



Australian
Competition &
Consumer
Commission

Final determinations: Newcastle Agri Terminal Pty Ltd and Qube Holdings Limited at the Port of Newcastle

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

30 July 2015

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Summary

The Australian Competition and Consumer Commission (ACCC) has made final determinations that Newcastle Agri Terminal Pty Ltd (NAT) and Qube Holdings Limited (Qube) are exempt port terminal service providers at their respective bulk wheat port terminal facilities at the Port of Newcastle. These determinations are made under the Port Terminal Access (Bulk Wheat) Code of Conduct (Code) and are consistent with the ACCC's draft determinations regarding these facilities published on 7 May 2015.

This decision means that, from 1 October 2015, both NAT and Qube will only be subject to Parts 1 and 2 of the Code. Obligations under these parts include requirements to deal with exporters in good faith and publish information about how capacity is allocated and the current state of the shipping stem. As exempt service providers, they will not need to comply with Parts 3 to 6 of the Code.

These determinations follow from findings in the ACCC's previous decision to accept GrainCorp Operations Limited's (GrainCorp) access undertaking variation regarding its Port of Newcastle port in June 2014, which resulted in a reduction in the level of regulation applied to that facility. The ACCC subsequently determined GrainCorp an exempt service provider under the Code at the Port of Newcastle in October 2014.¹

While the ACCC recognises that time has passed since these decisions, it does not consider that there have been any significant changes in the market since then.

In making its final determinations, the ACCC has had regard to the matters listed at subclause 5(3) of the Code. The ACCC's assessments of these matters in relation to both NAT's and Qube's facilities are set out in **chapter 4**. Key factors supporting the ACCC's decisions include:

- competitive pressures among the three bulk wheat port terminals and excess export capacity at the Port of Newcastle, which would drive effective competition in the market for bulk wheat terminal services and provide incentives for each facility to provide fair and transparent access to exporters
- the existence of alternative markets and alternative providers in upcountry storage and handling options
- setting a level regulatory playing field among the NAT and Qube facilities and GrainCorp's already exempted facility at the Port of Newcastle. This level playing field is likely to promote competition, lead to the efficient operation and use of the facilities and increase investment incentives.

ACCC monitoring

In making its decisions to exempt NAT and Qube, the ACCC considers that it is appropriate to monitor all bulk wheat port terminal facilities at the Port of Newcastle to observe the level of competition at these facilities into the future. This monitoring will involve examining the shipping activity at each port terminal and conducting periodic industry consultations.

The ACCC would be concerned if its monitoring reveals a reduction in the level of competition at Newcastle. 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. The ACCC can revoke an exemption determination if it is satisfied that the reasons for granting the exemption no longer apply.

¹ ACCC, *Decision to Accept GrainCorp Operations Limited's Application to Vary the 2011 Port Terminal Services Access Undertaking (GrainCorp's undertaking variation decision)*, June 2014; ACCC, *Exemption in respect of GrainCorp's Carrington (Newcastle) Port Terminal Facility (Determination for GrainCorp at the Port of Newcastle)*, 1 October 2014.

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. 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. Exempt service providers

PTSPs must comply with the entire Code (Parts 1 to 6), unless exempted. NAT and Qube are both PTSPs at the Port of Newcastle.

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 and 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.

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 assessments of NAT's and Qube's facilities against each of these matters are set out in **chapter 4** of this document.

The ACCC recently considered the level of competition in the Newcastle port zone (NPZ) in its exemption assessment of GrainCorp's Port of Newcastle facility.² Given this, and the fact that NAT's and Qube's facilities are operating at the same port, the ACCC has also had regard to the recent assessments of the level of competition in the Newcastle port zone when conducting these exemption assessments of the NAT and Qube facilities.

1.2. Further information

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2. ACCC assessment process and decisions

In March 2015, Qube wrote to the ACCC seeking to be determined an exempt service provider of port terminal services at the Port of Newcastle. In April 2015, NAT made a similar application for its facility at the Port of Newcastle.

