ACCC draft decisions

GrainCorp Operations Limited and Quattro Ports at Port Kembla

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

30 July 2015

Contents

Summary

The ACCC has made draft decisions that GrainCorp Operations Limited (GrainCorp) and Quattro Ports (Quattro) should be exempt service providers of port terminal services provided by means of their respective port terminal facilities at Port Kembla under the Port Terminal Access (Bulk Wheat) Code of Conduct (the Code), once Quattro becomes subject to regulation under the Code.

The ACCC's draft view is that it is appropriate that exemptions for GrainCorp and Quattro at Port Kembla be granted concurrently at the time Quattro becomes a port terminal service provider as defined by the Code.

Under these exemptions, GrainCorp and Quattro will be subject to a lower level of regulation at their respective Port Kembla facilities, as Parts 3 to 6 of the Code will not apply to those facilities.

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

- GrainCorp's Port Kembla port terminal currently faces limited competitive constraints, as there is no directly competing port terminal facility. While containerised exports at Port Botany provide some competition, there is little overlap with the grain catchment areas of the next closest bulk grain ports at Newcastle and Melbourne.

- Competition from Quattro is likely to increase the competitive constraint faced by GrainCorp and limit its ability to exercise market power in the provision of port terminal services, particularly given the significant level of spare capacity expected to be available across the two Port Kembla facilities.

- Quattro's Port Kembla terminal will also face significant competition from GrainCorp, as the dominant incumbent provider of port terminal services at Port Kembla, as well as some competition from containerised grain exports.

The ACCC's draft views are based on analysis of current and expected capacity constraints and usage at Port Kembla and the extent to which port terminals at Port Kembla would compete with other port terminals for bulk wheat in overlapping catchment areas. The ACCC has also considered the extent of any competitive constraint imposed by container exports and domestic demand for wheat.

The ACCC's draft view is that exempting Quattro from Parts 3 to 6 of the Code in relation to port terminal services at Port Kembla will increase its operational flexibility and decrease its compliance costs.

In the absence of competition from Quattro, the ACCC's draft view is that the full set of obligations in the Code should apply to GrainCorp's facility to constrain its market power in the provision of port terminal services at Port Kembla. However, with the entry of Quattro as a competing port terminal service provider, the ACCC considers that it will be appropriate to exempt GrainCorp at the time that Quattro becomes covered by the Code. Exempting GrainCorp from Parts 3 to 6 of the Code in relation to port terminal services at Port Kembla would similarly increase GrainCorp's operational flexibility and decrease its compliance costs. Exemptions for both facilities would also allow GrainCorp and Quattro the opportunity to compete with each other on commercial terms.

The ACCC considers that if it makes final decisions consistent with these draft decisions, exporters of bulk wheat will be likely to have fair and transparent access to port terminal

services at Port Kembla. Competition between Quattro and GrainCorp is likely to drive the more efficient operation and use of both Port Kembla facilities in the absence of full regulation under the Code.

The ACCC has considered NSW Farmers' submission that the ACCC should preserve necessary Code obligations, but reduce regulatory burden by agreeing to approve all future capacity allocation system proposals instead of granting exemptions. The ACCC considers that this proposal is not an appropriate option as it is not consistent with the intent of the exemption process set out in the Code (discussed at section 1.8 of this document).

The ACCC's full assessments of the matters under subclause 5(3) of the Code regarding each port terminal are set out in chapters 4 and 5 of this document.

ACCC monitoring

If the ACCC makes a final decision to exempt Quattro and/or GrainCorp in relation to the Port Kembla terminals, the ACCC considers that it will be appropriate for it to undertake monitoring of Port Kembla bulk wheat port terminal services to continue to assess the level of competition at these facilities into the future.

In particular, 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 will remain able to monitor the level of shipping activity and market concentration at Quattro and GrainCorp's Port Kembla terminals through examining daily ship loading statements provided to the ACCC. The ACCC also proposes to periodically consult with industry to seek information about exporters' ability to access port terminal services at Port Kembla.

Consultation

The ACCC invites public submissions on the draft decisions set out in this document. Submissions must be received before 5:00pm (AEST), **14 August 2015**. Further details about making a submission can be found in section 1.9 of this document.

1. Introduction

The Port Terminal Access (Bulk Wheat) Code of Conduct was made under section 51AE of the Competition and Consumer Act 2010 (CCA). It commenced on 30 September 2014 and regulates the conduct of bulk wheat port terminal service providers (PTSPs). The Code replaced the previous regulatory framework under the *Wheat Export Marketing Act 2008* (WEMA) where four PTSPs (including GrainCorp) were subject to ACCC-approved access undertakings.

The purpose of the Code is to regulate the conduct of PTSPs (as defined in the Code) to ensure that exporters of bulk wheat have fair and transparent access to port terminal services.[1]

1.1 The Code

The Code applies to PTSPs, where a PTSP is 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.

where:

> **port terminal service** means 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.

and:

> **port terminal facility** means 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.

The Code has six Parts which apply to all PTSPs (in the absence of any exemption being granted):

- Part 1 of the Code contains general provisions about the Code and its application.
- Part 2 of the Code requires all PTSPs to deal with exporters in good faith, publish a port loading statement and policies and procedures for managing demand for their services, and make current standard terms and reference prices for each port terminal facility publically available on their website.
- Part 3 of the Code places a number of requirements on a PTSP including:
    - not to discriminate in favour of itself or its trading business, or hinder third party exporters' access to port terminal services

[1] Clause 1(2) of the Code

    - 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 specified dispute resolution processes including mediation and arbitration.
- Part 4 of the Code requires a PTSP to have, publish and comply with a port loading protocol which includes an ACCC approved capacity allocation system.
- Part 5 of the Code requires PTSPs to regularly publish expected capacity, stock information about various grains held onsite at a port terminal facility and key performance indicators.
    - Stocks information about grain held in upcountry storage sites is outside the scope of the Code, which provides no obligations on PTSPs in relation to non-port infrastructure.
- Part 6 of the Code sets out requirements relating to retaining records such as access agreements and variations to those agreements.

1.2 Exemption from the Code

The Code provides for processes whereby the ACCC or the Minister for Agriculture may 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. Exempt service providers face a lower level of regulation as they remain subject to only Parts 1 and 2 of the Code.

The exemption processes under the Code only provide for the ACCC or the Minister for Agriculture to grant an exemption from all of Parts 3 to 6 of the Code. 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.

1.2.1 ACCC exemption

Under clause 5(2) of the Code, the ACCC may make a determination to exempt PTSPs in relation to port terminal services provided by means of specified port terminal facilities (an exemption determination). In doing so the ACCC must have regard to matters listed at subclause 5(3) of the Code (see section 1.5). The ACCC can also revoke an exemption determination under subclause 5(6) of the Code.

On 1 October 2014 the ACCC determined that GrainCorp is an exempt service provider in relation to its Carrington (Newcastle) Port Terminal Facility. The ACCC determined that although GrainCorp is vertically integrated as a PTSP and an exporter, it would have limited ability to exercise market power at the Carrington facility due, in Part, to effective competition in the provision of bulk grain port terminal services at the Port of Newcastle.[2] This determination followed the ACCC's earlier decision, under the previous access undertakings regime, to reduce GrainCorp's regulatory obligations regarding its Carrington facility.[3]

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

[3] ACCC, *Decision to accept: GrainCorp Operations Limited's Application to Vary the 2011 Port Terminal Services Access Undertaking*, 18 June 2014.

On 25 June 2015 the ACCC also determined Emerald Grain Pty Ltd (Emerald) to be an exempt service provider at its Melbourne Port Terminal, and GrainCorp to be an exempt service provider at its Geelong port terminal.[4]

1.2.2 Ministerial exemption

Clause 5(1) of the Code provides that the Minister for Agriculture may determine that a PTSP is an exempt service provider of services supplied by means of a specified port terminal facility if the Minister is satisfied that the provider 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).

On 17 November 2014 the Minister for Agriculture found that Co-operative Bulk Handling Limited's (CBH) port terminal facilities located at Albany, Esperance, Geraldton and Kwinana satisfactorily meet the criteria for exemption under clause 5(1) of the Code. The Minister therefore determined that CBH is exempt from Parts 3 to 6 of the Code in relation to services provided by means of those facilities.

1.3 GrainCorp's exemption application

GrainCorp's Port Kembla bulk wheat port terminal is located at Port Kembla in NSW, and includes the following facilities – intake/receival facility, grain storage facility, weighing facility, shipping belt and two ship loaders.

GrainCorp submits that it is appropriate that GrainCorp be determined to be an exempt service provider at Port Kembla because exemption will:

- place GrainCorp on a level playing field with competing alternative markets (domestic and container packing), neither of which are subject to regulation

- promote grain industry competition by allowing GrainCorp to provide competitive services to exporters for bulk grain exports, noting Quattro has already announced it has agreed medium-term take-or-pay commitments with Noble, Cargill and Emerald for "substantial volumes"

- support lower supply chain costs by allowing GrainCorp to operate its Port Terminals more flexibly. GrainCorp submits that more flexibility and efficient operations at port will allow increased investment in improving port and supply chain infrastructure.[5]

GrainCorp submits that its ability to exercise market power in NSW and Port Kembla is limited given:

- excess port elevation capacity

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[4] 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.

[5] GrainCorp, *Submission in support*, p.3.

- impending competition for port elevation services for bulk grain from Quattro's Port Kembla facility
- strong competition from competing alternative domestic and container packing markets
- excess upcountry storage capacity
- excess container packing capacity.[6]

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/.

1.4 Quattro's exemption application

Quattro's Port Kembla bulk wheat port terminal is located at Port Kembla in NSW. It is currently under construction, and is expected to include the following facilities – intake/receival facility, grain storage facility, weighing facility, shipping belt and ship loader.

Quattro submits that it should be an exempt service provider at its Port Kembla facility because:

- Part 3 obligations (i.e. non-discrimination and no hindering obligations, dispute resolution procedures) place an 'undue burden' on Quattro
- the time and cost of upfront compliance with the Code will hinder Quattro in its critical start-up period
- the obligation to enter protracted negotiations for access, and submit to costly arbitration can be exploited by competitors to impede Quattro's operational efficiency at a time when Quattro will need to make rapid commercial decisions in response to competitive market pressures.[7]

Quattro also submits that:

- surplus capacity is likely to neutralise any ability for Quattro to impose unilateral terms on exporters in the event of an exemption
- there is competition for port elevation services with GrainCorp's Port Kembla and Newcastle facilities, Newcastle Agri-Terminal, and Emerald's Melbourne Port Terminal.[8]

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

[6] GrainCorp, *Submission in support*, p. 3.
[7] Quattro, *Submission in support*, p. 5.
[8] Quattro, *Submission in support,* p. 2.

1.5 ACCC exemption assessment process

1.5.1 Legislative framework

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

(a) the legitimate business interests of the port terminal service provider

(b) the public interest, including the public interest in having competition in markets

(c) the interests of exporters who may require access to port terminal services

(d) the likelihood that exporters of bulk wheat will have fair and transparent access to port terminal services

(e) the promotion of the economically efficient operation and use of the port terminal facility

(f) the promotion of efficient investment in port terminal facilities

(g) the promotion of competition in upstream and downstream markets

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

(i) whether there is already an exempt service provider within the grain catchment area for the port concerned

(j) any other matters the ACCC considers relevant.

1.5.2 Timeline for assessment

The ACCC's *Guidelines on the ACCC's process for making and revoking exemption determinations* (the 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 a draft decision before the ACCC makes a final determination. 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 and Quattro's exemption applications is shown in the table below.

Table 1: ACCC assessment

Date	Action
14 April 2015	GrainCorp lodged an exemption application for its Port Kembla terminal
24 April 2015	Quattro lodged an exemption application for its Port Kembla terminal

Date	Action
7 May 2015	The ACCC published its Issues Paper and invited public submissions by 29 May 2015.
15 May – 13 June 2015	Submissions received from interested parties
18 June 2015	The ACCC published three public submissions on its website
30 July 2015	The ACCC published draft decisions on the exemption applications and invited public submissions on its draft views by 14 August 2015.

The ACCC would like to finalise its exemption assessments for the Port Kembla terminals as soon as possible. The actual timeframe may depend on the nature of comments received from industry in response to the draft decisions in this document.

1.6 Public consultation process

The ACCC released an Issues Paper on 7 May 2015 seeking public submissions on GrainCorp and Quattro's exemption applications and related key issues. The ACCC received public submissions from the following parties in response to its Issues Paper:

- Australian Grain Exporters Association (AGEA)
- Glencore Grain Pty Ltd (Glencore)
- NSW Farmers' Association (NSW Farmers)

Public submissions are available on the ACCC's website at [insert link].

1.7 ACCC approach to the exemption assessments prior to Quattro's terminal becoming operational

The ACCC notes that Quattro's Port Kembla terminal is currently still under construction and not expected to be operational until late 2015.

The ACCC has the option of delaying its assessment of one or both of the Port Kembla terminals until such a time as Quattro's facility is operational and its impact on the competitiveness of the zone has been demonstrated. However, the ACCC considers that there are a number of reasons why it is important to assess Quattro's exemption application at this time, including that it will give Quattro greater certainty regarding its regulatory obligations prior to the commencement of those obligations.

1.8 NSW Farmers proposed alternative to exemptions

NSW Farmers submits that it is currently premature to exempt the port facilities from the requirements at Parts 3 to 6 of the Code. In particular, NSW Farmers is concerned about removal of the requirement that a PTSP not discriminate against an access seeker in favour of itself, or an exporter of which it as associated entity.

NSW Farmers has proposed that the ACCC consider the following approach as an alternative to granting exemptions:

> NSW Farmers recommends the ACCC consider whether it would be open for it to make the regulatory decision to a) not exempt the facility, and b) reduce the regulatory burden of the code. This could be done by approving any policy and procedure for managing demand published under cl 8 of the code as a capacity allocation system for the purposes of cl 25.

The ACCC has considered NSW Farmers proposal and its draft view is that this approach would not be appropriate for the following reasons:

Firstly, the Code provides for two levels of regulation to apply to port terminal services: either the full level of regulation (that is, the entire Code will apply) or, if an exemption is granted, a lower level of regulation where only Parts 1 and 2 of the Code apply. The ACCC considers that the effect of adopting the NSW Farmers approach would be to create an alternative third level of regulation somewhere between an exemption and the full level of regulation in the Code.

