane facilities. This submission supported the ACCC's draft view.

Accordingly, the ACCC considers that its industry and competition analysis of QBT's Brisbane facility presented in its draft determinations document remains appropriate to inform the ACCC's final exemption assessment of this facility.

The ACCC's draft determinations document is available online at https://www.accc.gov.au/regulated-infrastructure/wheat-export/wheat-export-projects/port-of-brisbane-wheat-ports-exemption-assessments/draft-determinations

## 1.5. Further information

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# 2. ACCC exemption assessment of QBT's terminal at the Port of Brisbane

This chapter sets out the ACCC's final assessment of whether it should determine QBT to be an exempt service provider at its Port of Brisbane facility. The ACCC's assessment is set out against the matters in subclause 5(3) of the Code, which the ACCC must have regard to in assessing an exemption application.

As noted in section 1.4, the ACCC's final assessment draws on its recent competition analysis of QBT's Port of Brisbane facility, as presented in Chapters 2 and 3 of the ACCC's draft determinations document.

## 2.1. Legitimate business interests

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 assessing whether an exemption will be in a PTSP's legitimate business interests should be considered against the reasons for a 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, 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 service provider's ability to compete in the provision of port terminal services or other upstream and downstream markets.

As QBT's Brisbane port terminal is currently unregulated, QBT submits that compliance with Parts 3 to 6 of the Code will unnecessarily impede its flexibility and impose higher costs. QBT submits that:

> *QBT is currently exempt under the Code through to 1 October 2015 (and was not regulated under the previous grain access regime under the Wheat Export Marketing Act 2008 (Cth)).This application is merely seeking to maintain that status quo.*[10]

QBT further submits that:

> *A continuation of QBT's exemption will allow QBT to dynamically compete for bulk export tonnes on sound commercial terms, to ensure that investment capital is optimised in order to reduce supply chain costs and to ensure the QBT terminal remains competitive with the nearby GrainCorp terminal and internationally*

[10] QBT, Submission in support, p. 7.

*competitive more generally. As a relatively new entrant, QBT needs the flexibility to compete as vigorously as possible to attract volumes away from the GrainCorp terminal.*

*It would be contrary to QBT's legitimate business interests to be subjected to regulatory burden and the related costs when there would be no benefit to competition, grain exporters or growers, or the public from doing so.*[11]

### 2.1.1. Operational flexibility

The ACCC notes that parties are able to exercise a degree of flexibility in operating port terminal services even where they must comply with all requirements in the Code. Non-exempt service providers are able to set prices, terms and conditions through their standard terms, and negotiate access agreements with exporters that are different to their standard terms.

Non-exempt service providers are also able to (subject to ACCC approval processes) select their method of capacity allocation and length of time that it is allocated for. For instance, in November 2012 the ACCC decided that it was appropriate for GrainCorp to move from a single year allocation method to long-term arrangements for all its East Coast ports, which had the potential benefits of providing greater certainty for users in planning their long-term grain export programs and assist in supply-chain planning.[12]

The ACCC acknowledges, however, that while there is scope for flexibility in providing port terminal services where the entire Code applies, a service provider will have greater operational flexibility if only Parts 1 and 2 apply to them.

If QBT is not required to comply with Parts 3 to 6 of the Code, as is presently the case, it will be able to continue to engage freely in direct commercial negotiations and vary operational rules as it considers necessary for particular exporters. For example, exempt service providers have the flexibility to facilitate slot trades and reorder the priority with which vessels will be berthed and loaded without having to comply with notification timeframes and potential requirements of approved port loading protocols, making them more responsive to the needs of their customers.

### 2.1.2. Compliance costs

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

In QBT's circumstances, the ACCC notes that as QBT is not currently regulated under the Code it would be required to develop an entirely new compliance program.

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

[11] QBT, Submission in support, p. 4.

[12] ACCC media release, *ACCC allows GrainCorp to introduce long-term port access agreements*, 30 November 2012.

**Conclusion**

As a general proposition, the ACCC considers that it is in a PTSP's legitimate business interests to reduce (or not impose additional) regulatory compliance costs and maintain operational flexibility. As such it is the ACCC's view that because an exemption for QBT would allow it to continue operating with flexibility and not impose additional compliance costs it will likely be consistent with their legitimate business interests.

As noted above, the ACCC considers that the legitimate business interests of QBT should be considered against the reasons for having regulation in place and the level of competitive constraint faced by QBT. These factors are considered below in the ACCC's assessments against other matters in subclause 5(3) of the Code.

## 2.2. The public interest and competition in markets

The ACCC considers that subclauses 5(3)(b) and (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 grain storage and handling services and the transport of grain to port. Related markets mainly include container grain exports and domestic demand for grain. The ACCC's analysis of these markets is set out in its draft determinations document.

The following issues are relevant when having regard to subclauses 5(3)(b) and (g) of the Code:

- Whether there is 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 (such as the grain acquisition market).
- 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) of the Code, discussed above).
- Whether the competitive situation in upstream and downstream markets would allow a vertically integrated PTSP to exercise market power in the provision of services at port in the absence of Parts 3 to 6 of the Code applying, and whether that competitive situation would change as a result of an exemption.

These considerations (in particular considerations around the effect in the grain acquisition market) overlap with the ACCC's consideration below of clauses 5(3)(c) and 5(3)(d) of the Code concerning access seekers.

### 2.2.1. Competition in bulk wheat export operations

The ACCC notes from its analysis of port terminal services and upcountry and related markets presented in its draft determination document, that QBT faces significant competition from GrainCorp's Brisbane port terminal.

Specifically:

- QBT's and GrainCorp's Brisbane terminals are located at the same port. QBT's terminal provides similar services to GrainCorp's Brisbane facility, but in comparison, the QBT terminal has certain limitations. GrainCorp's facility can accommodate slightly larger vessels and has both rail and road access, as opposed to QBT's road only access.

- The ACCC considers that the grain catchment areas for the two Brisbane terminals are similar, however the QBT terminal's catchment area is likely to be slightly smaller as it is more limited to locations where road transport is competitive.