Draft determinations and industry response

On 7 May 2015, the ACCC released draft determinations to exempt NAT and Qube at the Port of Newcastle and invited comments on the merits of the exemptions.³

In May 2015, the ACCC received a response from the Australian Grain Exporters Association supporting the draft determinations to exempt both NAT and Qube. No other submissions were received.

Final determinations

The ACCC's final determinations are that both NAT and Qube are exempt service providers of port terminal services provided by means of their respective facilities at the Port of Newcastle.

These determinations have been made after having regard to each of the matters listed at subclause 5(3) of the Code (see **chapter 4**).

² ACCC, *Determination for GrainCorp at the Port of Newcastle*.

³ ACCC, *ACCC draft determinations – Exemptions in respect of Newcastle Agri Terminal, Qube's Newcastle Port Terminal Facility (Draft determinations for NAT and Qube at the Port of Newcastle)*, 7 May 2015.

3. Monitoring

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 at the Port of Newcastle. This is because the ACCC considers that it is important to examine the future competitive outcomes at this port, and related markets, following the exemptions granted to all three bulk wheat PTSPs at the Port of Newcastle.

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 intends to pursue two main monitoring activities, industry analysis and industry consultation.

3.1. Industry analysis

Industry analysis may include examining the shipping activity at each port terminal. All PTSPs publish and provide to the ACCC daily ship loading statements under Part 2 of the Code.

The ACCC will monitor the market concentration of exporters shipping wheat from the Port of Newcastle. As part of these monitoring activities, the ACCC also intends to consider the market concentration of GrainCorp, as it is the current major vertically integrated exporter at the Port of Newcastle. The ACCC would be concerned if GrainCorp, in the future, increases its export market share at its port facility 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 will give some indication of whether third party exporters continue to be able to access Port of Newcastle 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.

3.2. Consultation with industry

Industry consultation 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 Port of Newcastle 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 Newcastle after the exemptions, the ACCC may conduct an enquiry. The ACCC could also consider a public process to assess whether to revoke an exemption for the relevant port terminal facility.

4. ACCC assessment of matters in subclause 5(3)

This chapter sets out the ACCC's assessment of whether it should determine NAT and/or Qube to be exempt service providers at their respective Port of Newcastle facilities. The 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.

4.1. Legitimate business interests

In deciding whether to exempt a PTSP, subclause 5(3)(a) of the Code requires the ACCC to have regard to the legitimate business interests of the PTSP. The ACCC considers that this includes a consideration of how an exemption may impact a PTSP's compliance costs, competitiveness, commercial viability and investment incentives.

The ACCC's view is that exempting NAT and Qube at the Port of Newcastle would be in their respective legitimate business interests because it:

- would reduce compliance costs
- places them on a level regulatory playing field with the exempt GrainCorp facility
- is likely to increase their competitiveness and commercial viability, leading to more efficient investment decisions.

If NAT and/or Qube are not exempted from the Code, they would need to comply with the obligations in part 3 of the Code that relate to access to services and access disputes. These obligations would involve compliance costs.

The ACCC notes that compliance costs alone are not a reason to grant an exemption because regulation may, in some cases, be appropriate. Compliance costs can also be difficult to quantify, particularly when a company has not previously been regulated.

Nevertheless, these compliance costs would place NAT and/or Qube at a competitive disadvantage to GrainCorp, which was exempted at the Port of Newcastle port on 1 October 2014.⁴ Exempting NAT and Qube at the Port of Newcastle will therefore place them on a level regulatory playing field with GrainCorp.

More competition in port terminal services may also improve NAT's and Qube's commercial viability and lead to more efficient investment decisions, discussed in **chapter 4.4**.