The ACCC considers that monopoly regulation should be fit-for-purpose and should apply different requirements depending on a party's incentive and ability to exert market power. However, the ACCC has some concern that in this case the NSW Farmers proposal is not consistent with the intent of the exemption process as set out in the Code. If the ACCC does not exempt a PTSP, all of the obligations in Parts 3 to 6 of the Code will apply to the PTSP. In this case, the ACCC must have regard to the matters in clause 25(3) of the Code when deciding whether or not to approve a capacity allocation system. The ACCC cannot approve a capacity allocation system without making such an assessment.

Secondly, the ACCC considers that where a vertically-integrated PTSP is subject to sufficient competitive constraint, it may have incentives to discriminate in favour of its own trading division but will be constrained in its ability to actually do so. In this case, regulation is not required as it would simply duplicate the constraint provided by the competitive environment. Similarly, a PTSP subject to competition would have an incentive to negotiate reasonable terms of access in order to compete effectively, and a regulatory requirement for recourse to arbitration would not be necessary.

However, in the absence of competition a PTSP will have both the incentive and ability to discriminate in favour of its own trading division. In this case, the ACCC considers that an upfront approval role in relation to capacity allocation systems will often be preferable to *ex post* enforcement action, as it is usually more efficient and timely. Therefore, the *ex ante* capacity allocation approval and *ex post* non-discrimination provisions can be seen as complementary tools intended to address the same problem – that is, a vertically-integrated monopoly's incentive and ability to restrict competition in related markets. The ACCC does have flexibility to approve a range of different capacity allocation systems having regard to the matters listed at subclause 25(3) of the Code. However, the ACCC considers that it is unlikely there would be a situation where the level of competitive constraint would be sufficient to support removal of this *ex ante* approval role, yet insufficient to support the removal of the *ex post* non-discrimination provisions and the arbitration provisions.

The ACCC has considered the appropriateness of granting an exemption to GrainCorp and/or Quattro at their respective Port Kembla facilities having regard to the matters set out at clause 5(3) of the Code. The ACCC's draft views are set out at Chapters 4 and 5 of this document. In particular, the ACCC has considered the level of competitive constraint faced by both GrainCorp and Quattro. In both cases, the ACCC considers that it would not be appropriate to remove the capacity allocation approval process while retaining the non-discrimination and arbitration provisions, even if this were a possibility under the Code.

Other points raised by NSW Farmers are discussed throughout Chapters 2-5 of this document.

1.9 Consultation on these draft decisions

The ACCC invites public submissions on the draft decisions set out in this document. Submitting parties should clearly identify the draft decision(s) that their submission relates to. Please include detailed reasons to support the views put forward in submissions.

Submissions should be addressed to:

General Manager
Infrastructure & Transport – Access & Pricing Branch
ACCC
GPO Box 520
Melbourne VIC 3001

Email: transport@accc.gov.au

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

1.1.1. Due date for submissions

Submissions must be received before 5:00pm (AEST) **14 August 2015**.

1.1.2. Confidentiality of information provided to the ACCC

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

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

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

1.1.3. Further information

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

Mr Michael Eady
Director
Infrastructure & Transport - Access & Pricing Branch
ACCC
GPO Box 520
MELBOURNE VIC 3001

Ph: 03 9290 1945

Email: michael.eady@accc.gov.au

2 Port Kembla bulk wheat port terminal services

This chapter sets out the ACCC's draft views on the capacity, availability and demand for bulk wheat port terminal services at Port Kembla. The ACCC has considered the characteristics of GrainCorp's facility, the expected characteristics of Quattro's facility and the extent to which there are likely to be capacity constraints.

The ACCC considers that the level of capacity constraint at Port Kembla is a key factor in assessing the level of competition. As a general proposition, where demand for port terminal services exceeds supply (i.e. capacity is constrained), the ACCC considers that vertically integrated PTSPs such as GrainCorp may have stronger incentives to favour their own exporting business and exclude others. The ACCC considers that these incentives are particularly strong where those services are provided by the vertically integrated owner of monopoly infrastructure.

On the other hand, where demand for port terminal services is below supply a PTSP will have some level of incentive to provide access on fair commercial terms, to drive utilisation of its infrastructure. The ACCC considers that the greater the oversupply of capacity and the greater the competition for grain (i.e. from other PTSPs and the domestic and container markets), the greater the incentive for a PTSP to provide access on fair terms.

The ACCC's consideration of the capacity, availability of and demand for port terminal services at Port Kembla is relevant to the ACCC's assessment of the exemption applications, having regard to the matters specified in subclause 5(3) of the Code.

Stakeholder views from the ACCC's consultation process on the exemption applications are also included as relevant throughout this chapter.

2.1 Port terminal facilities and capacity

Port Kembla will have two PTSPs if, as expected, Quattro's new development commences operation (estimated 'toward the end of 2015').[9]

GrainCorp's facilities occupy Berth 104 at Port Kembla. Quattro's facilities will occupy Berth 103. Figure 1 demonstrates their close proximity.

[9] Quattro, *Submission in support*, p. 2.

Figure 1: Port Kembla - location of GrainCorp and Quattro facilities

Source: GrainCorp, *Submission in support, p. 12.*

GrainCorp and Quattro have submitted the following specifications of their respective facilities:

Table 2: Overview of current and proposed port terminal facilities at Port Kembla

Port terminal facility	GrainCorp	Quattro
Location	Berth 104, Port Kembla	Berth 103, Port Kembla
Rail receival	3 600 TPH 1 hopper	1 000 TPH 1 hopper
Road receival	250 TPH 1 hopper	400 TPH 1 hopper

Port terminal facility	GrainCorp	Quattro
Storage capacity	260 000t vertical storage	98 000t vertical storage 30 000t horizontal storage
Ship loader	5 000 TPH 2 ship loaders	1 200-1 500 TPH 1 mobile ship loader
Maximum berth depth	16.25m	14.5m

Source: GrainCorp, *Submission in support;* Quattro, *Submission in support*; Quattro, http://www.quattroports.com.au/our-ports.html, accessed on 2 July 2015.

The main difference between the Port Kembla terminals is that GrainCorp's facility is larger.

GrainCorp's ship loaders are capable of loading up to 50 000 tonnes per hour (tph) while Quattro's mobile ship loader has been estimated to be capable of loading 1 200-1 500tph. As the Australian Export Grains Innovation Centre (AEGIC) notes:

> Faster loading rates can help lower port and vessel charter costs for the exporter, as turnaround time is faster.[10]

GrainCorp's superior loading rate may therefore make it a more attractive proposition to exporters.

The ACCC notes that the operational specifications are just one of a number of factors that may contribute to an exporter's decision to use one of the Port Kembla terminals. For instance, the location of grain production and where it is stored, as well as the quality of available capacity (i.e. peak or non-peak) will also be considered.

The relationship between where grain is stored upcountry and access to port terminal capacity is discussed in chapter 3 of this document.

2.1.1 Elevation capacity at Port Kembla

Assessing the likely level of capacity constraint at Port Kembla requires an assessment of how much port capacity is likely to be supplied by GrainCorp and Quattro in the future.

Available capacity for grain in the Port Kembla Zone

The ACCC considers that the most appropriate way to assess the likely amount of available capacity at Port Kembla in the future is to consider a range of estimates of port capacity against historical export figures over the last five years.

The ACCC notes that historical exports may not necessarily reflect a terminal's actual maximum capacity. Where a PTSP has demonstrated its ability to export at or close to its stated maximum, it is reasonable to suggest it will maintain that ability in the future.

Where a PTSP has been unable to demonstrate its ability to export at or close to its stated maximum (including new entrants such as Quattro), it is appropriate to consider any information that can shed light on the reasonableness of the estimate.

Table 3 sets out the relevant capacity estimate figures.

[10] Australian Export Grains Innovation Centre, *The Cost of Australia's bulk grain export supply chains: An information paper*, South Perth, January 2014, p. 23.

Table 3: Elevation capacity estimates for GrainCorp and Quattro's Port Kembla terminals

Throughput	GrainCorp Port Kembla	Quattro Port Kembla
2014-15 published available capacity (mtpa)	2.80	n/a
Maximum estimated by service provider (mtpa)	4.30	1.30
Annualised maximum historic monthly throughput[11] (mtpa)	3.70	n/a

Source: GrainCorp, GrainCorp shipping stem for 2014/15 season opening*, 3 February 2014, p. 2; GrainCorp,* Submission in support*, p. 10; Quattro,* Submission in support*, p. 8; data provided by GrainCorp and Australian Crop Forecasters.*

The parties submit that there will be 5.60 million tonnes per annum (mtpa) total annual capacity between the two facilities (comprised of 4.30 mtpa at GrainCorp's facility and 1.30 mtpa at Quattro's facility).

The ACCC makes the following observations on these stated maximums in light of actual exports from Port Kembla over the last five years:

- GrainCorp's highest single calendar month of exports at Port Kembla over the last five years was 307 256 tonnes (March 2012). If GrainCorp was to achieve this over the course of an entire year it would be able to provide 3.70 mtpa (annualised maximum historic monthly throughput). This is less than GrainCorp's submitted maximum of 4.30 mtpa.
- GrainCorp's highest single year of exports over the last ten years is 3.1 million tonnes (2012). GrainCorp has shipped an average of 1.27 mtpa over the last five years. GrainCorp has therefore not demonstrated its ability to provide its annualised monthly maximum of 3.70 mtpa or stated maximum of 4.30 mtpa
- Quattro submits that 'Quattro Port Kembla is expected to have an annual throughput of between 1.1 to 1.3 million tonnes'[12] but states on its website that it 'will have the capacity to handle in excess of 1.3 million tonnes of export grain per annum.'[13] Since Quattro has not yet commenced operations, it has not been able to demonstrate its export capacity.

GrainCorp and Quattro have therefore been unable to demonstrate their ability to provide their stated capacity maximums.

It is therefore appropriate to consider reasons why GrainCorp and Quattro may nevertheless be able to provide 4.30 mtpa and 1.30 mtpa respectively. For instance, GrainCorp's annualised maximum historic monthly throughput of 3.70 mtpa provides an indication of GrainCorp's ability to provide more than its five and 10 year averages (1.76 mtpa and 1.27 mtpa, respectively) and its current published available capacity of 2.80 mtpa.

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[11] The annualised maximum historic monthly throughput reflects the highest single month of exports at a port over the previous five years, multiplied by 12 months.

[12] Quattro, *Submission in support*, p. 5.

[13] Quattro website, http://www.quattroports.com.au/our-ports.html, accessed on 22 June 2015 at 3.36pm.

While a useful indicator, this annualised maximum may not be reflective of actual capability for a number of practical reasons. For example, regular maintenance activities and unavoidable closures or delays due to external circumstances (e.g. vessels failing survey) would likely affect longer term capacity over the course of a year.

To achieve higher throughput than this historic monthly maximum, GrainCorp may have made improvements and expansions, or altered the mix of commodities exported from its facility. A port may be able to achieve higher throughput if it is dealing with only a few commodities/grades as this will maximise use of the available storage space and reduce downtime for cleaning to ensure grades are appropriately separate. GrainCorp has not however submitted that it has made any such improvements, expansions or modifications.

In relation to Quattro's estimated capacity of 1.30 mtpa the ACCC notes that Quattro's facility is not yet operational and therefore its functional capacity remains untested. It is therefore possible that in providing this estimate Quattro has overstated the actual capacity of its facility. The ACCC notes that over the last five years Quattro stakeholders Cargill, Emerald and Noble exported a total of 3.0 million tonnes (or 34 per cent) of the 8.8 million tonnes shipped out of GrainCorp's Port Kembla facility during that time. Quattro shareholders therefore shipped around 0.60 mtpa on average over the last five years.

The ACCC considers that Quattro's facility would be likely to provide at least enough capacity to satisfy its shareholders' historical requirements. Given the size of the investment, it is likely that the shareholders will have a desire to export more than the 0.6 mtpa that has historically been exported from GrainCorp's facility. The ACCC therefore considers it reasonable to assume Quattro's facility will provide a minimum of 0.6 mtpa.

While the precise level of capacity at Port Kembla is difficult to estimate, the ACCC considers that in the future:

- GrainCorp will likely be able to provide somewhere between its published available capacity of 2.80 mtpa and its annualised historical monthly maximum of 3.70 mtpa, and potentially at some point up to 4.30 mtpa, and
- Quattro will likely provide a significant level of additional capacity, at the very least sufficient to cater for the historical volumes of Quattro shareholders Cargill, Noble and Emerald (0.6 mtpa), and potentially up to 1.30 mtpa.

In sum, with the arrival of Quattro the ACCC considers that Port Kembla will receive a significant increase in capacity.

2.2 Exports and exporters

The second step in assessing the level of capacity constraint at GrainCorp and Quattro's terminals is to determine the likely demand for capacity at Port Kembla.

GrainCorp has provided data on historical exports from Port Kembla. The ACCC has also obtained historical data from Australian Crop Forecasters.

The ACCC considers that the likely demand for port terminal services at Port Kembla requires the consideration of:

- Historic data on grain production in Port Kembla's draw zone (i.e. how much grain will various markets be competing for?)
- Historic data on the Port Kembla export task (i.e. what is the demonstrated history of bulk wheat export in Port Kembla?)

- Historic data on market shares (i.e. how many exporters have been competing for port terminal services in the past?).

2.2.1 Grain production

Defining the amount of grain that GrainCorp and Quattro will compete for will depend on how the relevant draw zone is defined.

GrainCorp submits that grain production relevant to Port Kembla is in Central and Southern NSW. GrainCorp submits:

> Central and Southern NSW produces on average 5.6Mt of grain per annum. Grain production is highly variable and has ranged from 1.5Mt to 9.6Mt over the last 10 years.[14]

Quattro submits that grain production in the Port Kembla, Newcastle and Victoria/Queensland zones can be profitably exported from Port Kembla, suggesting that the pool of available grain will be larger. Quattro submits:

> Over the last 20 years, production in New South Wales (NSW) has averaged 8.5 million tonnes. Fluctuations in production have mainly been due to yield variations.[15]

According to ABARES, an average of 10mt of wheat, barley and canola was produced in the whole of New South Wales over the last five years:

Table 4: ABARES - Australian wheat, barley and canola production – New South Wales

Year	Wheat production[16]	Barley[17]	Canola[18]	Total
2012-13	7 365	1 286	1 494	10 145
2011-12	8 473	1 425	1 091	10 989
2010-11	10 488	2 194	805	13 487
2009-10	5 350	1 236	281	6 867
2008-09	6 963	1 449	227	8 639

The grain catchment area for Port Kembla is discussed at section 3.2 below. In summary, the catchment area includes southern and central NSW.