- Based on historical exports at both Brisbane terminals it is likely that there will be significant spare capacity available between both terminals, including a degree of spare capacity at peak times of the year. This significant level of spare capacity suggests that QBT will continue to face commercial incentives to compete with GrainCorp's facility, as it does in the current environment, to maximise throughput volumes at its facility.[13]

Accordingly, the ACCC considers competition between and on the Brisbane port terminals will continue to ensure that third party exporters will to be able to obtain capacity at both peak and non-peak times of the year at QBT's facility (and/or GrainCorp's Brisbane facility), if QBT is exempt.

### 2.2.2. Competition in upstream and downstream markets

The ACCC has also considered the nature of competition in upstream and downstream markets. The ACCC has considered whether the competitive situation in the upcountry storage and handling, and transport markets, might provide QBT with market power that could be leveraged into its port services, if an exemption is granted, to limit the ability of exporters to participate in the upstream grain acquisition market. For example, a PTSP with upstream market power may provide more favourable terms and conditions to users who utilise both its port and upcountry facilities. Equally, the ACCC must consider the effect on those markets of granting the exemption at port.

The ACCC also considers that related markets, such as container exports and domestic demand, can also affect the promotion of competition in bulk wheat port terminal services as well as upstream and downstream markets.

The ACCC notes that QBT does not own upcountry assets such as storage and handling facilities in its catchment area, and as such has no ability to leverage an upstream position into its port services.[14]

Additionally, based on its analysis of upcountry and related markets in its draft determinations document, the ACCC considers that:

- Road transport is used by a large number of marketers to move grain to port in Brisbane and there are a range of options available to marketers to transport grain to QBT's Brisbane facility. GrainCorp's facility can receive both road and rail deliveries of grain, providing a direct and strong competitive constraint on QBT's terminal.

- Containerised grain exports from the Port of Brisbane are significant, with wheat exports via containers representing around 35 per cent of total wheat exports from Queensland.[15] This is higher than the proportion of container wheat exports in Victoria (approximately 30 per cent). The ACCC considers that containerised exports

[13] ACCC, Draft determinations: GrainCorp Operations Limited and Queensland Bulk Terminals at the Port of Brisbane, 27 August 2015, pp. 15-19.

[14] QBT, Submission in support, p. 2.

[15] ACCC, *Draft determinations: GrainCorp Operations Limited and Queensland Bulk Terminals at the Port of Brisbane*, 27 August 2015, pp. 38-39.

represent a viable alternative export path for a large amount of grain produced in the QBT terminal's catchment area. Containerised exports will therefore continue to provide a further competitive constraint on QBT's bulk export operations in Brisbane.

- There is strong and consistent demand for grain in southern Queensland from domestic users, particularly for stock feed businesses.[16] Domestic users of grain face lower supply chain costs compared to the export markets and are able to pay growers an amount that is at least equivalent to the export parity price. The level of constraint that domestic users place on bulk and container exports is generally restricted by the size of domestic demand, which is relatively consistent over time and generally does not encompass the entire crop, although there have been seasons where domestic demand has made up an very large proportion of grain production in Queensland, leaving little available for export.

The ACCC considers that QBT faces strong competition from GrainCorp's Brisbane port terminal, as well as from the presence of significant container wheat exports at the Port of Brisbane, and faces the relative disadvantage of not owning upcountry assets. As such the ACCC considers that if an exemption were granted to QBT, and QBT were permitted to continue to operate without the full regulations of the Code as it currently does, it would not be to the detriment of current levels of competition in the grain acquisition market, or to upcountry and related markets.

Being subject to the lower level of regulation under the Code would also enable QBT to compete more effectively with GrainCorp in the provision of port terminal services.

**Conclusion**

In light of the above factors, the ACCC's view is that there will be significant constraints on QBT such that competition at port and upcountry will not be reduced if the ACCC grants QBT an exemption. The ACCC considers that QBT faces a strong competitor in GrainCorp's Brisbane port terminal given the relative advantages GrainCorp's terminal has over QBT as well as the existence of GrainCorp's port terminal and upcountry supply chain infrastructure.

Additionally, QBT will continue to face competition from the significant container exports and domestic demand in southern Queensland.

## 2.3. Interests of exporters and access to port terminal services

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.

The ACCC generally considers that granting an exemption will not be detrimental to the interests of exporters requiring access to port terminal services if they can still compete in the grain export market on their relative merits. As noted above, this consideration overlaps with considerations discussed above concerning the public interest and promotion of competition in upstream and downstream markets.

Competition on the relative merits of exporters would be hindered if terms and conditions of access favour one or more exporters (and in particular the port operator's own trading arm) on a basis other than their merits, thereby distorting the competitive process.

The ACCC will also consider the bargaining power of exporters and whether exporters have a viable alternative to export or market grain.

[16] ibid, pp. 41-44.

Public submissions received from the exporter association AGEA as well as exporters Glencore and CBH supported granting an exemption to QBT's Brisbane port terminal.

As submitted by QBT, it has a degree of vertical integration in wheat exporting:

> *QBT is a wholly owned subsidiary of Wilmar Gavilon Pty Ltd (WG), which is ultimately 50% owned by each of Wilmar International Limited and Marubeni Corporation. WG is an exporter of grain in Brisbane, such that there is a degree of vertical integration.*[17]

QBT therefore may have some incentive to favour the Wilmar Gavilon exporting arm over other exporters at its Brisbane facility.

However, based on the ACCC's analysis presented in its draft determination document, the ACCC considers that there is likely to be a significant amount of available capacity across both QBT and GrainCorp's Brisbane port terminals, with QBT facing strong competition from GrainCorp's terminal as well as from containerised exports (in particular) and also domestic demand. Therefore, the ACCC considers that QBT will continue to have strong incentives to allow other parties to access capacity at its terminal in order to maximise throughput and compete with the GrainCorp facility, as is currently the case.