Accordingly, and consistent with the ACCC's draft determination, the ACCC's view having regard to subclause 5(3)(a) of the Code is that exempting NAT and Qube at the Port of Newcastle is in both of their legitimate business interests.⁵

4.2. The public interest and competition in markets

In deciding whether to exempt a PTSP, 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. The ACCC considers that this includes examining competition in the bulk wheat terminals and related markets.

The ACCC's view is that exempting NAT and Qube at the Port of Newcastle is in the public interest and will not be detrimental to competition in markets because:

⁴ ACCC, *Determination for GrainCorp at the Port of Newcastle*.

⁵ ACCC, *Draft determinations for NAT and Qube at the Port of Newcastle*, p. 8.

- competitive constraints and excess export capacity at the port facilities would drive competition between the three bulk wheat terminal facilities at the Port of Newcastle
- there is a level of competition in upstream markets, as well as competition from alternative markets for wheat, that would likely further promote competition among the bulk export facilities at the Port of Newcastle

The ACCC also considers that placing NAT and Qube on a level regulatory playing field with the exempt GrainCorp facility is likely to promote their competitiveness, including in related markets.

4.2.1. The market for bulk wheat terminal services

NAT, Qube and GrainCorp's port facilities

NAT is an independent PTSP at the No. 2 Dyke berth in Carrington at the Port of Newcastle.⁶ Three exporters (CBH, GlenCore and Agrex) are major investors in NAT. None of NAT's investors owns a majority shareholding.⁷

NAT's facility has 60 000 tonnes of storage capacity and rail receipt and ship loading rates of up to 2 000 tonnes per hour. NAT made its first shipment in February 2014 and in its first year made four shipments totalling 115 000 tonnes.⁸

Since 2011, Qube has provided port elevation services for Louis Dreyfus at Berth 3 Kooragang at the Port of Newcastle.⁹ Qube's facility has no storage capacity. Louis Dreyfus has a joint venture with Mountain Industries (acquired by Asciano) that provides storage and handling services for Louis Dreyfus' grain.¹⁰

GrainCorp's Carrington facility at the Port of Newcastle was commissioned in 1935. It has 164 400 tonnes of storage capacity, rail receipt capacity up to 2 700 tonnes per hour and ship loading rates of up to 4 000 tonnes per hour.¹¹ GrainCorp has been the largest exporter of bulk wheat from this terminal in the 2010-11 to 2013-14 seasons, accounting for about 43 per cent of total bulk wheat exports.¹²

Port zone

As outlined in the ACCC's decision to exempt GrainCorp at its Port of Newcastle facility, wheat exported in bulk from the Port of Newcastle is typically sourced from northern New South Wales. This area is referred to as the Newcastle Port Zone (NPZ).¹³

Competitive constraints

The ACCC considers that each PTSP faces competitive constraints from other facilities, as well as from the threat of new entrants. These constraints may also increase by putting all PTSPs on a level regulatory playing field.

NAT is constrained by GrainCorp's facility. Both operate ship loaders and associated infrastructure, such as intake, storage, weighing and testing facilities. Although NAT has

⁶ NAT, 'Media Release – First Grain Shipment for Newcastle Agri Terminal', 22 February 2014, viewed 29 July 2015, <http://www.naterminal.com.au/index.php/latest-news/51-media-release-first-grain-shipment-for-newcastle-agri-terminal>.

⁷ Ibid; ACCC, *Determination for GrainCorp at the Port of Newcastle*, p. 18.

⁸ Ibid.

⁹ ACCC, *Determination for GrainCorp at the Port of Newcastle*, p. 18; Qube, 'Newcastle Facility', viewed 29 July 2015, <http://www.qube.com.au/ports-and-bulk/facilities/newcastle-facility>.

¹⁰ ACCC, *Determination for GrainCorp at the Port of Newcastle*, p. 18.

¹¹ GrainCorp Operations Limited, 'Ports', 2012, p. 9.

¹² ACCC, *Determination for GrainCorp at the Port of Newcastle*, p. 17.