Although the precise amount of grain produced in the Port Kembla catchment area is difficult to estimate, the ACCC notes that it is likely less than the ABARES figures for the whole of NSW (approximately 10 mtpa over the last five years). A report by JCS Solutions has estimated production in particular regions within NSW and Victoria. Based on these figures, the ACCC considers that the proportion of overall NSW grain production that would be produced in southern and central NSW is likely to be in the order of 51-57 per cent. This is broadly consistent with GrainCorp's estimate that central and southern NSW produces on

[14] GrainCorp, *Submission in support*, p. 7.

[15] Quattro, *Submission in support*, p. 7.

[16] Australian Bureau of Agricultural and Resource Economics and Sciences, *Agricultural commodity statistics 2014*, p. 208.

[17] ABARES, *Agricultural commodity statistics,* p. 28.

[18] ABARES, *Agricultural commodity statistics,* p. 162.

average 5.6 mtpa of grain. The pool of available grain for export via wheat port terminals is then reduced by the amount that is sold into the container and domestic markets.

Further, the ACCC notes that the size of the crop can fluctuate significantly and is greatly reduced in times of drought. This can have a significant impact on bulk export PTSPs on the East Coast of Australia, where the domestic market has 'first call' on grain. The domestic market is discussed at section 3.4.

2.2.2 Exports and capacity utilisation

Past demand for bulk wheat port terminal capacity is one indicator of future demand. While historical data on exports at Port Kembla might not necessarily be reflective of future exports, the ACCC considers they are a relevant consideration.

The ACCC notes that any discussion of port terminal capacity should acknowledge the significance of available capacity at the peak shipping periods, where capacity is most highly valued by customers.

Over the last five years at Port Kembla the peak shipping period has been from January to May.[19] The ACCC will therefore separately consider the supply and demand of capacity at Port Kembla over the entire year and during the peak period.

Utilisation over whole year

GrainCorp and Quattro both submit that GrainCorp's Port Kembla facility has historically operated at low utilisation. GrainCorp and Quattro submit that 1.3-1.7 mtpa has been exported out of GrainCorp's port terminal facility on average over the last five years.[20]

Table 5 provides a summary of estimated utilisation rates based on Port Kembla's estimated future capacity both with and without the additional capacity expected to be provided by Quattro's port terminal. As noted in section 2.1.1 above, there are practical difficulties with estimating future elevation capacity at Port Kembla. These utilisation rates are based on an average capacity estimate that falls in between the minimum and maximum estimates for each facility discussed above. This includes GrainCorp's published available capacity figures, Quattro shareholders' average exports at Port Kembla over the last five years as a conservative minimum estimate for Quattro's facility, and the theoretical maximum capacity estimates as submitted by GrainCorp and Quattro.

The estimated utilisation rates indicate that there would have been significant levels of spare capacity at Port Kembla in low and average throughput years

Table 5: Average exports and capacity utilisation estimates

Past five years	GrainCorp terminal	GrainCorp terminal + Quattro terminal
Average annual exports (Mt)	1.76	1.76
Maximum annual exports (Mt)	3.02	3.00
Minimum annual exports (Mt)	0.60	0.60
Estimated capacity (Mt)	2.80 – 4.30	3.40 – 6.60

[19] Data provided by GrainCorp and Australian Crop Forecasters.

[20] GrainCorp, *Submission in support*, p. 10, Quattro, *Submission in support,* p. 9

Past five years	GrainCorp terminal	GrainCorp terminal + Quattro terminal
Capacity utilisation (average year)	49%	36%
Capacity utilisation (high throughput year)	83%	61%
Capacity utilisation (low throughput year)	17%	12%

Source: GrainCorp, *submission in support*, Quattro, *submission in support, Data provided by GrainCorp and Australian Crop forecasters.*

As discussed below, Quattro shareholders Cargill, Noble and Emerald have together accounted for a significant proportion of exports out of GrainCorp Port Kembla over the last five years (with the majority exported by Cargill). Quattro shareholders exported 3.0 of the 8.82 million tonnes total over the five years, while non-Quattro exporters shipped 5.82 million tonnes.

Cargill, Noble and Emerald have noted that they will conduct all future bulk exports through Quattro facilities. The parties submit, collectively, that:

> Once Quattro Port Kembla is operational, volumes conducted by Quattro's investors will be made through Quattro Port Kembla. However, as Quattro Port Kembla is introducing new capacity, volume taken up by Quattro's investors, equivalent capacity at competing facilities for other exporters will become available.[21]

It is therefore useful to consider the impact that Quattro's arrival will have on the available capacity at GrainCorp Port Kembla.

Utilisation of GrainCorp Port Kembla over the last five years in the absence of the Quattro shareholders' volumes is follows:

Table 6: Average exports and capacity utilisation at GrainCorp's terminal (without Quattro shareholders' exports)

Past five years	Exports	Capacity utilisation estimates
Average annual exports (mtpa)	1.16	32%
Maximum annual exports – high throughput year (mtpa)	2.20	61%
Minimum annual exports – low throughput year (mtpa)	0.20	5%

Source: GrainCorp, *submission in support*; Quattro, *submission in support; data provided by Australian Crop Forecasters.*

On whole of year utilisation over the last five years, the ACCC notes that:

- based on existing levels of capacity at GrainCorp's terminal, when Port Kembla's estimated capacity is assessed against average and low throughput exports over the

[21] Quattro, *Submission in support,* p. 9.

last five years, there has still been spare capacity available (however, in high throughput years capacity utilisation has also been relatively high),

- when Quattro's estimated capacity is added, utilisation across both Port Kembla terminals is even lower, and there would appear to be significant spare capacity even in high throughput years.

Utilisation in peak periods

The ACCC notes that capacity at peak shipping periods is highly valued. It is therefore appropriate to assess the level of utilisation in this period specifically.

Over the last five years, 4 750 337mt were shipped out of Port Kembla in the peak periods of January to May at an average of 190,013mt per month.

Table 7 estimates the level of capacity utilisation in peak periods at Port Kembla:

Table 7: Average exports and capacity utilisation during peak period (Jan-May)

Past five years (Jan-May)	GrainCorp terminal	GrainCorp terminal + Quattro terminal
Average annual exports (Mt)	0.95	0.95
Estimated capacity (Mt)	1.25 – 1.79	1.40 – 2.75
Capacity utilisation (average year)	62%	46%
Capacity utilisation (high throughput year)	85%	63%
Capacity utilisation (low throughput year)	19%	14%

Source: GrainCorp, *supplementary information*, GrainCorp, *submission in support*, Quattro, *submission in support*

Not surprisingly utilisation at peak periods in an average throughput year has been higher relative to the whole year. However, there has still been spare capacity available in this key shipping window. In a high throughput year the utilisation rate is similar to the whole of year utilisation rate and there is likely to be limited spare capacity in the absence of Quattro's facility.[22]

Port Kembla's jump from 49 per cent utilisation over an average year to 59 per cent during the peak period of an average year generally reflects the same broad trend as in Geelong (63 to 85 per cent), Portland (56 to 80 per cent) and Melbourne (54 to 80 per cent).[23] However, the rise in peak period utilisation at Port Kembla is smaller and the total amount of spare capacity is higher.

On the impact that Quattro's arrival will have on available capacity at GrainCorp Port Kembla, Quattro shareholders share of peak period exports over the past five years accounted for 1.50 million tonnes, while other exporters (including GrainCorp's own trading

[22] In 2011-12 peak period capacity utilisation was slightly lower than whole of year utilisation due to particularly high throughput during traditionally non-peak months (October-November and June-August). The ACCC considers this is not likely to be representative of high-throughput years more broadly.

[23] ACCC, *ACCC Determinations – Exemptions in respect of Emerald (Melbourne), GrainCorp (Geelong and Portland)* p.23.

arm) shipped 3.24 million tonnes. Quattro shareholders therefore shipped about one third (or 31.7 per cent) of all peak period tonnes over the last five years.

Table 8 estimates the levels of capacity utilisation at GrainCorp Port Kembla in the absence of Quattro shareholders.

Table 8: Average exports and capacity utilisation during peak period (Jan-May) (excluding Quattro shareholders)

Past five years (Jan-May)	GrainCorp terminal
Average annual exports (Mt)	0.6
Estimated capacity (Mt)	1.25 – 1.79
Capacity utilisation (average year)	39%

Source: GrainCorp, *submission in support*, Quattro, *submission in support; Data provided by GrainCorp*

Once Quattro's port terminal becomes operational, it is therefore likely that a significant amount of peak period capacity will be freed up for other exporters at GrainCorp's terminal.

It is unlikely to be economically efficient to have sufficient port terminal infrastructure to accommodate the entire export task within a three to six month window that goes un-utilised for the remainder of the year. Therefore, while exporters' preference may be to export the majority of grain within a peak period, spreading the export task into the non-peak period would represent an efficient use of infrastructure.

However, the ACCC recognises that exporting wheat during the peak period (in the first half of the calendar year) will generally provide the best returns for marketers. Where a number of grain marketers are able to access port terminal capacity during this period, the marketers will be competing to acquire grain, which would also provide increased returns for grain producers. A key concern from the ACCC's perspective when considering whether to exempt a PTSP is therefore the extent to which a vertically integrated service provider can discriminate in favour of its own trading business by allocating itself the majority of peak period capacity and allowing it to obtain the best prices.

Given the provision of port terminal services involves a high proportion of fixed infrastructure costs that do not vary based on throughput, a PTSP that faces competition would have an incentive to maximise throughput during peak and non-peak periods where there is spare capacity.

If exporters have the option of shipping from more than one port terminal, each PTSP's behaviour in allocating capacity during peak periods may also be constrained by its need to attract exporters to use its facility during non-peak periods. This is consistent with the approach taken by GrainCorp in its long term agreement arrangements to encourage spreading of capacity throughout the year by requiring long term agreement customers to book at least 30 000 tonnes of capacity each month for 10 months per year at one port.[24] Therefore, the extent to which capacity constraints in peak periods are a concern will depend on the presence of competing ports and the overall level of spare capacity throughout the rest of the year.

As the utilisation figures in the tables above indicate:

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

- Even in the absence of Quattro, there has been spare capacity at GrainCorp's Port Kembla facility over the whole year and (though to a lesser extent) the peak shipping period in average throughput years.
- Quattro's arrival would significantly increase the amount of spare capacity in both peak and non-peak periods, even in high throughput years.

2.2.3 Exporters and bargaining power

Exports out of Port Kembla over the last five years have been dominated by three exporters, GrainCorp, Cargill and Glencore. In 2013 GrainCorp signed long term agreements for 1.4 mtpa of capacity at Port Kembla for three years. These agreements run until 30 September 2016. Capacity at GrainCorp's Port Kembla terminal that is not allocated via long term agreements is allocated on a first-in, first-served basis.

Share of exports over the last five years are set out in Table 9.

Table 9: Share of exports at Port Kembla over last five years

Exporters * Quattro shareholders	**Percentage of shipped tonnes (whole year)**	**Percentage of shipped tonnes (peak periods)**
GrainCorp	42%	43.3%
Cargill*	32%	30%
Glencore	22%	20.9%
ADM	3%	3.1%
Noble*	<1%	1.2%
CBH	<1%	<1%
Emerald*	<1%	<1%
JKI	<1%	<1%

Source: GrainCorp, *supplementary information*, GrainCorp, *submission in support*, Quattro, *submission in support*

Export shares during the peak Port Kembla shipping months of January to May are largely the same as shares over the entire year.

Once Quattro's facility is operational GrainCorp Port Kembla will likely be operating without the business of Quattro shareholders Cargill, Noble and Emerald, which have accounted for around a third of all exports out of Port Kembla over the last five years.

As noted at Table 10, when the exports of Quattro shareholders are taken out of total exports from Port Kembla over the last five years, there is a drop in utilisation in an average year from 49 per cent to 32 per cent over the whole year, and a drop from 62 per cent to 46 per cent in peak shipping months.

In the absence of the Quattro shareholders over the last five years, share of the other exporters at GrainCorp's Port Kembla facility would be as follows:

Table 10: Share of exports at Port Kembla over last five years (excluding Quattro shareholders)

Exporters	Percentage of shipped tonnes (whole year)	Percentage of shipped tonnes (peak periods)
GrainCorp	62.5%	63.4%
Glencore	31.4%	30.6%
ADM	5.2%	4.6%
CBH	<1%	<1%
JKI	<1%	<1%

Source: GrainCorp, *supplementary information*, GrainCorp, *submission in support*, Quattro, *submission in support*

Regarding the level of competition for capacity at GrainCorp Port Kembla, Quattro's arrival will create a significant increase in the amount of available spare capacity, and third party exporters such as Glencore and ADM may more easily be able to access capacity. Glencore has maintained a significant market presence at Port Kembla over the last five years. Glencore has no legal interest in existing port terminals in New South Wales and no known plans to develop or acquire its own facilities in the region. The Port Kembla terminals will therefore likely compete for Glencore's and other exporters' business in the future.

Regarding the level of competition for capacity at Quattro Port Kembla, Quattro submits that:

> *It is expected that the three Quattro investors which export grain will collectively export less than two thirds of Quattro Port Kembla's export capacity.*[25]

The ACCC notes that Quattro shareholders have exported an average of 0.6 mtpa over the last five years at Port Kembla. While the ACCC considers that Quattro shareholders may intend to export more than that amount out of a facility that has a stated capacity of 1.1–1.3 mtpa, there may still be significant spare capacity available at Quattro's facility.

Even if it is assumed that GrainCorp will conduct all of its exports through its facility, that Cargill, Emerald and Noble will export exclusively out of the Quattro facility, and that both wish to increase their past levels of exports at Port Kembla, there is still likely to be spare capacity at Port Kembla (i.e. total bulk exports at Port Kembla have been 1.76 mtpa on average over the last five years, while estimated capacity is 3.40 mtpa – 6.60 mtpa).

The Port Kembla facilities will therefore have strong incentives to secure throughput from non-affiliated third party exporters.

[25] Quattro, *Submission in support*, p. 6.