In particular, the ACCC's analysis of port terminal services and the exporters using these services, and analysis of container grain exports, indicates that:

- Wilmar Gavilon (including its owner companies) has been one of the largest exporters from QBT's facility. However, QBT has been an unregulated facility since it began operating in June 2011 and has allowed a number of other third party exporters to use the facility, including in peak times. In an environment where QBT competes with GrainCorp's Brisbane port terminal, there has also been a significant amount of spare capacity at both peak and non-peak times allowing further users to access the facility if they wished to do so.[18]

- Historical export data suggests that a significant level of spare capacity is expected to be available at GrainCorp's facility at the same port, placing a strong and direct competitive discipline on QBT's Brisbane terminal.[19]

- Containerised exports represent a further alternative pathway to export grain from the QBT terminal's catchment area, and have been used to export around 35 per cent of total wheat exports in the region.[20]

In light of the above factors, the ACCC's view is that granting the exemption would not be detrimental to the interests of exporters requiring access to port terminal services at QBT's Brisbane terminal. The ACCC considers that QBT will continue to have incentives to provide access to its facility on reasonable terms in order to maximise throughput, and that additional regulation on QBT under the full application of the Code is not necessary to ensure fair and transparent access to QBT's facility.

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[17] QBT, Submission in support, p. 2.

[18] ACCC, *Draft determinations: GrainCorp Operations Limited and Queensland Bulk Terminals at the Port of Brisbane*, 27 August 2015, pp. 15-21.

[19] ACCC, Draft determinations: GrainCorp Operations Limited and Queensland Bulk Terminals at the Port of Brisbane, 27 August 2015, pp. 15-19.

[20] ibid, pp. 38-39.

## 2.4. Economically efficient operation and efficient investment

Subclauses 5(3)(e) and 5(3)(f) of the Code require the ACCC to have regard to the promotion of the efficient operation and use of a facility, and the efficient investment in port terminal facilities when deciding whether to grant an exemption.

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

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

### 2.4.1. Promotion of the efficient operation and use of QBT's facility

Regarding the impact of an exemption for QBT on the efficient operation and use of its facility, QBT submits:

> *given the strong competition QBT faces from various parts of the supply chain the ability to offer flexible and innovative port terminal services to all exporters will drive efficient (and increased) utilisation of QBT and associated supply chain assets in the delivery of port terminal services.*[21]

Glencore also submits that an exemption will promote the efficient use of facilities in Brisbane:

> *In circumstances where they face competitive constraints, exemption from Parts 3 - 6 of the Code will assist infrastructure owners to engage commercially and flexibly with third party exporters. This, in turn, facilitates the efficient allocation and use of port terminal infrastructure with reduced potential for regulatory distortions.*[22]

As outlined under the above discussion of subclauses 5(3)(b) and (g) of the Code, the ACCC's view is that the significant competition that QBT faces from GrainCorp's competing Brisbane terminal, and from containerised exports and domestic demand, will continue to drive the efficient operation and use of QBT's facility in the absence of obligations to comply with Parts 3 to 6 of the Code.

As noted in the discussion of subclause 5(3)(a) of the Code, exempting QBT from having to comply with Parts 3 to 6 of the Code will continue to provide it with flexibility in the way it allocates capacity. Also, as noted in the discussion of subclauses 5(3)(c) and (d) of the Code, the ACCC's view is that QBT will continue to have incentives to provide access to its facility on reasonable terms in order to maximise throughput. The ACCC therefore considers that the ability for QBT to operate flexibly, and its incentives to increase use of its facility, will promote the efficient operation of the facility.

### 2.4.2. Promotion of efficient investment in port terminal facilities

The ACCC considers that an exemption for QBT's Brisbane facility would not be detrimental to the promotion of efficient investment in port terminal facilities.

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[21] QBT, Submission in support, p. 6.

[22] Glencore, Submission in response to Issues Paper, p. 2.

QBT submits:

> *Investment in port terminal facilities will ultimately be driven by financial returns. Given the high level of competition in Brisbane, QBT strongly favours continuation of the exemption to allow flexible and innovative supply chain offerings and responsive pricing that will help to drive higher utilisation and/or lower costs supporting future port and supply chain investment.*[23]

As QBT's Brisbane terminal is currently unregulated, a determination to exempt QBT's facility may not substantially change the way QBT operates and the level of investment it makes. However, the ACCC considers that not exempting QBT, and allowing an increased level of regulation to be applied on QBT at its Brisbane facility from the introduction of Parts 3 to 6 of the Code, may be detrimental to efficient investment in QBT's facility. This is particularly relevant in a competitive environment as discussed in the above discussion of subclauses 5(3)(b) and (g) of the Code.

Further, containerised exports shipped out of Queensland are no longer regulated, and make up around 35 per cent of total wheat exports.[24] This unregulated export alternative will continue to place a constraint on QBT's bulk export programme which could impact the efficient investment in the facility if QBT is not granted an exemption.

**Conclusion**

The ACCC's view is that an exemption for QBT will:

- allow it to continue to provide flexible services and meet the demands of its customers, promoting the efficient operation and use of QBT's facility
- not introduce unnecessary regulation which may impede the level of efficient investment in a competitive environment
- allow QBT to continue to operate on a more level playing field with the container and domestic markets, which are not regulated, further promoting efficient investment in port terminal facilities.

Accordingly, the ACCC considers that exemption will promote the efficient operation and use of QBT's terminal, and not be detrimental to efficient future investment in port terminal facilities.

## 2.5. Exporter or associated entity of an exporter

Subclause 5(3)(h) of the Code requires the ACCC to have regard to whether the PTSP is an exporter or an associated entity of an exporter. The extent to which a vertically integrated operator favours, or is likely to favour, its own trading division will influence the ACCC's decision on whether it is appropriate that the provider should be exempt from having to comply with Parts 3 to 6 of the Code in providing access to its services.

QBT submits that there is a degree of vertical integration between QBT and Wilmar Gavilon's businesses.[25]

The ACCC acknowledges that QBT's first motivation would likely be to satisfy the export requirements of its associated exporter, Wilmar Gavilon (including its owner companies), and would therefore likely provide preferential access to Wilmar Gavilon.

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[23] QBT, Submission in support, p. 6.

[24] ACCC, *Draft determinations: GrainCorp Operations Limited and Queensland Bulk Terminals at the Port of Brisbane*, 27 August 2015, pp. 38-39.

[25] QBT, Submission in support, p. 2.

The ACCC however notes that Wilmar Gavilon (including its owner companies) must compete with numerous other exporters in the grain acquisition and export market and that there are two competing bulk wheat port terminals at the Port of Brisbane, both of which have a history of having spare capacity across the year.