¹³ Ibid, p. 19.

some advantages in its better rail access and ability to service larger vessels, it also has smaller storage capacity. Both facilities can export large shipments of bulk wheat, although NAT's first shipment was only in February last year.¹⁴

The ACCC considers that NAT is not substantially constrained by Qube's facility, which only consists of a ship loader without any associated infrastructure.¹⁵

Qube is constrained by NAT's and GrainCorp's facilities. Both of these facilities offer more comprehensive services. Qube's facility lacks storage and receival infrastructure and only consists of a ship loader. It has, to date, only serviced Louis Dreyfus, which operates a storage facility at the port in a joint venture with Mountain Industries.¹⁶

The ACCC considers that all facilities at the Port of Newcastle may also be constrained by the credible threat of new entrants. NAT and Qube are relatively new players and only recently entered the market to compete with the incumbent GrainCorp. Qube's facility, however, shows the potential for exporters like Louis Dreyfus to establish alternative export pathways to the existing large scale export terminals.¹⁷

Exempting NAT and Qube from the Code places them on a level regulatory playing field with the already exempt, and larger, GrainCorp facility. Operating under the same regulatory arrangements is likely to improve NAT and Qube's competitiveness in price and services, due to reduced compliance costs and the ability to provide flexible solutions to individual customers' needs.

Excess export capacity

The ACCC considers that there is currently excess export capacity at the Port of Newcastle based on the large amount of total capacity, average grain production levels and the availability of alternative markets for wheat. This is more pronounced in the recent years of drought.¹⁸ Excess export capacity encourages competition between PTSPs as each facility aims to attract customers to use as much of its capacity as possible.

The presence of three PTSPs at the Port of Newcastle has led to large amounts of capacity. In 2014, GrainCorp submitted that annual elevation capacity at these three terminals was 4.3 million tonnes.¹⁹ GrainCorp estimated annual shipping capacity of 2.5 million, 1.5 million and 0.3 million tonnes for itself, NAT and Qube, respectively.²⁰

Average wheat production in the NPZ has fallen short of the estimated total export capacity of 4.3 million tonnes, even if record months of production from the last five years are anticipated. In 2014, GrainCorp estimated that average annual wheat production in the NPZ was 2.94 million tonnes.²¹ There are no signs that NPZ wheat production is trending upwards.

The ACCC considers that the amount of contestable capacity may be more relevant than total capacity. Contestable capacity is the amount of capacity that is realistically available for all exporters to compete for, and is likely to be less than total capacity. For instance, Qube currently only provides access to Louis Dreyfus, so its capacity has been unavailable to

¹⁴ ACCC, *Draft determinations for NAT and Qube at the Port of Newcastle*, p. 9.

¹⁵ *Ibid.*, p. 10.

¹⁶ *Ibid.*, pp. 10, 13.

¹⁷ *Ibid.*, p. 10.

¹⁸ ACCC, *GrainCorp's undertaking variation decision*, p. 64.

¹⁹ *Ibid.*, p. 78.

²⁰ *Ibid.*, p. 79.

²¹ ACCC, *Determination for GrainCorp at the Port of Newcastle*, p. 19.

other exporters.²² Further, GrainCorp has an incentive to allocate capacity to its own trading arm. In the 2010-11 to 2013-14 seasons, GrainCorp's trading arm was responsible for 43 per cent of total bulk wheat exports from the Port of Newcastle.²³

Therefore, as set out in the ACCC's draft decision, the level of contestable capacity at the Port of Newcastle is more relevant, and is likely to be less than, than total capacity.²⁴

However, future exports and the demand for future capacity at the Port of Newcastle is unlikely to exceed historic levels and reach contestable capacity.