3 Competition across the bulk wheat supply chain, container exports and domestic demand

This chapter sets out the ACCC's draft views on bulk wheat supply chain services upstream from the port such as upcountry storage and grain transportation services. In particular, the ACCC has considered the relevant grain catchment area for the two port terminals.

The ACCC considers that GrainCorp's facility and the Quattro facility (once operational) will have the same grain catchment area, as the two facilities are located on adjacent sites at Port Kembla and will have similar transport links. This close proximity indicates that grain originating in the overall Port Kembla catchment area could supply either of the two facilities. In this chapter, the ACCC considers the extent to which the Port Kembla terminals draw grain from catchment areas that overlap with other ports, and therefore the extent to which the Port Kembla terminals compete with these port terminals for bulk wheat export volumes.

This chapter also discusses the competitive effect of container export services and the domestic demand for wheat. Where containerised exports and domestic demand are alternative options for grain marketers wishing to sell wheat, they may provide a competitive constraint on the bulk wheat PTSPs.

The ACCC's consideration of the extent to which the PTSPs compete with each other and are constrained by containerised exports and domestic demand is relevant to the ACCC's assessment of the exemption application, having regard to the matters under subclause 5(3) of the Code.

Stakeholder views from the ACCC's consultation process on the exemption applications are also included as relevant through this chapter.

3.1 Port Kembla terminals upcountry links

The upcountry environment relating to the Port Kembla terminals is a relevant consideration in the ACCC's assessment, as both GrainCorp and shareholders of Quattro have vertically integrated operations in the Port Kembla grain catchment area. Whether either of the port operators is able to use its position in upcountry markets to limit the ability of competing exporters to access port terminal services is relevant to the ACCC's consideration of the exemption applications.

As discussed in Chapter 2, total grain production in the Port Kembla catchment area has varied over the last ten years.

3.1.1 Upcountry storage and handling

The Productivity Commission (PC) addressed upcountry storage and handling and transport networks in its inquiry report into Wheat Export Marketing Arrangements in July 2010. The PC noted three findings relating to upcountry networks from its inquiry, specifically:

> *Greater competition can improve the efficiency of the grain supply chain. These efficiency improvements lower the costs of the supply chain, providing benefits to the industry, and particularly to growers.*
>
> *Up-country storage facilities do not exhibit natural monopoly characteristics. There is no case for specific third party access regulation. Specific access regulation is likely to hinder the development of efficient supply chains.*

> *Competition in the grain supply chain requires that participants have the ability to by-pass the bulk handling system.*[26]

The PC recommended in its review into the wheat export marketing arrangements that upcountry grain storage should not be regulated.[27] This view was adopted by government, and as a result, upcountry services have not been subject to access regulation.

The ACCC considers that the current state of competition in upcountry storage and handling facilities in southern and central NSW is relevant to the assessments of GrainCorp and Quattro's exemption applications. If there is a sufficient degree of competition in upcountry services, it will limit the ability for a port operator to leverage market power from its upcountry networks to its port terminal services. It is also relevant to consider whether granting an exemption to Quattro and/or GrainCorp will promote competition in related markets, including the market for upcountry services.

GrainCorp submits there is a substantial and competitive country storage network in NSW, and that various storage providers can readily supply wheat and other grains into alternative local and export channels, depending on the market price and supply chain cost for grain.[28] GrainCorp submits that there are around 40 major independent country silos owned by competitors including Cargill, Emerald, Glencore and Louis Dreyfus. GrainCorp submits that most of these competing country silos have access to bulk or containerised grain trains, contracted by the owner of the facility or the exporter.[29]

Quattro also submits that there is a 'highly competitive environment, exhibited through the existence of a large upcountry storage and handling network with greater capacity than the volume of grain produced'.[30] Quattro submits that its investors own a small proportion of the total upcountry storage facilities available in NSW:

> *Quattro's investors, Cargill and Emerald own in total c.15 upcountry storages in NSW, of which 7 naturally sit within Port Kembla's catchment area. This represents a small portion of the total upcountry storage facilities available in NSW.*[31]

Quattro submits that upcountry storage is not a factor limiting competition at port.[32]

Based on GTA freight differentials, there are approximately sixty upcountry storage and handling facilities in southern and central NSW which are freight-advantaged to Port Kembla.[33] Of these facilities, approximately two thirds have rail access while the remainder are serviced solely by road transport.

GrainCorp and Quattro shareholders' storage and handling networks

GrainCorp has an extensive network of upcountry storage and handling facilities able to service Port Kembla, with the majority of these facilities located on rail lines (Figure 1). Over three quarters of the upcountry facilities freight-advantaged to Port Kembla are owned by GrainCorp (even after site closures from Project Regeneration).

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[26] Productivity Commission, Wheat Export Marketing Arrangements, 1 July 2010, p. 31

[27] The Parliament of the Commonwealth of Australia, House of Representatives, Wheat Export Marketing Bill 2008, Explanatory Memorandum, pp. 13, 14

[28] GrainCorp, p. 16.

[29] GrainCorp, p. 17.

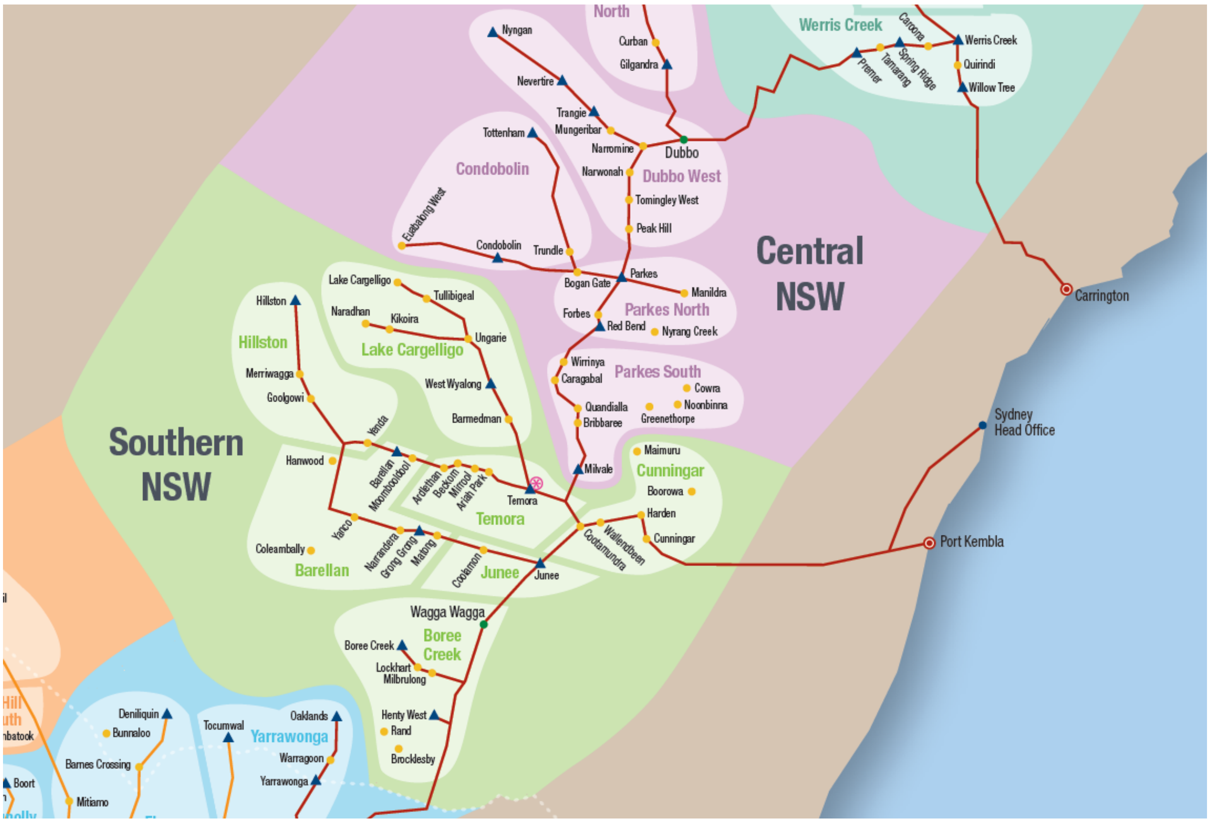
[30] Quattro, p. 10.

[31] Quattro, pp. 10, 17.

[32] Quattro, p 17.

[33] The GTA freight differentials are discussed in further detail at section 3.2.1 below.

Figure 2: Section of GrainCorp up country network 2014-15



Source: GrainCorp website at www.graincorp.com/regeneration

Of the three Quattro shareholders who are grain exporters, only Emerald and Cargill have interests in their own upcountry storage and receival facilities. These include the following sites which are freight-advantaged to Port Kembla:

- Emerald has storage and receival sites at Ardlethan, Goolgowi, and Coolamon.
- Cargill owns storage and receival sites at Bogan Gate, Grong Grong, Stockinbingal and West Wyalong through its subsidiary GrainFlow. Cargill also has an interest in the storage and handling facility operated by BFB at Temora.

Figure 3: Emerald up country network

Source: Emerald website at http://emeraldgrain.com/home/grower-services/store-and-move-grain/our-network/

Figure 4: Section of GrainFlow upcountry storage and handling network

Source: GrainFlow website at http://www.grainflow.com.au/grainflow-sites/

Figures 2, 3 and 4 show that storage and handling sites owned and operated by the vertically-integrated bulk handling companies are distributed across southern and central NSW. Emerald's network is concentrated in the southern portion of the Port Kembla catchment area, while GrainCorp and GrainFlow's networks are more evenly distributed throughout southern and central NSW.

Alternative storage and handling service providers

There are several storage and handling facilities which are freight-advantaged to Port Kembla and not owned by GrainCorp or Quattro's shareholders, including:

- GrainForce's facility at Bathurst[34]
- Murrumbidgee Grain's facility at Bomen[35]
- Mountain Industries' facility at Forbes, which provides an alternative to the GrainCorp facility[36]
- Lake Grain Pty Ltd's (Lake Grain) facility at Lake Cargelligo, which provides an alternative to the GrainCorp facility.[37]

The ACCC understands that the total storage capacity at each of these facilities varies from 7 500 to 50 000 tonnes.

The below table shows estimated shares of the upcountry storage facilities across all of NSW, and those in the areas identified by GTA as being freight-advantaged to Port Kembla.

Table 11: Ownership of upcountry storage and handling facilities in NSW

Operator	All of NSW	Sites freight-advantaged to Port Kembla*
GrainCorp	63%	79%
Cargill (GrainFlow and BFB)	6%	8%
Emerald	4%	5%
Other	27%	8%

*According to GTA freight differentials for 2014-15.

The ACCC is aware of a number of other grain storage facilities located in southern and central NSW and not listed by GTA, including:

- Lachlan Fertilizers' facility at Cowra[38]
- Grenfell Commodities' facilities at Grenfell[39]
- Kennett Rural's facility at Harden[40]

[34] GrainForce website at http://grainforce.com/index.php/services/storage-agents, accessed 14 July 2015
[35] Rodney's Transport website at http://www.rodneystransport.com.au/about.php, accessed 14 July 2015
[36] Mountain Industries website at http://www.mountainindustries.com.au/agricultural_services.htm, accessed 14 July 2015
[37] Lake Grain website at https://www.lakegrain.com.au, accessed 14 July 2015.
[38] Lachlan Fertilizers website at http://www.lachfert.com.au/category.php/view/id/8, accessed 14 July 2015.
[39] Grenfell Commodities website at http://www.grenfellcomm.com.au/index.php?page=storage, accessed 14 July 2015.

- Croker Grain's facilities at Marrar, Cootamundra and Widgelli.[41]

Some of these facilities are mainly focused on container packing and servicing the domestic market, and it is unclear the extent to which they would provide an alternative for marketers seeking to export bulk wheat.

On-farm storage

On-farm storage also contributes to total upcountry storage capability in southern and central NSW. Recently there has been an increasing trend for on-farm storage, particularly in eastern Australia, as it allows producers to:

- sell direct to local buyers and assist in maximising their marketing opportunities
- avoid delays and associated costs at harvest due to slow off-site receival turnaround times[42]
- accumulate grain for transport to domestic users or for export via containers.

The PC considered on-farm storage in the course of its inquiry into Wheat Export Marketing Arrangements and noted that:

> *On-farm storage capacity also makes up a relatively greater proportion of the total storage in the eastern states than in Western Australian and South Australia which rely more heavily on bulk handlers for grain storage.*[43]

GrainCorp estimates that NSW has in excess of 6 million tonnes on-farm storage, of which 4 million tonnes is located in southern and central NSW.[44]

However, NSW Farmers submits that on-form storage is not a true competitor to the bulk export supply chain, citing the following reasons:

> *… even in instances in which a farmer may utilise on farm storage to take advantage of counter seasonal price spikes or the capacity to blend grain to increase a premium, delivery will often occur through the bulk handling system.*
>
> *… often the purpose for the establishment of on-farm storage is a strategic decision related to production, not marketing. That is to ensure fewer delays at harvest caused by backlogs at local receival sites, keeping harvesters (particularly contract harvesters) operational and managing quality risks caused by in-harvest rainfall events. Silos used for this purpose do not need to be manufactured to handle the issues of preserving grain quality that are accompanied with longer term storage of grain.*
>
> *…for most farmers the market signal to invest in the establishment and ongoing management of the type of on farm storage required for longer storage periods does not exist.*[45]

Capacity of the upcountry storage and handling network

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[40] Kennett Rural website at http://www.kennettrural.com/Services/GrainStorageandHandling/tabid/62/Default.aspx, accessed 14 July 2015.

[41] Croker Grain's website at http://www.crokergrain.com.au/storageHandling.cfm, accessed 14 July 2015.

[42] AEGIC, *The cost of Australia's bulk grain export supply chains: An information paper*, January 2014,p. 6

[43] Productivity Commission, *Wheat Export Marketing Arrangements*, 1 July 2010, p. 68.

[44] GrainCorp, Submission in support, p. 17.