QBT has demonstrated that, since beginning operations in June 2011, it has allowed third party exporters access to its facility in both peak and non-peak times of the year. This access has been provided on commercial terms. The ACCC considers that QBT will continue to have strong commercial incentives to attract third-party exporters in order to drive utilisation of its facilities and increase profits.

The ACCC's view is that although QBT may provide Wilmar Gavilon with some preferential access to QBT's facility, QBT has strong commercial incentives to continue to attract and offer reasonable terms and conditions to other third-party customers given the level of spare capacity at the Port of Brisbane and competition from GrainCorp's Brisbane facility and alternative grain markets.

Accordingly the ACCC does not consider that QBT's level of vertical integration requires it to be subject to Parts 3 to 6 of the Code.

## 2.6. PTSP already exempt in the grain catchment area

Subclause 5(3)(i) of the Code 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 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 affecting each facility.

The ACCC examined the relevant grain catchment area for QBT's Brisbane terminal in its draft determinations document and considers that the area spans across most of the grain growing regions of southern Queensland and certain parts of northern NSW. The ACCC considers that the catchment area for GrainCorp's Brisbane terminal is similar to QBT's but is likely to span into certain western parts of south Queensland and encompasses areas where established rail lines provide cost-effective rail transport options to allow grain to be delivered by rail to GrainCorp's facility.[26]

The ACCC considers there to be limited overlap between these catchment areas and the catchment areas for the Newcastle port terminals. Therefore, while there are currently exempt service providers at Newcastle, the ACCC considers that these ports provide a very limited degree of competition on the Brisbane port terminals.

Prior to making the determinations in this document relating to exemptions for both the Brisbane port terminals, no bulk wheat terminal services provider in the relevant catchment was exempt under the Code.

The ACCC has however, determined that GrainCorp is an exempt PTSP by means of its Brisbane facility (see chapter 3). The ACCC considers that exempting GrainCorp's port terminal from the full application of the Code supports also granting an exemption for QBT's Brisbane facility, particularly given the level of competition the ACCC considers there to be between the two port terminals.

[26] ACCC, *Draft determinations: GrainCorp Operations Limited and Queensland Bulk Terminals at the Port of Brisbane*, 27 August 2015, pp. 31-38.

## 2.7. Other matters

QBT submits that:

> *Unlike many of the major grain terminal providers, any costs of compliance imposed on QBT would be borne by a single-terminal operation and would have a disproportionate impact on its effective cost base per terminal.*[27]

The ACCC considers that being a single terminal operator may not necessarily support an exemption decision, as other factors such as the level of vertical integration, competition and the amount of export capacity at the facility are all significant factors, and are discussed above.

The ACCC does not consider that there are any other matters relevant to its assessment of QBT's Brisbane port terminal exemption application.

[27] QBT, Submission in support, p. 7.

# 3. ACCC exemption assessment of GrainCorp's terminal at the Port of Brisbane

This chapter sets out the ACCC's final assessment of whether it should, pursuant to clause 5(2) of the Code, determine that GrainCorp is an exempt service provider of port terminal services provided by means of its Brisbane facility. The ACCC's assessment is set out against the matters in subclause 5(3) of the Code, which the ACCC must have regard to in assessing an exemption application.

As noted in section 1.4, the ACCC's final assessment draws on its recent competition analysis of GrainCorp's Port of Brisbane facility presented in the ACCC's draft determinations document.

## 3.1. Legitimate business interests

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.

GrainCorp submits that granting an exemption to GrainCorp's Brisbane Port Terminal would be in its legitimate business interests as it would:

- allow GrainCorp to compete commercially for the export of bulk grain;
- support operational flexibility to improve service and reduce supply chain costs;
- provide equity with competing export container packers that are not regulated;
- provide equity with a competing bulk port terminal, QBT, that is not regulated; and
- reduce the level of regulation and cost of compliance.[28]

As noted in the ACCC's discussion of whether an exemption would be in QBT's legitimate business interests, the ACCC considers that, while a PTSP will have scope for flexibility in providing port terminal services where the entire Code applies, exemption will generally increase a service provider's operational flexibility, and reduce its compliance costs.

The ACCC also noted in that discussion that assessing whether an exemption will be in a PTSPs legitimate business interests should be considered against the reasons for a PTSP to be subject to all of the Code's obligations. For example, it would be in a PTSP's legitimate business interests to reduce regulatory requirements where competition already provides sufficient constraint on a PTSP's ability to exercise market power.

The ACCC notes that GrainCorp is currently subject to all of the Code's obligations at Brisbane and certain other ports and therefore has an established compliance regime. GrainCorp will be required to continue its existing compliance processes unless and until the ACCC makes a final determination to exempt GrainCorp. In the short term, GrainCorp's incremental costs of continuing to comply with the obligations in Parts 3 to 6 of the Code are unlikely to be high, as GrainCorp already has processes in place to facilitate compliance and has operated under similar regulations for some time. However, an exemption could be expected to reduce GrainCorp's ongoing regulatory compliance costs.

In 2013 GrainCorp signed long term agreements for 0.4 mtpa capacity at its Brisbane port terminal for three years. These agreements run until 30 September 2016. If GrainCorp were granted an exemption prior to renegotiating these agreements, it would have a greater

[28] GrainCorp, Submission in support, p. 3.

degree of flexibility in these negotiations. Allowing this flexibility would be consistent with its legitimate business interests.

**Conclusion**

It is the ACCC's view that an exemption for GrainCorp would increase its operational flexibility and decrease its Code compliance costs, and therefore be consistent with its legitimate business interests.

As noted above, the ACCC considers that the legitimate business interests of GrainCorp should be considered alongside reasons for having regulation in place and the level of competitive constraint faced by GrainCorp at its Brisbane facility. These factors are considered below in the ACCC's assessments against other matters in subclause 5(3) of the Code.

## 3.2. The public interest and competition in markets

The ACCC considers that subclauses 5(3)(b) and (g) of the Code relate to the promotion of competition in markets, including the market for bulk wheat port terminal services as well as 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 grain storage and handling services and the transport of grain to port. Other related markets include container grain exports and domestic demand for grain.

The ACCC also notes that its consideration of these markets (in particular considerations around the effect in the grain acquisition market) overlaps with the ACCC's consideration below of clauses 5(3)(c) and 5(3)(d) of the Code concerning access seekers.