In 2014, GrainCorp submitted that average annual bulk export grain demand was only 1.1 million tonnes, with a peak demand of 1.8 million tonnes.²⁵ In the current season to July 2015, about 0.26 million tonnes of bulk wheat has been exported from the Port of Newcastle. In the 2013-14 and 2012-13 seasons, annual bulk wheat exports from the port were approximately 0.36 million and 1.12 million tonnes, respectively.²⁶

The ACCC considers that the excess export capacity at the Port of Newcastle is likely to encourage competition between the PTSPs, as each facility would likely aim to attract a larger customer base to use as much of its capacity as possible.

In addition, the ACCC considers that bulk exports at the three facilities also compete with container exports and domestic demand for wheat, as discussed below.

4.2.2. Alternative and upstream markets

NAT, Qube and GrainCorp not only compete with each other in the market for bulk wheat terminal services, they also compete with the alternative domestic and container export markets. The level of competition in upstream storage and handling is also an important consideration.

Domestic demand

Domestic users compete with bulk exports for grain, particularly when there is a drought and there is less wheat available for export. Domestic users generally face lower supply chain costs when compared to the export markets and are able to pay a price that is at least equivalent to the export parity price. Domestic demand each year is generally constant. In New South Wales, Victoria and Queensland, about 50 per cent of the grain produced is sold to domestic buyers.²⁷

Container exports

There are a number of container packing facilities in the NPZ that can pack wheat into container boxes for export. These facilities are operated by Glencore, Cargill as well as other smaller packers.²⁸ NAT and Louis Dreyfus also operate such facilities at the Port of Newcastle.²⁹

Some containerised wheat has been exported from the Port of Newcastle, although most container wheat exports from New South Wales are shipped out of Port Botany in Sydney.

²² ACCC, *Draft determinations for NAT and Qube at the Port of Newcastle*, p. 13.

²³ ACCC, *GrainCorp's undertaking variation decision*, p. 61.

²⁴ ACCC, *Draft determinations for NAT and Qube at the Port of Newcastle*, p. 13.

²⁵ ACCC, *GrainCorp's undertaking variation decision*, p. 78.

²⁶ Australian Crop Forecasters, *ABS Export Report*, 2 July 2015, p. 4.

²⁷ Australian Export Grains Innovation Centre, 'The cost of Australia's bulk grain export supply chains', January 2014, p. 9.

²⁸ ACCC, *Determination for GrainCorp at the Port of Newcastle*, p. 20.

²⁹ *Ibid.*

Container wheat exports shipped out of Port Botany are significant and have represented almost 20 per cent of total wheat exports from New South Wales over the four years to 2013-14.³⁰

The presence of numerous container packing facilities in the NPZ coupled with the ability to export via containers indicates that container exports represent another alternative option to bulk exports.

Upcountry storage and handling services

There has been increased competition in upcountry storage and handling in the NPZ. Like GrainCorp, other grain traders such as Cargill, Viterra and Louis Dreyfus have invested in upcountry storage networks. However, unlike GrainCorp, neither NAT nor Qube operate upcountry storage and handling facilities.

For some growers, on-farm storage is also a viable alternative. These on-farm facilities have increased growers' marketing options and improved their bargaining positions. However, the ACCC recognises that, at some point, the grain must enter the supply chain if it is to be exported.

Given that NAT and Qube do not currently operate upcountry networks, the ACCC considers that exempting them from Parts 3 to 6 of the Code will not be detrimental to the level of competition in upcountry storage and handling.

As stated above, if NAT and Qube are exempted they will be on a level regulatory playing field with GrainCorp, promoting competition between the PTSPs. To the extent that competition may increase as a result of the exemptions, this may also increase competition in the market for upcountry storage and handling services.

Accordingly, consistent with the ACCC's draft determination, the ACCC's view having regard to subclause 5(3)(b) and (g) of the Code is that exempting NAT and Qube at the Port of Newcastle is in the public interest, will not be detrimental to competition in upstream and downstream markets and is likely to promote competition in markets.³¹

4.3. 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.