[45] NSW Farmers submission pp. 12-13

Quattro has provided estimates for the total storage capacity across NSW, submitting that there are 170 upcountry storage sites in NSW which represent over 15 Mt of estimated storage capacity. In addition, Quattro estimates there is a further 6.4 million tonnes of on farm storage across NSW.[46]

GrainCorp has provided an estimate of the total storage capacity for central and southern NSW of 14 Mt, and submits that this is made up of 6.5 Mt capacity at GrainCorp's own facilities, 2.9 Mt storage capacity owned by other bulk handlers, plus 4.1 Mt of on-farm storage.[47]

GrainCorp submits that its silos receive on average 2.9 Mt of grain, representing an average market share of 51 per cent against average grain production of 5.6Mt.[48] Based on its estimate of total upcountry storage capacity and this average grain production, GrainCorp submits that average capacity utilisation of the upcountry storage network is only 41 per cent.[49]

Competition in upcountry storage and handling

The ACCC understands that there are a number of competing providers of upcountry storage and handling services across southern and central NSW, including the bulk handlers and other independent operators. GrainCorp is the owner and operator of a substantial majority of the bulk (off-farm) storage and handling facilities. As such, the ACCC is of the view that GrainCorp is a dominant provider of grain storage and handling services in southern and central NSW and has a strong market position.

The second largest provider of upcountry storage services in southern and central NSW is Cargill, via its subsidiary GrainFlow, and then Emerald Grain. However, as noted at Table 11 above, GrainCorp's share of upcountry facilities is higher in areas that are freight-advantaged to Port Kembla compared to the whole of NSW. It is also higher than GrainCorp's share of upcountry facilities in Victoria.

Given the fixed costs of upcountry grain storage facilities the ACCC considers that where there are other facilities in close geographic proximity, site operators are incentivised to compete with each other in order to attract customers and maximise throughput in the facility. In some locations GrainCorp's facilities do face direct competition from nearby facilities. For example, Emerald's facility competes with GrainCorp at Ardlethan, GrainFlow's facility provides an alternative to GrainCorp's facility at Bogan Gate, and Lake Grain's facility provides an alternative to GrainCorp's facility at Lake Cargelligo. Some of GrainCorp's receival sites were established as early as 1918 and most of its infrastructure was established in the 1960s, meaning that GrainCorp will face additional pressure where competing facilities are newer and more efficient.[50]

However, growers in some locations may have limited options outside of the GrainCorp upcountry network. For example, NSW Farmers submits that for growers to the east of GrainFlow's West Wyalong facility, the only commercially available options to deliver grain are all owned by GrainCorp (that is, GrainCorp's Wirrinya, Caragabal, Quandialla and Bribbaree receival facilities). The ACCC does not consider that it is necessary for there to be multiple competitors at every alternative location upcountry for there to be a level of competition in upcountry storage, although there may be limited competition in particular geographic regions.

[46] Quattro, Submission in support, p. 10.

[47] GrainCorp, Submission in support, pp. 13, 16.

[48] GrainCorp, Submission in support, p. 16

[49] GrainCorp, Submission in support, p. 16.

[50] AEGIC, *The cost of Australia's bulk grain export supply chains: A postscript*, Version 2014.1, p. 8.

NSW Farmers submits that in determining where to deliver grain farmers will consider the price received, the cost of delivery to silo/domestic user, freight on board (FOB) costs (such as the location differential to port), and other transaction costs such as the speed of turnaround and its impact on the harvest. NSW Farmers submits that these factors will often result in a farmer selecting the nearest silo as the preferred destination for their grain.[51] A provider of storage and handling services will therefore only be able to increase costs up to the point where it becomes cheaper for the farmer to travel and deliver grain at a further site. In areas where there is only one local storage and handling provider, the option of on-farm storage may provide some further constraint on that provider's ability to exert market power. However, the ACCC notes that this constraint may be limited given that some on-farm storage facilities are designed for short-term storage during harvest and may not have the capability to store grain over the longer term.[52]

In addition to the bulk wheat export market, upcountry bulk storage sites are able to service the domestic market for grain (discussed in section 4.4). Some sites can also serve the containerised grain export market (discussed in section 4.3). There are a number of companies with integrated operations offering storage together with container packing or transport services, or both. These sites provide competitive options for exporters and farmers to use.

Overall, the ACCC considers that there appears to be surplus upcountry storage capacity in southern and central NSW, which provides an incentive for storage and handling providers to maximise throughput at their facilities. The ACCC considers that there are some geographic areas within the Port Kembla grain catchment area where GrainCorp may be able to exert market power in the provision of storage and handling services. However, other areas within the catchment area are competitive with multiple providers operating at particular locations.

While GrainCorp is the dominant provider of storage and handling services in the Port Kembla grain catchment area, storage facilities owned by other parties combined with on-farm storage means that growers in at least some areas do have alternative options to deliver their grain, and exporters utilising Port Kembla are able to obtain grain outside of GrainCorp's upcountry network. The ACCC also notes the Productivity Commission's assessment that up-country storage facilities do not exhibit natural monopoly characteristics, suggesting that barriers to competitive entry are not prohibitively high.

The ACCC's draft view is that given GrainCorp's dominant position there is currently not sufficient competition in upcountry storage and handling that would provide a constraint on GrainCorp's ability to exercise market power while it remains a monopoly PTSP at Port Kembla. However, the ACCC notes that parties exporting grain from Port Kembla do nevertheless have alternative options to using GrainCorp's upcountry network, and that exporters using Quattro's facility will likely be able to take advantage of these alternatives, although growers in particular locations may continue to have limited options for delivering their grain outside GrainCorp's network. The ACCC therefore considers that GrainCorp's dominance upcountry, while significant, is unlikely to prevent exporters sourcing grain to export via Quattro's Port Kembla terminal.

3.1.2 Grain transport services

The use of rail and/or road networks to transport grain from storage facilities to port is a relevant consideration in examining the level of competition between various port terminals. Transport networks and the associated freight charges to move grain to port is a key factor

[51] NSW Farmers, Submission, p. 10.

[52] NSW Farmers, Submission, pp. 12-13.

for marketers in determining which port terminal to export grain from. In particular, port terminals would generally only be viable substitutes for each other where a sufficient number of marketers can transport grain to either port at a similar cost. Therefore, the availability and cost of transport options will be a key factor in determining the grain catchment area of the Port Kembla terminals.

The average distance from up-country receival sites to port in Australia is about 250km. However, the freight distances in NSW are higher than other states, with the average distance to port in NSW significantly higher than the national average at 412km.

AEGIC estimates that the catchment area within which road transport is competitive with rail is upwards of a 200 km radius from port, depending on the season and subsequent road freight rates.[53] Given the longer freight distances in NSW, a significant proportion of up-country receival sites are therefore likely to be outside of this competitive zone, and rail transport will be the more efficient option. This is reflected in the modal share estimates for NSW, where 85 per cent of grain is transported to port by rail, compared to 46-60 per cent in other states. Average rail line access costs per tonne/kilometre are lowest in NSW, which may reflect the greater distances travelled allowing fixed costs to be recovered over a greater distance.

This is consistent with GrainCorp's submission that rail plays an important role in the bulk export of grain from Central and southern NSW due to longer hauls of up to 600kms to Port Kembla.[54] Quattro states that its investors have historically delivered over 90 per cent of their grain to Port Kembla by rail.[55]

However, it appears that road transport is a more viable option for containerised exports and the domestic market, particularly for grain received closer to port. GrainCorp submits that grain grown within approximately 400 km of Port Kembla tends to move by road either into the large local domestic market or via containers out of Port Botany. GrainCorp estimates that 50 per cent of domestic and containerised grain is moved by rail. Quattro also notes that the container market is serviced by both rail and road.[56]

Rail

The majority of the rail network in NSW is standard gauge and links to Australia Rail Track Corporation's (ARTC's) interstate network, which is also standard gauge. This is an advantage over the situation in Victoria, where multiple rail gauge configurations across different parts of the state complicate the freight task. The link to the interstate network means that grain grown in NSW could be transported via the interstate network to Emerald's Melbourne port terminal as an alternative to the NSW ports.

AEGIC states that Pacific National is the dominant operator of above-rail services in NSW and that there is limited competition for the rail freight task within each state.[57] However, AEGIC notes that Noble, Emerald and Cargill are expected to use Qube's rail services to transport grain to the Quattro facility.'[58] Both GrainCorp and Quattro also submit there are a number of alternative providers of above rail services.

GrainCorp submits that there are a range of rail providers in NSW:

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[53] AEGIC, The cost of Australia's bulk grain export supply chains: A postscript, Version 2014.1, p. 17

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

[55] Quattro, Submission in support, p. 17.

[56] Quattro, Submission in support, p. 12.

[57] AEGIC, The cost of Australia's bulk grain export supply chains, p. 18.

[58] AEGIC, The cost of Australia's bulk grain export supply chains: A postscript, p. 3.

> *The incumbent major rail provider, Pacific National, supplies rail to a number of grain exporters and can readily relocate trains within NSW (and to some extent to the standard gauge network in Victoria). Rail services are being supplied by new rail providers such as Qube, Aurizon and G&W.*[59]

Quattro submits that resources are available from Qube, Pacific National, Southern Shorthaul Rail and Freightliner. Quattro considers that Aurizon would also be able to operate in the Port Kembla catchment area if there were sufficient demand.[60]

GrainCorp has provided data on the number of trains in NSW indicating that there are a total of 18 trains used for export grain and 7 trains used to transport domestic grain. GrainCorp submits that it owns just over half the export trains.[61] The ACCC understands that Quattro's shareholders also have trains operating in NSW.

The ACCC recognises that rail has scale advantages compared to road transport and that rail is likely to be the most efficient transport method to move grain to port in the Port Kembla catchment area due to the long distances generally involved.

The ACCC considers that the availability of services from multiple above-rail providers operating in the Port Kembla zone indicates there is some competition in the provision of above-rail services. In particular, Qube is likely to provide a significant competitive constraint on the incumbent provider Pacific National once the Quattro facility is operational.

Road

According to AEGIC, the modal share of road to port in NSW is 15 per cent. This is significantly lower than in other states, where road transport can account for over half the export task (e.g. Queensland and South Australia).[62]

GrainCorp's Port Kembla terminal currently receives grain by road, and Quattro's terminal is also expected to have road receival facilities. Quattro submits that its facility will primarily receive grain by rail but a road discharge facility is also incorporated in the design.[63] One key advantage of road transport over rail is its lower fixed costs. AEGIC notes that where grain production is particularly volatile, road transport may become more cost-effective against rail transport. Road may also become more cost-effective where it enables access to back-loading markets such as fertiliser.

There are a number of companies providing trucking services in southern and central NSW. These include Freight Link Pty Ltd, which has a fleet of B-Double trucks and specialises in the bulk transportation of grain to port and back loading of fertilizer to key country destinations.[64]

As noted above, the ACCC expects that rail will continue to be the dominant transport option for grain in the Port Kembla catchment area. However, in some situations road transport may also be an efficient option, particularly servicing the domestic market and containerised exports. The ACCC considers that the availability of road transport will provide some competitive constraint on rail freight, particularly in the catchment area closer to port.

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

[60] Quattro, Submission in support, p. 12.

[61] GrainCorp, Submission in support, p. 9.

[62] AEGIC, The cost of Australia's bulk grain export supply chains, p. 17.

[63] Quattro, submission in support, p. 3.

[64] Australian Grain Link website at http://www.australiangrainlink.com.au/transport.php, accessed 14 July 2015.

3.2 The Port Kembla grain catchment area

In general, the ACCC's assessments of exemption applications will consider the extent to which port terminals can compete with each other. As such it is important to consider the relevant grain catchment areas for each port terminal and the extent to which these areas can supply grain to alternative terminals to facilitate competition.

Port terminals may be in competition with each other if, for instance, grain from one area could practically move to either of the two (or more) terminals at a similar cost.

The relevant catchment area for the two Port Kembla terminals is likely to be related to established transportation links to each port including rail networks and road pathways that connect the port terminals to growing regions and the associated upcountry storage infrastructure.

GrainCorp and Quattro have identified the broad geographic areas which produce grain that they consider can be exported through their Port Kembla terminals.

Quattro submits that GrainCorp's Port Kembla terminal is its main competitor and shares the same catchment area, similar freight requirements and market price forces. Both GrainCorp and Quattro consider that the Port Kembla grain catchment area overlaps to some degree with the catchment areas for the Newcastle terminals and Victorian port terminals.

As noted above, the ACCC considers that GrainCorp's facility and the Quattro facility (once operational) will have the same grain catchment area, as the two facilities are located on adjacent sites at Port Kembla and will have similar transport links. This close proximity indicates that grain originating in the Port Kembla catchment area could supply either of the two facilities.

This section considers the extent to which the grain catchment area for the Port Kembla terminals overlaps with other ports, and the degree to which GrainCorp and Quattro are likely to face competition from PTSPs at Newcastle or in Victoria.

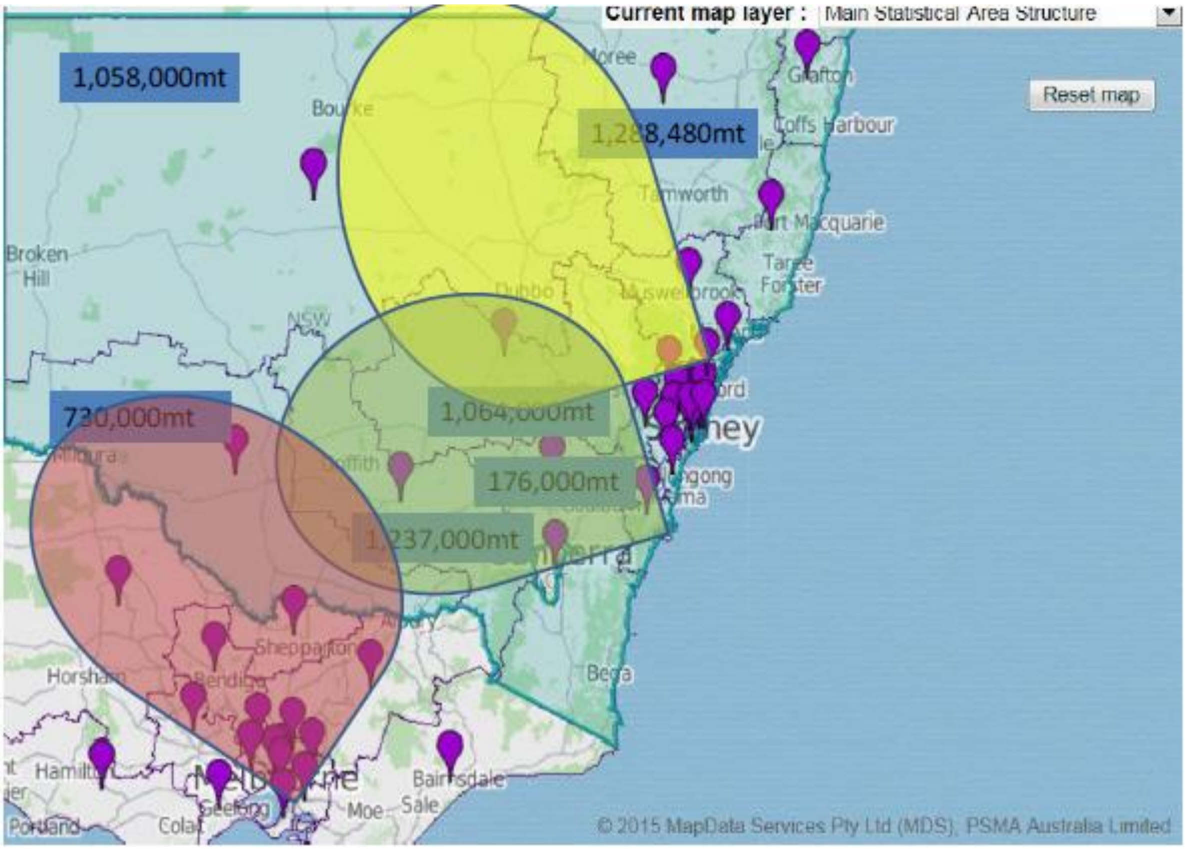
Quattro submits that:

> *…grain from southern NSW can flow to not only the existing GrainCorp facility at Port Kembla and the new Quattro facility at the same port but also into Victoria, meaning competition from Emerald and GrainCorp's Melbourne and Geelong terminals respectively. Similarly, grain in the central and northern regions of NSW can also flow into the Newcastle Ports.*[65]

Quattro submits that Port Kembla's key catchment areas include the Murrumbidgee area, Central West NSW and South Eastern NSW. Figure 5 was provided by Quattro to indicate the overlapping catchment areas between the Melbourne and Newcastle terminals and the Port Kembla terminals.