### 3.2.1. Competition in bulk wheat export operations

The ACCC considers that GrainCorp's Brisbane terminal currently faces a level of competition from QBT's terminal at the same port. In particular, the ACCC's analysis presented in its draft determinations noted the following.

- GrainCorp's and QBT's Brisbane terminals provides similar services. GrainCorp's Brisbane facility however is larger than QBT's, with the substantive differences being the GrainCorp facility being able to accommodate slightly larger vessels and being able to receive grain by both rail and road, compared to QBT's road only access.

- The ACCC considers that the grain catchment areas for the two Brisbane terminals overlap to a large extent. However the GrainCorp terminal's catchment area is likely to be slightly larger as it extends into certain western parts of southern Queensland where rail lines run to the Port of Brisbane, and road transport is less competitive.

- Based on historical exports at both Brisbane terminals, it is likely that there will be significant spare capacity available between the two competing port terminals in Brisbane, including a degree of spare capacity at peak times of the year.

- GrainCorp's Brisbane terminal in particular is likely to have a large amount of spare capacity. Over the last five years data shows that GrainCorp's facility has an average utilisation rate of around 31 per cent, and only 38 per cent during the peak months between January and July. Even in the highest throughput year during the same period, GrainCorp's facility had an annual utilisation rate of 57 per cent and a peak utilisation rate of 61 per cent.[29]

The ACCC acknowledges the differences in capability of the two Brisbane port terminals, in particular the lower level of capability of QBT's terminal relative to GrainCorp's terminal. The ACCC however notes that there are a number of features of the southern Queensland region that the ACCC considers mitigate the impact of these capability differences for many exporters. The features include:

- The significant use of road transport to move grain to port, which is the only way QBT's terminal can receive grain. Estimates indicate that between 54 to 65 per cent of grain has been transported to the Port of Brisbane by road in recent years.[30]
- The size of the vessels being loaded at GrainCorp's Brisbane port terminal are mostly vessels that could be loaded at QBT's facility. GrainCorp submits that 95 per cent of vessels loaded at its Brisbane facility are less than 35 000 tonnes.[31] QBT submits that with the recent upgrade of its shiploader its facility can load vessels up to 50 000 deadweight tonnes subject to draft restrictions.[32]

Taking the above points into account, the ACCC considers that the two Brisbane port terminals, although having different capabilities, are likely to be substitutes for a number of marketers.

As such, the ACCC considers that the significant level of spare capacity, particularly at GrainCorp's Brisbane port terminal, suggests that GrainCorp would face commercial incentives to increase and maximise throughput of its own terminal wherever it can and, for a number of marketers, would continue to compete with QBT's nearby facility.

### 3.2.2. Competition in upstream and downstream markets

The ACCC has also considered the nature of competition in upstream and downstream markets. The ACCC has considered whether the competitive situation in the upcountry storage and handling, and transport markets, might provide GrainCorp with market power that could be leveraged into its port services, if an exemption was granted, to limit the ability of exporters to participate in the upstream grain acquisition market. For example, a PTSP with upstream market power may provide more favourable terms and conditions to users who utilise both its port and upcountry facilities. Equally, the ACCC must consider the effect on those markets of granting the exemption at port.

The ACCC also considers that related markets, such as container exports and domestic demand, can also affect the promotion of competition in bulk wheat port terminal services as well as upstream and downstream markets.

Based on the ACCC's analysis of upcountry and related markets set out in its draft determination document, the ACCC considers that GrainCorp has a significant presence in the provision of storage and handling services across southern Queensland and northern NSW. Based on sites identified by GTA, GrainCorp operates around 76 per cent of sites in its terminal's catchment area.[33]

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[29] ACCC, *Draft determinations: GrainCorp Operations Limited and Queensland Bulk Terminals at the Port of Brisbane*, 27 August 2015, pp. 17-18.

[30] ibid, pp. 28-31.

[31] GrainCorp, Submission in support, p. 12.

[32] QBT, Submission in support, p. 12.

[33] ACCC, *Draft determinations: GrainCorp Operations Limited and Queensland Bulk Terminals at the Port of Brisbane*, 27 August 2015, p. 26.

However, the ACCC considers that there are a number of competitive features of the southern Queensland region that place a level of competition on GrainCorp's upcountry position. In particular, the ACCC's analysis presented in its draft determinations noted the following.

- There are some alternative upcountry storage options in these regions, particularly from facilities owned by GrainFlow, a subsidiary of Cargill, which provides both road and rail access. Additionally, there are several other single site operators with integrated storage and handling services in the catchment area that offer container packing or road transport services, or both. Some growers, however, in certain locations may continue to have limited options for delivering their grain outside of GrainCorp's network.
- As noted above, with a large proportion of road transport being used to transport grain to the Port of Brisbane for export, the alternative storage options, which can only accommodate road transport, are likely to be viable alternatives options for a number of marketers.
- There is a level of surplus upcountry storage capacity that should encourage GrainCorp, as well as other storage providers, to attract and service customers wanting to use its upcountry facilities given the presence of both alternative storage options as well as an alternative port terminal in QBT's facility also at the Port of Brisbane. Additionally, both of these competing port terminals have spare export capacity.
- Containerised grain exports are significant. Wheat exports via containers represent around 35 per cent of total wheat exports from Queensland, with the majority being exported through the Port of Brisbane.[34] Additionally, the number and variety of upcountry container packing facilities and the ability to move containers to port by road further make containerised exports an alternative export option to bulk for a large amount of grain produced in the catchment area, providing a competitive constraint on GrainCorp's bulk export operations in Brisbane.
- There is strong and consistent demand for grain in southern Queensland for domestic consumption, particularly from stock feed businesses.[35] Domestic users of grain face lower supply chain costs compared to the export markets and are able to pay growers an amount that is at least equivalent to the export parity price. The level of constraint that domestic users place on bulk and container exports is generally restricted by the size of domestic demand, which is relatively consistent over time and generally does not encompass the entire crop, although there has been seasons where domestic demand has made up a very large proportion grain production in Queensland, leaving little available for export.