The ACCC's view is that even after exempting NAT and Qube at the Port of Newcastle, both PTSPs will still have incentives to provide fair and transparent access to exporters because:

- there is competition in the market for bulk wheat terminal services at the Port of Newcastle (as outlined in **chapter 4.2.1**).
- neither NAT nor Qube are vertically integrated exporters.

As discussed above in **chapter 4.2**, the ACCC considers that NAT and Qube operate in a competitive environment. The ACCC considers that NAT, Qube and GrainCorp competitively constrain each other's facilities, as does the credible threat of new entrants. There is also currently excess export capacity at the Port of Newcastle, which is likely to continue.

Unlike GrainCorp, neither NAT nor Qube are vertically integrated exporters.

³⁰ Australian Crop Forecasters' data

³¹ ACCC, *Draft determinations for NAT and Qube at the Port of Newcastle*, pp. 11-12.

Although three exporters (CBH, Glencore and Agrex) have stakes in NAT, the ACCC considers that this diverse shareholding may encourage a variety of exporters to use NAT's facility. To date, no NAT investors have shipped through NAT.

Given the excess export capacity at the Port of Newcastle, Qube should similarly be open to a variety of exporters although, to date, its facility has only exported grain for Louis Dreyfus.³²

The ACCC also considers that exporters may benefit from being able to negotiate more freely with PTSPs that are more flexible to meet exporter needs.

Accordingly, and consistent with the ACCC's draft determination, the ACCC's view having regard to subclause 5(3)(c) and (d) of the Code is that exempting NAT and Qube at the Port of Newcastle will be unlikely to adversely affect exporters' interests or ability to secure fair and transparent access to their port terminal services.³³

4.4. 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.

The ACCC's view is that exempting NAT and Qube at the Port of Newcastle would promote the economically efficient operation of, use of and investment in the respective port terminal facilities because:

- Compliance related operating costs will be lower and there will be no capacity allocation restrictions, increasing their competitiveness in price and services. This competition will encourage PTSPs to offer favourable terms of access which may increase the use of the facilities and encourage economically efficient use.
- Being on a level regulatory playing field with the already exempted GrainCorp may increase their incentives to invest in facilities to further increase competitiveness.

4.4.1. Efficient operation and use of facilities

As discussed in **chapter 4.2**, the ACCC considers that there is competition in the market for bulk wheat terminal services in the NPZ, driven by competitive constraints and excess export capacity at the Port of Newcastle. If NAT and Qube are exempted at the Port of Newcastle, this competition is likely to further incentivise the efficient use and operation of their facilities.

The ACCC considers that if NAT and Qube are exempted at the Port of Newcastle, efficient operation and use of their facilities is likely to be encouraged because the PTSPs:

- will incur fewer compliance costs and are likely to offer terms as attractive as GrainCorp's already exempted facility, increasing their price competitiveness
- will have more flexibility and are likely to offer access agreements that can be tailored to individual customer needs, increasing their competitiveness in services.

Given the Port of Newcastle's excess export capacity, this increase in competitiveness is likely to enhance NAT's and Qube's ability to attract customers, leading to more use of their facilities.

³² ACCC, *Determination for GrainCorp at the Port of Newcastle*, p. 18.

³³ ACCC, *Draft determinations for NAT and Qube at the Port of Newcastle*, p. 14.

4.4.2. Efficient investment in facilities

The ACCC considers that a PTSP is more likely to invest in facilities that are currently or potentially competitive with other facilities in the same area. Unnecessary regulation may also discourage investment at a facility.

The ACCC's view is that if NAT and Qube are exempted at the Port of Newcastle, their incentive to invest in their respective facilities is likely to increase. This may improve their competitiveness, given that they will be on a level regulatory playing field with GrainCorp.

Accordingly, and consistent with the ACCC's draft determination, the ACCC's view having regard to subclause 5(3)(e) and (f) of the Code is that exempting NAT and Qube at the Port of Newcastle will promote the economically efficient operation and use of, and encourage efficient investment in, their port terminal facilities.³⁴

4.5. Exporter or associated entity of an exporter

In deciding whether to exempt a PTSP, 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.