[65] Quattro, Submission in support, p. 3.

Figure 5: Quattro depiction of grain catchment areas in NSW



Source: Quattro submission, p. 11.

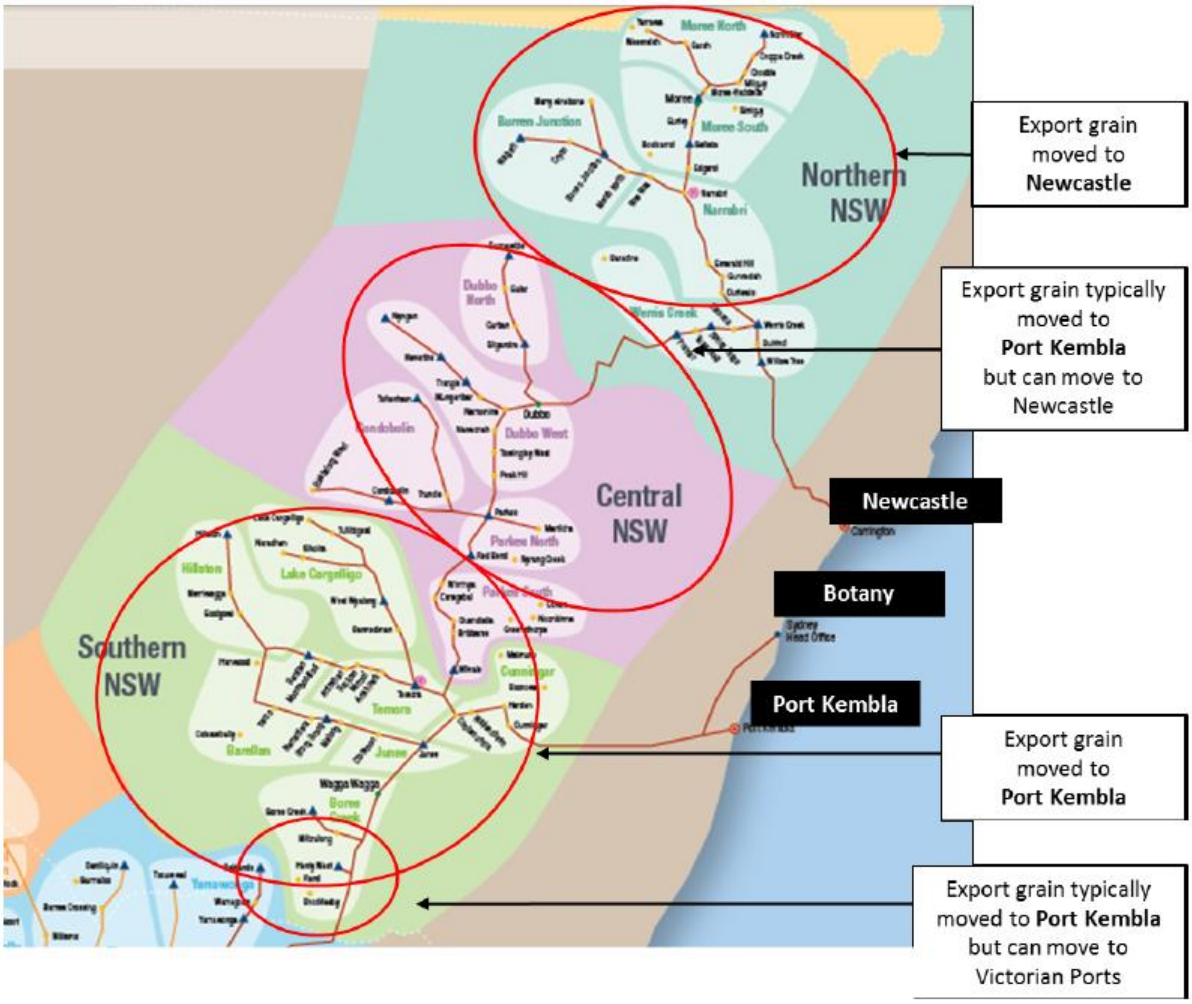
GrainCorp submits that growing regions in central and southern NSW supply most of the export grain to Port Kembla, however:

> *… grain from Central NSW sometimes moves to the Port of Newcastle where exporters have the option of shipping through three bulk export terminals, being GrainCorp's Carrington facility, the Louis Dreyfus Commodity Terminal and the Newcastle Agri-Terminal.*[66]

GrainCorp also provided an illustration of its view of NSW growing regions and typical routes to export markets. Figure 6 presents GrainCorp's view that there is some overlap between Port Kembla and Newcastle catchment areas in central NSW, and that there is also some overlap with the catchment area for the Victorian ports at several sites in southern NSW.

[66] GrainCorp, Submission in support, p. 6.

Figure 6: GrainCorp depiction of grain catchment areas



Source: GrainCorp, submission, p. 6.

During the ACCC's market inquiries, several exporters agreed that the grain catchment area for Port Kembla has some overlap with the catchment areas for Newcastle and Melbourne, and that the Port Kembla terminals compete with the Newcastle and Melbourne terminals to some degree.

However, NSW Farmers takes a more narrow view of the grain catchment area based on the concept of a 'Natural Terminal Port' which is defined by reference to freight costs. On this basis, NSW Farmers considers that the grain catchment area for Port Kembla is distinct from that of Newcastle and Melbourne, submitting that:

> *As a rule it does not make commercial sense to arbitrage grain away from the NTP on the basis that the additional cost of moving the grain further away is not matched by a corresponding premium; either in the form of a reduced port costs or access to a premium export market.*[67]

However, NSW Farmers notes that grain may be diverted to Port Kembla from sites within what it defines at the Newcastle Port Zone and the Melbourne Port Zone, including 15 GrainCorp sites, three GrainFlow sites and one additional Emerald site.

[67] NSW Farmers, Submission, p. 6.

3.2.1 Freight charges to port terminals

To assist in determining the relevant grain catchment area for the Port Kembla terminals, the ACCC considers it appropriate to examine the relevant transportation costs to move grain from upcountry locations to the Port Kembla terminals and potential alternatives such as Melbourne and Newcastle.

This allows the ACCC to identify the grain catchment areas for each terminal where the transport costs are lowest. This then provides the ACCC with an indication of where these grain catchment areas overlap with each other and allow grain to be transported to alternative (or substitute) terminals at a similar transport cost which would facilitate competition between the terminals.

Grain Trade Australia (GTA) produces 'Location Differentials' to value upcountry grain on a port basis.[68] A Location Differential is a value attributed to an upcountry grain bulk storage and handling facility.[69] These values are representative of transport costs to move grain from and upcountry site to a port terminal facility for export.

GTA notes that its Location Differentials are not actual freight rates from storage facilities to port, but are widely used by the Australian grain industry to price "port based" contracts.[70] GrainCorp uses GTA Location Differentials to assist in in calculating some of its road freight charges[71] and the Australia Export Grains Innovation Centre (AEGIC) notes that:

> *Industry sources have indicated while GTA freight differentials are not the actual freight rates charged by GrainCorp, they are close approximations and it would be reasonable to use them as an indication of actual rates. They are more likely to be used by traders who will on sell based on track prices without intending to physically shift the grain to an end user.*[72]

Quattro submits that the Port Kembla catchment area overlaps with both Newcastle and Victorian port terminals. Quattro has considered the GTA Location Differentials and notes a number of upcountry sites whether the difference to either Port Kembla or Newcastle is small:

> *Examples include Peak Hill, Tomingly West, Tottenham and Trundle, of which have location differentials variances of lower than $5 p/t between the two catchment areas. In total, 28 upcountry sites have Location differential variances of lower than $10 per tonne between the two catchment areas.*[73]

Quattro similarly states that Port Kembla and Melbourne are situated over 800km apart, but that despite this large distance, these catchment areas can contest for volumes due to rail linkages.[74] Quattro similarly notes a number of upcountry sites whether the difference to either Port Kembla or Melbourne is small:

> *Examples include Bomen, The Rock, Milbrulong and Lockhart, all which have Location Differentials variances over lower than $5 per tonne between the two*

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[68] GTA was formed in 1991 to formalise commodity trading standards, develop and publish the trade rules and standardise grain contracts across the Australian grain industry. GTA's role today is to ensure the efficient facilitation of commercial activities across the grain supply chain.

[69] GTA, *Explanatory memorandum: GTA Location Differentials 2014/2015 Season*, p. 1

[70] Ibid, p. 1

[71] GrainCorp, 2014/15 Grower Warehousing Agreement, p. 19

[72] AEGIC, The cost of Australia's bulk grain export supply chains: An information paper, January 2014, p. 19

[73] Quattro, Submission in support, p. 12.

[74] Quattro, Submission in support, p. 12.

catchment areas. In total, 17 upcountry sites have location differential variances of lower than $10 per tonne between the two catchment areas.[75]

Tables 6 and 7 presents various GTA Location Differentials from upcountry sites across southern and central NSW. The ACCC considers that the Locational Differentials provide an indication of the costs to move grain from a specific upcountry site to port and are expressed as indicative costs on a dollars per tonne basis.

Analysis of the GTA Location Differentials suggests that there are upcountry sites in southern and central NSW where the difference in indicative freight costs to either the Melbourne port terminal or Newcastle port terminals are small.

There are five sites in south NSW where the difference between transporting grain to Port Kembla or Melbourne port terminal is less than $5 per tonne. This is in the context of total differential rates in the order of $30 to $60 for sites freight-advantaged to Port Kembla.

Table 12: Various GTA Location Differentials to Port Kembla and Melbourne Port Terminal (indicative dollars per tonne)

Site and site operator	Port Kembla	Melbourne	Differential
Bomen (Murrumbidgee Grain)	41.25	44.25	3
The Rock (Emerald)	42.75	41.00	-1.75
Milbrulong (GrainCorp)	44.00	41.50	-2.5
Lockhart (GrainCorp)	44.25	40.75	-3.5
Yenda (Australian Grain Storage)	49.00	45.25	-3.75

Source: GTA 2014/2015 Location Differentials

In central NSW there are seven sites where the difference between transporting grain to Port Kembla or the port of Newcastle is less than $5 per tonne.

Table 13: Various GTA Location Differentials to Port Kembla and Newcastle (indicative dollars per tonne)

Site and site operator	Port Kembla	Newcastle	Differential
Tottenham (GrainCorp)	54.00	50.75	-3.25
Tomingley West (GrainCorp)	44.75	42.00	-2.75
Peak Hill (GrainCorp)	43.25	43.50	0.25
Trundle (GrainCorp)	45.75	49.50	3.75
Bathurst (Grainforce)	28.50	33.00	4.5
Condobolin (GrainCorp)	50.75	55.50	4.75
Nyrang Creek (GrainCorp)	38.25	43.00	4.75

Source: GTA 2014/2015 Location Differentials

While GTA Location Differentials provide an indication of freight rates to each port, they are not actual charges paid, and as such, observations from these indicators should be

[75] Quattro, Submission in support, p. 12.

appropriately caveated. GTA notes that negotiated freight rates may vary significantly from the gazetted Location Differentials.[76]

The ACCC considers transport costs are particularly relevant to determining the degree of geographic substitutability between the Port Kembla terminals and other port terminals. Relative transport costs will affect the extent to which a particular port can raise its prices (due to being closer to growers) before it will lose business to another port terminal. Where switching occurs, the alternative terminal would appear to be a substitute and provide competitive constraint.

Additionally, AEGIC notes that GTA Location Differentials in Australia's eastern States are a direct function of distance to port and do not account for loading efficiencies across different sites.[77] In practice, some sites across NSW do differ in their loading capabilities with some being able to load trains faster than others, and some having only road access. The ACCC considers that the lower level of road transport to port in NSW compared to other states (e.g. Victoria) suggests that Port Kembla's catchment area is more likely to be linked to established rail lines.

Table 14 presents average GTA Location Differentials across various sites within regions that form part of the potential Port Kembla draw zone.

Table 14: Average GTA Location Differentials by region (indicative dollars per tonne)

Region	Port Kembla	Newcastle	Melbourne
Dubbo North (8 sites)	49.34	39.13	-
Dubbo West (8 sites)	51.38	45.03	-
Condobolin (4 sites)	52.50	54.56	-
Parkes North (8 sites)	40.00	47.25	-
Parkes South (8 sites)	36.78	47.57	-
Lake Cargelligo (9 sites)	46.75	59.86	56.75
Temora (8 sites)	39.53	58.71	48.25
Cunningar (6 sites)	31.17	48.15	60.25
Junee (4 sites)	39.88	58.13	45.00
Hillston (6 sites)	53.13	68.55	46.75
Barellan (24 sites)	51.97	66.71	42.24
Boree Creek (7 sites)	45.54	64.18	39.25

Source: GTA 2014/2015 Location Differentials

This analysis suggests that there may be some degree of overlap between the Port Kembla catchment area and the Newcastle and Melbourne port terminal catchment areas, noting that:

- For sites in the Cunningar, Parkes South and Lake Cargelligo regions, the Location Differentials suggest that freight rates are likely to be significantly lower to Port Kembla terminals than alternative ports.