In coming to a final view on the proposed exemption of GrainCorp's Brisbane port terminal, the ACCC notes recent changes to GrainCorp's upcountry storage services fee structure, where a new differential of $2.50 per tonne applies to grain that is outturned from GrainCorp's upcountry storage facilities for delivery by rail to a non-GrainCorp port. However, the ACCC notes that these particular fee changes are extremely unlikely to have any practical effect for QBT at the Port of Brisbane, as the fee changes only apply to outturn by rail.

[34] ibid, pp. 38-39.

[35] ACCC, *Draft determinations: GrainCorp Operations Limited and Queensland Bulk Terminals at the Port of Brisbane*, 27 August 2015, pp. 41-44.

### Conclusion

In light of the factors outlined above, the ACCC's view is that there is a sufficient amount of competition on GrainCorp's Brisbane port terminal, and that there is a level of competition in upcountry storage and handling.

The ACCC considers that many exporters have an alternative to GrainCorp's Brisbane port terminal (i.e. QBT's port terminal) as well as some viable alternative upcountry options to GrainCorp's significant network. Additionally, the presence of the significant and consistent containerised wheat exports from the Port of Brisbane places added competitive pressures on GrainCorp's port terminal.

Together, these competitive pressures should allow exporters to continue to participate in the grain acquisition market if an exemption is granted. Furthermore, the ACCC considers that the competitive situation in upcountry storage and handling should not be diminished by granting the exemption.

## 3.3. Interests of exporters and access to port terminal services

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.

If an exemption were granted to GrainCorp at its Brisbane terminal, the interests of exporters requiring access to port terminal services are unlikely to be adversely affected if they can still compete in the grain export market on their relative merits. The ACCC considers that competition provides a strong incentive for a firm to act fairly and reasonably with its customers and to provide fair and transparent access to services. As noted above, this consideration overlaps with considerations above concerning the public interest and promotion of competition in upstream and downstream markets.

As a vertically integrated terminal operator and exporter, GrainCorp has an incentive to favour its own trading arm over other exporters at its Brisbane facility. This is discussed further below in the ACCC's consideration of subclause 5(3)(h) of the Code. It is important for the ACCC to consider the likelihood of this occurring, and exporters being unable to negotiate on fair terms if Parts 3 to 6 of the Code did not apply at GrainCorp's Brisbane facility.

Public submissions received from the exporter association AGEA as well as exporters Glencore and CBH supported granting an exemption to GrainCorp's Brisbane port terminal.

The ACCC's views on the incentives for GrainCorp to not to favour its own trading arm over third party exporters at its Brisbane facility draw on the ACCC's competition analysis set out in its draft determinations document. Relevant findings from this analysis include:

- Over the last five years GrainCorp's trading arm has been the largest exporter through its Brisbane terminal, exporting around 30 per cent of total volumes on average. A number of other exporters have been able to access capacity under the regulated regime, such as Cargill (exporting around 20 per cent), Glencore (17 per cent), Agrex (11 per cent) and Pentag (9 per cent). Five other exporters have shipped smaller quantities of grain from GrainCorp's Brisbane terminal during this period. All of these export proportions, including GrainCorp's, are similar during the peak period, indicating that to date GrainCorp has not prevented its competitors gaining access to its Brisbane terminal during peak times.[36] However, this access has been obtained while the facility has been subject to access regulation.

- Data presented in the ACCC's draft determination document indicates that GrainCorp's Brisbane facility has been underutilised over a number of years, including in low, average and high production years. GrainCorp's Brisbane facility also appears to have spare capacity during the peak times in high productions years. When compared to the utilisation of certain other port terminals on the East Coast, GrainCorp's Brisbane facility appears to be utilised the least.[37]

- As third party exporters have represented around 70 per cent of total exports from GrainCorp's Brisbane terminal, and as there appears to be significant spare capacity at all times of the year, GrainCorp appears to rely on third party customers to provide throughput.[38] As such, GrainCorp would be unlikely to completely foreclose third party access as this would result in it having significantly less throughput at its already underutilised terminal or having to make up a disproportionately large degree of throughput through its own grain network. This is particularly relevant given the presence of QBT's competing bulk export terminal located at the same port, which despite its relatively lower capabilities, appears to be a viable substitute port terminal for a number of marketers.

- If GrainCorp did seek to increase its exports at the expense of servicing some third party exporters, those third party exporters could seek access to shipping slots at QBT's competing Brisbane terminal. Although QBT has a lower level of capability, it has significant spare capacity across most of the year and would be incentivised to increase the use and customer base of its facility. Also, a number of exporters currently utilising GrainCorp's terminal have also used QBT's facility, suggesting that either facility can be used to execute at least some bulk exports.

- Containerised exports through the Port of Brisbane represent an alternative pathway to export some grain from the Brisbane catchment area, and have been used to export around 35 per cent of total wheat exports in recent years.[39] Container exports therefore provide a further level of competitive constraint on GrainCorp's bulk export operations at Brisbane.

Considering all of the above factors, the ACCC's view is that, overall, granting the exemption would not likely be detrimental to the interests of exporters requiring access to GrainCorp's Brisbane port terminal.

The ACCC considers that GrainCorp should have incentives to provide access to its facility on reasonable terms in order to increase and maximise throughput, and the full application of the Code is unlikely to be necessary to ensure fair and transparent access to GrainCorp's facility.

## 3.4. Economically efficient operation and efficient investment

Subclauses 5(3)(e) and 5(3)(f) of the Code require the ACCC to have regard to the promotion of the efficient operation and use of a facility, and the efficient investment in port terminal facilities when deciding whether to grant an exemption.

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[36] ACCC, *Draft determinations: GrainCorp Operations Limited and Queensland Bulk Terminals at the Port of Brisbane*, 27 August 2015, p. 20.

[37] ibid, p. 18.

[38] ibid, pp. 19-21.

[39] ibid, pp. 38-39.

### 3.4.1. Promotion of the efficient operation and use of GrainCorp's facility

GrainCorp submits that exemption for its Brisbane port terminal would:

> *Support lower supply chain costs by allowing GrainCorp to operate its Port Terminals flexibly.*[40]

As outlined under the above discussion of subclauses 5(3)(b) and (g) of the Code, the ACCC's view is that there is a level of competition on GrainCorp's Brisbane facility from QBT's nearby bulk export terminal, as well as from the significant containerised exports from the Port of Brisbane and domestic demand. The ACCC also considers that this competition should drive the efficient operation and use of GrainCorp's currently underutilised Brisbane facility in the absence of obligations to comply with Parts 3 to 6 of the Code.