Consistent with the ACCC's draft determination, the ACCC's view is that subclause 5(3)(h) of the Code is not significant to its assessment of whether to exempt NAT and Qube at the Port of Newcastle because neither NAT nor Qube are vertically integrated exporters or associated entities of an exporter.

To the extent it is relevant, the ACCC's view is that the considerations in subclause 5(3)(h) would support granting exemptions to NAT and Qube at the Port of Newcastle.

4.6. PTSP already exempt in the grain catchment area

In deciding whether to exempt a PTSP, 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's view is that GrainCorp's presence as an exempt service provider in the NPZ supports exempting NAT and Qube at the Port of Newcastle.

Although the ACCC considers this factor on a case by case basis, it generally considers that an exemption is supported where there is already an exempt service provider or where the Code does not otherwise apply to a service provider within the same port zone. It is undesirable to have different regulatory arrangements for operators in the same port zone because this may lead to distortions in competition and efficiency.

On 1 October 2014, the ACCC exempted GrainCorp's facility at the Port of Newcastle.³⁵ As stated in the draft determination, the ACCC considers that this facility is in the same grain catchment area as NAT's and Qube's facilities at the Port of Newcastle.³⁶

In its application to vary its 2011 access undertaking, GrainCorp submitted that it would be at a competitive disadvantage if it were subject to more regulation than its competitors.³⁷ The

³⁴ Ibid, p. 15.

³⁵ ACCC, *Determination for GrainCorp at the Port of Newcastle*, p. 13-14.

³⁶ ACCC, *Draft determinations for NAT and Qube at the Port of Newcastle*, p. 16.

³⁷ GrainCorp Operations Limited, 'Submission – Proposed variations to Port Terminal Services Access Undertaking', November 2013, pp. 2-3.

ACCC considers that NAT and Qube will be similarly disadvantaged if they are subject to more regulation than GrainCorp.

Accordingly, and consistent with the ACCC's draft determination, the ACCC's view having regard to subclause 5(3)(i) of the Code is that exempting NAT and Qube at the Port of Newcastle is supported by the presence of GrainCorp's exempted facility in the NPZ.³⁸

4.7. Other matters

In deciding whether to exempt a PTSP, subclause 5(3)(j) of the Code requires the ACCC to have regard to any other matters the ACCC considers relevant.

The ACCC does not consider that there are any other matters relevant to its determinations regarding NAT's and Qube's respective facilities at the Port of Newcastle.

³⁸ ACCC, *Draft determinations for NAT and Qube at the Port of Newcastle*, p. 16.

Appendix: The Code

The Code was prescribed under section 51AE of the *Competition and Consumer Act 2010* (Cth) (CCA) and commenced on 30 September 2014. It replaced the previous regulatory framework under the *Wheat Export Marketing Act 2008* (Cth), which required vertically integrated providers of port terminal services to provide the ACCC with access undertakings.

The Code's purpose 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'.³⁹

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'.⁴⁰

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'.⁴¹ 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.⁴²

Obligations on a port terminal service provider

A PTSP must comply with all six Parts of the Code. 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.

Part 3 of the Code requires a PTSP:

³⁹ Port Terminal Access (Bulk Wheat) Code of Conduct, cl. 2.

⁴⁰ Ibid, cl. 3.

⁴¹ Ibid.

⁴² Ibid.

- 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

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 facility at the Port of Newcastle.

On 7 May 2015 the ACCC released an issues paper seeking views on whether it is appropriate to determine GrainCorp and/or Quattro Ports to be exempt service providers at their respective facilities at Port Kembla.

On 23 June 2015, the ACCC released an issues paper seeking views on whether it is appropriate to determine GrainCorp and/or Queensland Bulk Terminals to be exempt service providers at their respective facilities at the Port of Brisbane.

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.

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.