- For sites in the Condobolin and Parkes North regions, Port Kembla is still likely to be the most cost effective option. However, the differences between the Location

[76] GTA, http://www.graintrade.org.au/location_differential_tables

[77] ibid, p. 20

Differentials to Newcastle are smaller on average, suggesting that delivery to the Newcastle terminals from these regions may also be a viable option. Similarly for sites in the Junee and Temora regions, Port Kembla is likely to be the most cost effective option, but delivery to the port of Melbourne may also be a viable alternative.

- For sites in Dubbo North and West regions, grain is more likely to be delivered to Newcastle. However, for sites in Dubbo West, delivery to Port Kembla may also be a viable option.

- For sites in the Boree Creek region, delivery to the Port of Melbourne is likely to be a more cost effective alternative to Port Kembla. GTA Location Differentials to the Port of Melbourne are not available for all sites within the Hillston and Barellan regions. However, where available the Port of Melbourne provides a cost effective alternative to delivering grain to Port Kembla. At other sites within these regions the Location Differentials indicate that delivery to Port Kembla is the most cost effective option.

The ACCC has also compared the degree of substitutability between Port Kembla and other terminals with the substitutability observed between Melbourne and Geelong port terminals during the Victorian ports exemption assessment. The ACCC notes there is significantly less substitutability between Port Kembla and the Melbourne and Newcastle port terminals compared to substitutability between Melbourne and Geelong.

In the Victorian ports exemption assessments, the ACCC noted that for around a third of Victorian sites there is a difference of less than five per cent between transporting grain to either Melbourne and Geelong. By comparison, there are only three sites in the Port Kembla catchment area where there is a difference of less than five per cent between transporting grain to Port Kembla and Melbourne or Newcastle (i.e. The Rock, Peak Hill and Coleambally).

Similar to the Victorian ports exemption assessments, the ACCC has also used GTA Location Differentials to consider the likely effect of a five per cent increase in storage and elevation charges at both the Port Kembla terminals. The results suggest that such an increase will lead to very minimal substitution between Newcastle and Port Kembla (switching would occur at only two sites) and no substitution between Melbourne port terminal and Port Kembla.

The ACCC notes that in practice exporters may choose to shift grain from sites in the Port Kembla catchment area to other ports for a range of commercial reasons. The ACCC understands that this does currently occur in practice. The ACCC also notes that it is relevant to consider the freight charges, and differences in freight charges, in the context of overall supply chain costs. With average supply chain costs in the order of $50-70 per tonne, differences in freight rates in the order of magnitude shown at tables 12 and 13 above may in some circumstances be outweighed by other factors, such as obtaining a higher FOB price at particular port or accumulating grain to a particular specification.[78]

However, all else being equal the ACCC considers that the degree of substitutability between Port Kembla and the Melbourne and Newcastle terminals appears to be low.

The ACCC's draft view is that while the Port Kembla terminals' grain catchment area has some overlap with Emerald's Melbourne port terminal and the Newcastle terminals, these options are likely to provide a very limited competitive constraint on the PTSPs at Port Kembla.

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[78] AEGIC, *The cost of Australia's bulk grain export supply chains*, p. 5; VFF, *Response to ACCC draft determinations*, 24 April 2015, p. 7.

3.3 Containerised exports

The degree to which containerised grain exports provides a competitive constraint on bulk exports is relevant to the ACCC's competition analysis of the level of competition faced by the Port Kembla terminals.

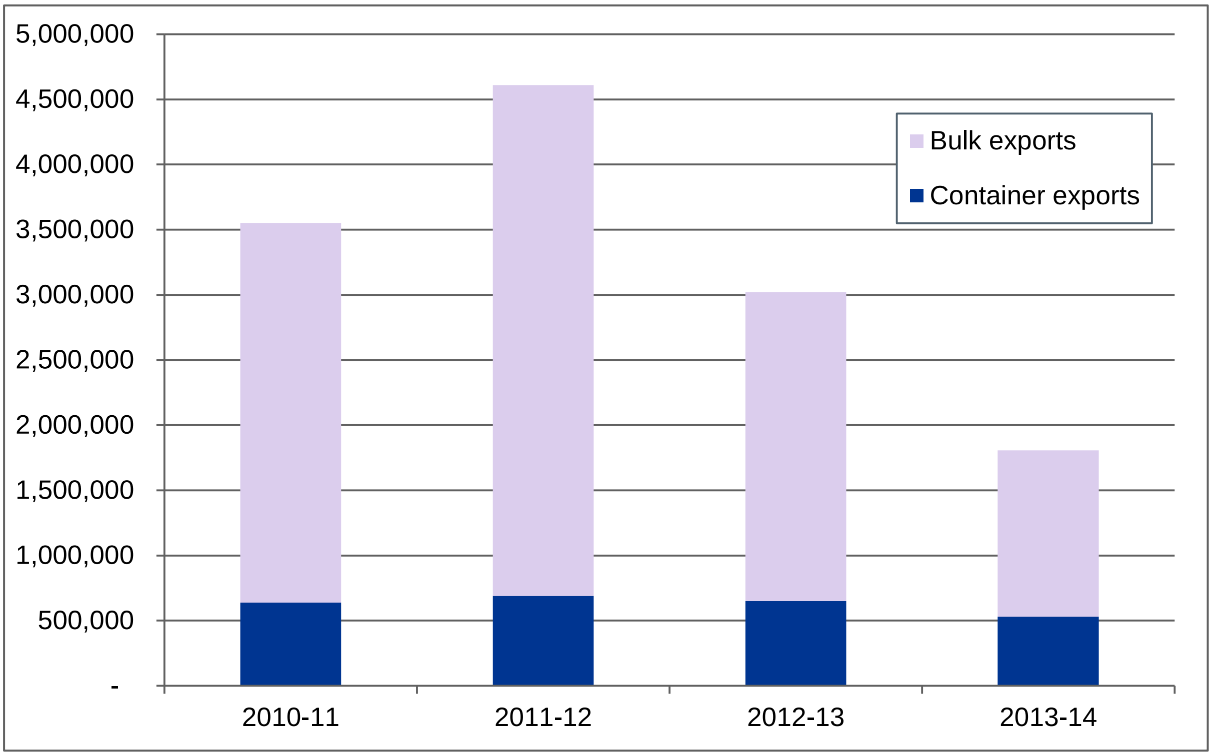
There are varying estimates of containerised export volumes from NSW as a whole, but limited information regarding containerised volumes specifically from the southern and central regions which form part of the draw zone for Port Kembla. Containerised exports from NSW are shipped out of Port Botany,

GrainCorp submits that the grain container export market in NSW has increased rapidly from 0.2 Mt up to a peak of 0.7 Mt. GrainCorp submits that this is driven by low cost container rates and low barriers to entry. Of this whole-of-NSW total, GrainCorp estimates that in an average production year approximately 0.5 Mt grain will go to container packers from central and southern NSW.[79]

Regarding wheat (as opposed to all grains) both GrainCorp and Quattro submit that approximately 0.6 Mt from NSW is exported out of Port Botany in containers per annum, based on average figures over the past 6 years.[80]

Figure 7 shows containerised and bulk wheat exports for NSW over the past four years.

Figure 7: Containerised and bulk wheat exports from NSW



Source: Australian Crop Forecasters.

Average annual container exports over this period were just over 0.6 Mt, consistent with GrainCorp and Quattro's estimates. Container exports were lower in 2013-14, as were bulk exports, reflecting lower total production levels in that year. Container exports from NSW

[79] GrainCorp, Submission in support, p. 13.

[80] GrainCorp, Submission in support, p. 16; Quattro, p. 8.

have on average represented almost 20 per cent of total wheat exports, and 7-8 per cent of total production. This is less than in Victoria, where containerised exports are currently approximately 30 per cent of total wheat exports.

The level of container exports has remained relatively stable over this period, particularly when compared to the fluctuations in bulk exports. This supports GrainCorp's view that containerised exports are more resilient than bulk exports in a normalised year.[81] GrainCorp submits that containers have first call on export grain as demonstrated by their higher share of export grain in drought years.[82]

A report by JCS Solutions identified the following key drivers for increasing container exports on the east coast:

- *Utilisation of container freight capacity at east coast ports*
- *Economies of scale and greater operational efficiency by combining grain freight with the larger intermodal freight market*
- *Circumventing some of the antiquated storage infrastructure that services grain rail freight*
- *Decreasing the centrality of storage infrastructure in controlling the grain freight supply chain and subsequently increase competition in the provision of logistics and transport services for grain*
- *Increase rail operators capacity to service grain freight, allowing them greater flexibility in the utilisation of their assets*
- *Greater access to Asian markets that have ports that cannot handle bulk commodities.*[83]

GrainCorp similarly submits that drivers of growth in container exports include strong demand from millers in south-east Asia, the availability of empty containers and low container shipping rates. GrainCorp also considers that deregulation of container exports in 2004 allowed container exports to grow substantially prior to removal of the single desk for bulk exports in 2008.[84]

GrainCorp submits that the container market (along with the domestic market) has the ability to pay a higher price than the bulk export market due to less supply chain infrastructure.[85] GrainCorp submits that there is excess container packing capacity and strong competition from competing container packing markets, particularly in low production years.[86]

Conversely, NSW Farmers submit that the container trade is unable to bring downwards pressure on the costs associated with the bulk export of wheat on the basis that it has a higher export supply chain costs.[87]

Grain can be packed into containers at a variety of locations along the supply chain and is most commonly packed either at port or at upcountry storage sites that have packing

[81] GrainCorp, p. 15.

[82] GrainCorp, p. 13.

[83] JCS Solutions, *Australian Feed Grain Supply and Demand Report 2013/14*, July 2014, p. 27.

[84] GrainCorp, Submission in support, p. 15.

[85] GrainCorp, Submission in support, p. 5.

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

[87] NSW Farmers, Submission, p. 12.

facilities. GrainCorp submits that it faces competition from nine major container packers with an estimated total packing capacity of around 1.4 Mt.[88]

There are a number of upcountry container packing facilities located within the Port Kembla grain catchment area, including:

- GrainForce's facility at Bathurst includes a container packing facility and a regular train service to access the Sydney Port system.[89]
- Mountain Industries' facility at Forbes includes a container park, packing facilities and a rail siding which is serviced by regular scheduled trains to and from Port Botany.[90]
- Kennett Rural's facility at Harden offers contract container packing, grain testing and segregated storage.[91]
- Croker Grain's facilities at Marrar, Cootamundra and Widgelli offer storage, handling export packing and testing services.[92]

The locations of these and other grain receival and container packing facilities indicates that a portion of the grain exported via containers from Port Botany (and also possibly the Port of Melbourne) is grown in the Port Kembla grain catchment area.

GrainCorp submits that container exporting facilities supply boxes into Port Botany, Australia's second-largest container port. GrainCorp states that parties exporting grain via containers include Glencore, Cargill, Louis Dreyfus, Fletchers, Agrigrain and others.[93] As noted by GrainCorp, Port Botany has undergone a major expansion of its facilities to cater for long term trade growth. These developments include construction of a third container terminal, additional wharf face, dedicated road access and additional rail sidings to provide rail access to the new terminal area.[94]

In summary, the ACCC considers that containerised grain exports appear to be less prominent in NSW than Victoria. However, at almost 20 per cent of total export volumes (compared with over 30 per cent in Victoria), the ACCC considers that containerised exports still provide a significant alternative pathway to export grain from NSW. Given that demand from Asia is expected to continue and the necessary upcountry infrastructure is already in place the ACCC expects this is likely to remain the case for the foreseeable future.

As noted below, a significant proportion of grain produced in NSW is consumed domestically. Container grain exports therefore compete with bulk exports for the exportable surplus of grain. As a smaller but still significant alternative pathway, containers provide a level of competitive constraint for bulk exports (even if not a perfect substitute). The ACCC's draft view is that this competition from containerised grain exports is directly relevant to the ACCC's Port Kembla exemptions assessments.

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[88] GrainCorp, Submission in support, p. 14.

[89] GrainForce website at http://grainforce.com/index.php/services/container-packing accessed 14 July 2015.

[90] Mountain Industries website at http://www.mountainindustries.com.au/agricultural_services.htm

[91] Kennett Rural's website at http://www.kennettrural.com/Services/GrainTradingInternationalContainerising/tabid/61/Default.aspx, accessed on 14 July 2015.

[92] Croker Grain's website at http://www.crokergrain.com.au/storageHandling.cfm, accessed 14 July 2015.

[93] GrainCorp, Submission in support, p. 5.

[94] NSW Ports website at http://www.nswportsbotany.com.au/projects-and-planning/port-botany-expansion/; GrainCorp, p. 16.