As noted in the discussion of subclause 5(3)(a) of the Code, exempting GrainCorp from having to comply with Parts 3 to 6 of the Code will provide it with flexibility in the way it allocates capacity. For example, GrainCorp would be able to facilitate slot trades as well as additions and changes to its shipping stem at short notice. This flexibility makes it more likely that GrainCorp will be able to meet the different needs of its customers and therefore is likely to drive higher utilisation.

The ACCC also noted in the discussion of subclauses 5(3)(c) and (d) of the Code that GrainCorp will have incentives to provide access to its facility on reasonable terms in order to increase throughput at its underutilised facility, and that the full level of regulation under the Code is unlikely to be necessary to ensure fair and transparent access to GrainCorp's Brisbane facility.

### 3.4.2. Promotion of efficient investment in port terminal facilities

As noted in the ACCC's views on an exemption's impact on GrainCorp's legitimate business interests, the ACCC considers that an exemption would improve GrainCorp's flexibility and reduce its compliance costs.

The ACCC considers that exemption may promote GrainCorp's investment in its port terminal facilities, with the strength of the incentive tied to the extent of competitive pressures from either a competing bulk service provider or alternative markets. On the competing bulk service providers and alternative markets, GrainCorp submits that it faces:

- *Strong demand from domestic end-users for 50% or production, limiting grain for export.*
- *Strong demand from container packers for 35% of exports, limiting grain for bulk export*
- *Increasing competition from QBT for 25% of bulk exports.*[41]

The ACCC considers that containerised exports in particular, as well as domestic demand, represent a competitive constraint on GrainCorp's bulk export business. The ACCC notes that these alternative avenues to market grain are significant in southern Queensland and are not subject to regulation. An exemption would therefore place GrainCorp's bulk export services on a more level playing field with those other avenues to market, and may promote further investment in bulk wheat facilities.

[40] GrainCorp, Submission in support, p. 3.

[41] GrainCorp, Submission in support, p. 3.

**Conclusion**

The ACCC's view is that an exemption for GrainCorp would:

- allow it to provide flexible services and meet the demands of its customers, promoting the efficient operation and use of GrainCorp's facility

- allow GrainCorp to continue to operate on a more level playing field with the container and domestic markets, which are not regulated, further promoting efficient investment in port terminal facilities.

Accordingly, the ACCC considers that exemption would promote the efficient operation and use of GrainCorp's terminal.

## 3.5. Exporter or associated entity of an exporter

Subclause 5(3)(h) of the Code requires the ACCC to have regard to whether the PTSP is an exporter or an associated entity of an exporter. The extent to which a vertically integrated operator favours, or is likely to favour, its own trading division will influence the ACCC's decision on whether it is appropriate that the provider should be exempt from having to comply with Parts 3 to 6 of the Code in providing access to its services.

The ACCC notes that the significance of GrainCorp's status as a vertically integrated service provider depends on the level of capacity constraint at its facility and the level of competition it faces for business.

On its vertical integration status and its implications for competition, GrainCorp submits:

> *GrainCorp is vertically integrated as a port service provider and an exporter of grain in Queensland. However GrainCorp has no market power, and is commercially incentivised to maximise grain throughput at its Port Terminals, given:*
>
> - *Strong competition from competing domestic and container packing markets*
>
> - *Competition in the provision of port elevation services for bulk grain export from the unregulated Wilmar Gavilon's Queensland Bulk Terminals at Brisbane*
>
> - *Excess country and packing capacity combined with excess port elevation capacity.*[42]

The ACCC notes that GrainCorp's vertical integration creates incentives for it to favour its own trading division. The ACCC however notes that GrainCorp must compete with numerous other exporters in the grain acquisition and export market and that there are two competing bulk wheat port terminals at the Port of Brisbane, both of which have a history of having spare export capacity across the year. As noted above, the ACCC considers that, while the two bulk export terminals differ in their capabilities, a number of features of the southern Queensland region such as the significant use of road transport to move grain to port, and the relatively smaller sized vessels being loaded at GrainCorp's Brisbane facility, suggest that for a number of marketers the two port terminals can be substitutes.

The ACCC took the level of vertical integration into account when considering subclauses 5(3)(c) and (d) above, where the ACCC noted that GrainCorp should have incentives to provide third parties with access to its facility on reasonable terms in order to increase and maximise throughput without the application of Parts 3 to 6 of the Code.

[42] GrainCorp, Submission in support, p. 3.

Also, as noted under consideration of subclauses 5(3)(b) and (g), the ACCC's analysis indicates that there is a sufficient amount of competition on GrainCorp's Brisbane facility and that competition in upcountry storage and transport services should not be diminished if an exemption were granted to GrainCorp's Brisbane facility. Additionally, the ACCC notes that the significant containerised wheat exports from the Port of Brisbane places further competitive pressures on GrainCorp's port terminal.

Overall, the ACCC considers that GrainCorp's ability to favour its own trading arm at its Brisbane facility are limited by a number of competitive pressures, which together amount to a sufficient level of competition on GrainCorp's Brisbane facility.

Accordingly the ACCC's view is that it does not consider that GrainCorp's level of vertical integration at its Brisbane port terminal requires it to be subject to Parts 3 to 6 of the Code.

## 3.6. PTSP already exempt in the grain catchment area

Subclause 5(3)(i) of the Code 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 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 affecting each facility.

The ACCC examined the relevant grain catchment area for GrainCorp's Brisbane terminal in its draft determinations document and considers that the catchment area spans across most of the grain growing regions of southern Queensland and certain parts of northern NSW.[43]

The ACCC considers GrainCorp's Brisbane terminal's catchment area and QBT's Brisbane facility's catchment area are similar and overlap, despite QBT's catchment area likely being slightly smaller as it is more limited to locations where road transport is competitive.

The ACCC considers there to be limited overlap between these catchment areas and the catchment areas for the Newcastle port terminals. Therefore, while there are currently exempt service providers at Newcastle, the ACCC considers that these ports provide a very limited degree of competition on the Brisbane port terminals.

Prior to making the determinations in this document relating to exemptions for both the Brisbane port terminals, no bulk wheat terminal services provider in the relevant catchment was exempt under the Code.

The ACCC has however, determined that an exemption should be granted for QBT's port terminal (see chapter 2). The ACCC considers that exempting QBT's port terminal from the full application of the Code supports also granting an exemption for GrainCorp's Brisbane facility, particularly given the level of competition the ACCC considers there to be between the two port terminals.

## 3.7. Other matters

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

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[43] ACCC, *Draft determinations: GrainCorp Operations Limited and Queensland Bulk Terminals at the Port of Brisbane*, 27 August 2015, pp. 31-38.

# Appendix: The Code

The Port Terminal Access (Bulk Wheat) Code of Conduct (Code) was made under section 51AE of the *Competition and Consumer Act 2010* (CCA) and commenced on 30 September 2014. It replaced the previous regulatory framework under the *Wheat Export Marketing Act 2008,* which required vertically integrated port terminal service providers (PTSPs), including GrainCorp, to provide the ACCC with access undertakings.

The purpose of the Code is 'to regulate the conduct of port terminal service providers to ensure that exporters of bulk wheat have fair and transparent access to port terminal services'.[44]

## The Code applies to a port terminal service provider

The Code applies to a **PTSP**, defined as 'the owner or operator of a port terminal facility that is used, or is to be used, to provide a port terminal service'.[45]

A **port terminal service** is defined as 'a service (within the meaning of Part IIIA of the [CCA]) provided by means of a port terminal facility, and includes the use of a port terminal facility'.[46] A **port terminal facility** is defined as:

> a ship loader that is:
>
> (a) at a port; and
>
> (b) capable of handling bulk wheat;
>
> and includes any of the following facilities, situated at the port and associated with the ship loader, that are capable of handling bulk wheat:
>
> (c) an intake/receival facility;
>
> (d) a grain storage facility;
>
> (e) a weighing facility;
>
> (f) a shipping belt.[47]

## Obligations on a port terminal service provider

A PTSP must comply with all six Parts of the Code. However, a PTSP that is determined by the ACCC or the Minister for Agriculture to be an exempt service provider need not 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 a PTSP to:

- deal with exporters in good faith
- publish a port loading statement and policies and procedures for managing demand for their services
- make current standard terms and reference prices for each port terminal facility publically available on their website.

[44] Port Terminal Access (Bulk Wheat) Code of Conduct, cl. 2.
[45] ibid, cl. 3.
[46] ibid.
[47] ibid.

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
- to deal with disputes during negotiation via a 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 if the system allocates capacity more than 6 months into the future.

Part 5 of the Code requires a PTSP to regularly publish expected capacity, stock information and key performance indicators.

Part 6 of the Code requires a PTSP to keep records of documents such as access agreements and variations to those agreements.

## Exempting a port terminal service provider

The Code allows the ACCC or the Minister for Agriculture to exempt a PTSP from Parts 3 to 6 of the Code in relation to port terminal services provided by means of a specified port terminal facility. An exemption cannot be granted from individual parts of the Code, for example, it would not be possible to only grant an exemption from Part 4 of the Code. Exempt PTSPs must still comply with Parts 1 and 2 of the Code.

### Exemptions by the ACCC

Under subclause 5(2) of the Code, the ACCC can determine a PTSP to be an exempt service provider of port terminal services. Subclause 5(3) of the Codes states that the ACCC must have regard to a list of matters in making a determination. Under subclause 5(6) of the Code, the ACCC can subsequently revoke an exemption determination if it is satisfied that the reasons for granting the exemption no longer apply.

On 1 October 2014 the ACCC determined GrainCorp to be an exempt service provider at its bulk wheat port terminal at the Port of Newcastle.[48]

On 25 June 2015 the ACCC released final determinations to:

- make Emerald Grain Pty Ltd an exempt service provider at the Port of Melbourne
- make GrainCorp Operation Limited an exempt service provider at the Port of Geelong
- not make GrainCorp an exempt service provider at the Port of Portland.[49]

On 30 July 2015 the ACCC determined Newcastle Agri Terminal Pty Ltd and Qube Holdings Ltd to be exempt service providers at their respective bulk wheat port terminals at the Port of Newcastle.[50]

[48] ACCC, *Determination: Exemption in respect of GrainCorp's Carrington (Newcastle) Port Terminal Facility*, 1 October 2014.

[49] ACCC, *Determinations: Exemptions in respect of Emerald's Melbourne Port Terminal Facility, GrainCorp's Geelong Port Terminal Facility, GrainCorp's Portland Port Terminal Facility*, 25 June 2015.

[50] ACCC, *Final determinations: Newcastle Agri Terminal Pty Ltd and Qube Holdings Limited at the Port of Newcastle*, 30 July 2015.

On 30 July 2015 the ACCC also issued draft decisions proposing that:

- Quattro Ports should be an exempt service provider at its bulk wheat port terminal at Port Kembla from the date that it becomes subject to regulation under the Code
- GrainCorp should be an exempt service provider at its bulk wheat port terminal at Port Kembla at the same time that Quattro becomes subject to regulation under the Code and is determined to be an exempt service provider.[51]

On 2 September 2015 the ACCC issued a draft determination that WA Chip & Pulp Co Pty Ltd should be an exempt service provider at its Bunbury port terminal facility.[52]

### Exemptions by the Minister for Agriculture

Under subclause 5(1) of the Code, the Minister for Agriculture may determine that a PTSP is an exempt service provider if the Minister is satisfied that it is a cooperative that has:

(a) grain-producer members who represent at least a two-thirds majority of grain-producers within the grain catchment area for the port concerned; and

(b) sound governance arrangements that ensure the business functions efficiently and that allow its members to influence the management decisions of the cooperative.

The ACCC does not have any role in exemptions under subclause 5(1) of the Code.

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

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[51] ACCC, *Draft decisions: GrainCorp Operations Limited and Quattro Ports at Port Kembla*, 30 July 2015.

[52] ACCC, *Draft determination: WA Chip & Pulp Co Pty Ltd at Bunbury*, 2 September 2015.