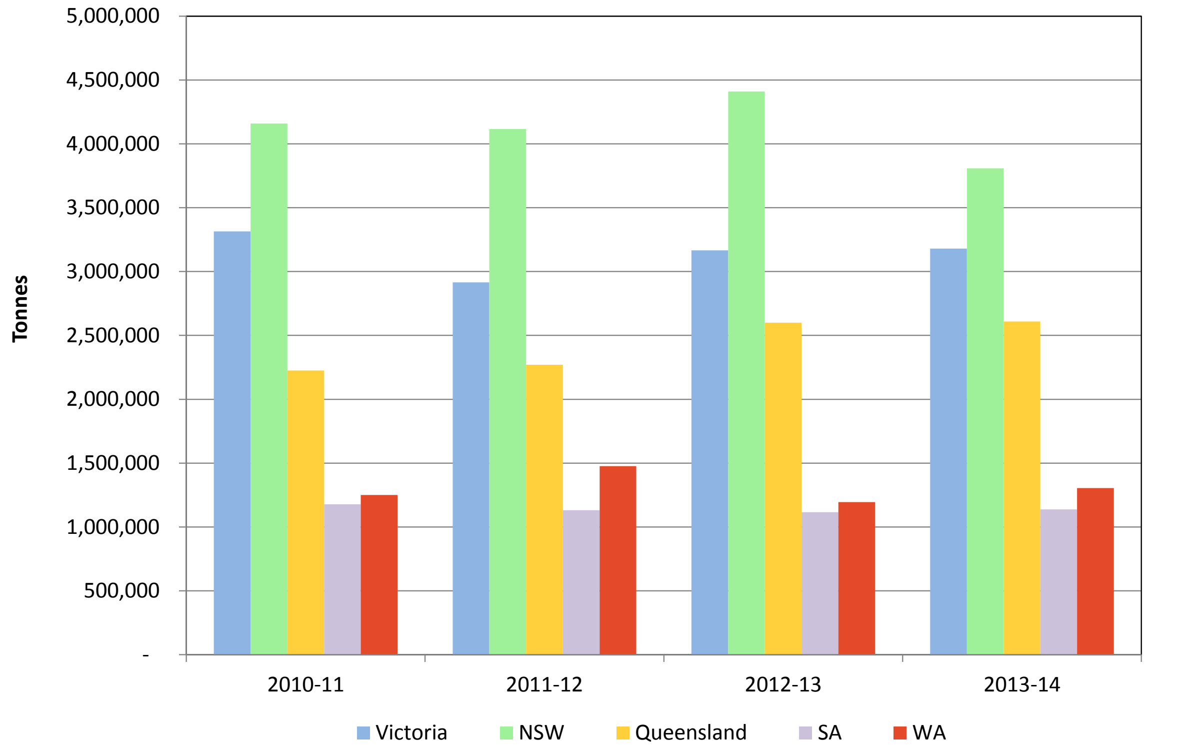
3.4 Domestic demand for grain

Domestic demand for grain is also a consideration in the ACCC's exemption assessment in that domestic users compete for grain that could be exported as bulk wheat.

Domestic users represent a significant level of consumption of grain across eastern Australia, and similar to container exports the domestic demand for grain is not subject to regulation. AEGIC estimates that over the past 10 years the domestic demand has consumed approximately half of the grain produced in the eastern States.[95]

According to data from Australian Crop Forecasters on domestic demand for grain in Australia's states and territories, demand is highest in NSW with the second highest being Victoria (see figure 8).

Figure 8: Domestic demand for grain across Australia



Source: Australian Crop Forecasters

GrainCorp submits that the domestic market in NSW consumes 4Mt per annum, and that this represents 70 per cent of total grain production in central and southern NSW.[96] However, as the domestic market may be serviced by grain producers across the whole of NSW, the proportion of grain in the Port Kembla grain catchment area that will be consumed domestically is likely to be lower.

A report by JCS Solutions on Australian Feed Grain Supply and Demand in 2014 estimated the level domestic demand in various regions of NSW and Victoria, as set out in Table 15.

[95] AEGIC, The cost of Australia's bulk grain export supply chains: An information paper, January 2014, p. 9

[96] GrainCorp, Submission in support, p. 13.

Table 15: Estimates of domestic demand by region in NSW and Victoria (mtpa)

Region	Domestic demand	Production
North eastern NSW	1.290	2.941
Western NSW	0.146	1.933
Sydney and Newcastle	1.034	0
Central NSW	1.787	3.467
Murray and Northern Victoria	1.507	5.803

Source: JCS Solutions report

Domestic demand in central NSW was estimated at 1.79 Mt, which represents around 30 per cent of the estimated 5.6 Mt average grain production in the Port Kembla catchment area. However, this does not include demand from the Murray region in south NSW, where feed production for the dairy industry is a major grain user. The actual proportion of grain from the Port Kembla catchment area that is consumed domestically is likely to be higher.

Grain from the Port Kembla catchment area may also be transported north to Sydney and northern NSW, particularly where there are supply shortages in those regions due to drought.[97] For example, during the recent dry season in Queensland and Northern NSW, grain was transported into Brisbane to meet stockfeed demand.[98]

Key domestic uses for grain produced in southern and central NSW include feed for domestic livestock and flour milling. Feed grain is used across various sectors. In Central NSW beef feedlots are the largest grain users, with the poultry and pig sectors also significant. Feed use in the whole of NSW has been estimated at just over 3 Mt, representing approximately 25 per cent of total Australian feed use.

Flour milling is conducted in Manildra and Narrandera. Flour is used for baking as well as industrial use in starch and ethanol production. Millmix is also supplied to the Australian stock feed industry, and NSW is the major supplier, supplying over 60 per cent of the total volume available. Dairy feed is also supplied to the NSW south coast and via containers to Tasmanian dairies.[99]

There are a number of businesses operating in the Port Kembla catchment area which receive and/or process grain for domestic use, including:

- AMBOS Stockfeeds, which operates at Young and Cootamundra in NSW and produces commercial livestock feeds and animal nutrition products using locally sourced cereal grains and protein meals.[100]
- East Coast Stockfeeds, which operates at Gooloogong and Canowindra and produces a range of stockfeeds for the domestic and export markets.[101]
- Grenfell Commodities, which operates a mill producing processed grains for stockfeed as well as bird seeds.[102]

[97] JCS Solutions, Australian Feed Grain Supply and Demand Report 2013-14: A report for the Feed Grain Partnership, July 2014, accessed at https://www.aecl.org/assets/www.aecl.org/outputs/140730-FGP-Supply-and-Demand-Report-July-2014.pdf, pp. 64-5.

[98] JCS report, p. 26

[99] JCS report, p. 28, 31, 64.

[100] AMBOS website at http://www.ambos.com.au/AboutUs.aspx, accessed 14 July 2015.

[101] East Coast Stockfeeds website at http://www.ecsf.com.au/about-us.php, accessed 14 July 2015.

- Kennett Rural, which sells grain to domestic users including flour millers, stock feeds manufacturers, food processors and feedlots.[103]

- JBS Australia, a beef producer which operates a grain processing facility north of Griffith in the Riverina, and feeds its cattle using locally produced feed commodities.[104]

NSW Farmers submits that the domestic market should have limited impact on policy settings because of the inter-related nature of the domestic and international markets, which sets the floor price at export parity. Because of this, NSW Farmers submits that:

> *Fair and non-discriminatory access to port terminal services is required to maintain the market efficiency and competitive tension in the bulk wheat export sector which determines the floor in the price for farmers' grain regardless of its end market.*

The ACCC considers that domestic demand offers growers in the Port Kembla catchment area a significant and reliable source of demand for grain. Domestic users of grain face lower supply chain costs compared to the export markets and are so able to pay growers an amount that is at least equivalent to the export parity price.

However, the ACCC notes that domestic demand volumes are relatively consistent from year to year. Variation in production volumes is therefore reflected in the 'exportable surplus' available to be exported either in containers or in bulk.[105] This surplus varies from year to year depending on the harvest.

Consistent with its view in relation to the Victorian exemption assessments, the ACCC considers that the extent to which domestic demand competes with the exportable surplus is relevant but somewhat limited, given that domestic demand cannot readily expand to consume the exportable surplus.

[102] Grenfell Commodities website at http://www.grenfellcomm.com.au/index.php?page=stockfeed, accessed 14 July 2015.

[103] Kennett Rural website at http://www.kennettrural.com.au/Services/GrainTradingDomestic/tabid/59/Default.aspx, accessed 14 July 2015.

[104] JBS website at http://www.jbssa.com.au/OurFacilities/Feedlots/default.aspx, accessed 14 July 2015.

[105] JCS Solutions, p. 27.

4 ACCC exemption assessment of Quattro's Port Kembla terminal

This chapter sets out the ACCC's assessment of whether it should determine under clause 5(2) of the Code that Quattro should be an exempt service provider of port terminal services provided by means of its Port Kembla facility once it is covered by the Code. The ACCC's assessment is set out against the matters in subclause 5(3)(a) to 5(3)(a)(i) of the Code, which the ACCC must have regard to in assessing an exemption application.

(a) the legitimate business interests of the port terminal service provider

Subclause 5(3)(a) of the Code requires the ACCC to have regard to the PTSP's legitimate business interests in deciding whether to grant an exemption.

The ACCC considers that an exemption will be in a PTSPs legitimate business interests where there are reasons why it is not necessary for the PTSP to be subject to all of the Code's obligations. For example, obligations in the Code intended to prevent a PTSP exercising market power may not be necessary where competition already provides sufficient constraint on the PTSP's ability to exercise market power. The ACCC considers that removal of unnecessary regulatory obligations is in a PTSPs legitimate business interests.

The ACCC considers when having regard to the legitimate business interests of the PTSP (as required under subclause 5(3)(a) of the Code), the following may be relevant:

- the ongoing commercial viability of services provided from the relevant port terminal facility
- the likely impact that obligations to comply with Parts 3 to 6 of the Code may have on any investment decisions made by the PTSP
- the likely impact of the costs incurred by the service provider if it were subject to the requirements of Parts 3 to 6 of the Code, including any opportunity costs arising from having to comply with these Parts of the Code
- the likely impact of greater regulation (through the application of Parts 3 to 6 of the Code) on the service provider's ability to compete in the provision of port terminal services or other upstream and downstream markets.

The ACCC also considers that the impact that Parts 3 to 6 will have on Quattro's operational flexibility, costs, and competitiveness as a new entrant service provider are all relevant to Quattro's legitimate business interests.

Quattro submits that compliance with Parts 3 – 6 of the Code will unreasonably impede its flexibility and impose costs.

On its legitimate business interests, Quattro submits:

> *Granting an exemption to Quattro's Port Terminal at Port Kembla would:*
>
> - *Allow Quattro and its investors to compete commercially for the export of bulk grain, especially in the critical start-up period;*
> - *Support operational flexibility to improve service and reduce supply chain costs;*

- *Provide small operators and exporters improved access to fobbing capacity which has been limited by the terms and conditions imposed by the existing bulk handling companies;*
- *Provide equity with the competing export container packers that are not regulated; and*
- *As a new start-up company minimise the level of regulation and costs imposed by such to allow Quattro to more effectively compete against operators with established systems.*

Quattro submits that Parts 3 to 6 of the Code are an impediment to Quattro's legitimate business interests.[106]

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, 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, the ACCC decided that it was appropriate for GrainCorp to move from a single year allocation method to long-term arrangements, 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.[107]

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 Quattro is not required to comply with Parts 3 to 6 of the Code it would be able to engage more freely in direct commercial negotiations and vary operational rules as it considers necessary for particular exporters. For example, exempt service providers would 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 requirements, making them more responsive to the needs of their customers.

Compliance costs

Regarding the impact that complying with Parts 3 to 6 of the Code will have on Quattro'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 Quattro's specific circumstances, the ACCC notes that because Quattro 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

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[106] Quattro, *Submission in support*, p. 14.

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

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.

Conclusion

As a general proposition, the ACCC considers that it is in a PTSP's legitimate business interests to reduce regulatory costs where regulation is not necessary, such as where there are sufficient competitive constraints.

It is therefore the ACCC's draft view that an exemption for Quattro would increase Quattro's operational flexibility and reduce its Code compliance costs.

The ACCC considers that if there are reasons why it is not necessary for Quattro to be subject to the full level of regulation in the Code, such as if Quattro faces a sufficient level of competitive constraint, an exemption would be in Quattro's legitimate business interests. The ACCC's consideration of the level of competitive constraint and other matters relevant to an exemption is set out below.

(b) the public interest, including the public interest in having competition in markets; and (g) the promotion of competition in upstream and downstream markets

The ACCC considers that subclauses 5(3)(b) and (g) of the Code relate to the promotion of competition in markets, including the market for bulk wheat port terminal services as well as for upstream, downstream and related markets.

Relevant upstream markets include the grain acquisition market, where grain is acquired prior to it being exported or on-sold, as well as other markets discussed in chapter 3 such as grain storage and handling services and the transport of grain to port. Related markets are also discussed in chapter 3 and include container grain exports and domestic demand for grain.

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) 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) will overlap with the ACCC's consideration below of clauses 5(3)(c) and 5(3)(d) of the Code concerning access seekers.

Competition in bulk wheat export operations

The ACCC notes from its analysis of the port terminal services in chapter 2, and its consideration of upcountry and related markets in chapter 3, that:

- Quattro's Port Kembla terminal is expected to provide similar services to GrainCorp's existing facility and will accommodate similar sized vessels. However, Quattro's facility will likely have slower loading rates. Both Port Kembla terminals have road and rail access. Quattro and GrainCorp's terminals are located in adjacent berths. The ACCC expects that the grain catchment area for the two Port Kembla terminals will be identical and that these facilities will be in direct competition for exporters' volumes.

- Analysis of the relevant catchment areas in chapter 3 indicates that there is little overlap in the grain catchment areas for the Port Kembla terminals and the Melbourne and Newcastle port terminals. The long distances that wheat is transported in NSW mean that road is a less viable alternative and exporters are more reliant on rail access. While some substitution between the Port Kembla terminals and the Melbourne and Newcastle ports may still occur in practice, exporters will likely face higher transport costs to shift grain from the Port Kembla grain catchment area to alternative ports, meaning these ports are unlikely to provide a significant constraint on PTSPs in Port Kembla.

- Based on historic throughput by Quattro shareholders, it is likely that there will be some spare capacity available at Quattro's Port Kembla terminal. Further, in the absence of Quattro shareholder volumes using GrainCorp's terminal, there will be a significant level of spare capacity available at the adjacent GrainCorp terminal. Overall, there is likely to be a significant level of spare capacity available both on an annual basis and during peak periods across the two Port Kembla terminals. This significant level of spare capacity suggests that Quattro will face commercial incentives to compete with GrainCorp's facility to maximise throughput volumes at its facility.

Accordingly, the ACCC considers that data suggests that third party exporters will be able to obtain capacity at peak times of year at one of the two terminals, and will not be required to shift all capacity to a time not conducive to obtaining a good price for grain internationally.

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 Quattro 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. 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 its analysis of upcountry and related markets in chapter 3, the ACCC considers that:

- Quattro shareholders Cargill and Emerald operate upcountry storage and handling facilities in the Port Kembla catchment area, suggesting some degree of vertical integration. However, neither of these parties are particularly large upcountry players.

The dominant provider of upcountry storage facilities in the Port Kembla catchment area is GrainCorp, which will operate in direct competition with Cargill and Emerald at port. There are several other companies with integrated storage operations also offering container packing or transport services, or both. The ACCC considers that with GrainCorp's extensive network, along with the various independent storage providers, exporters have storage options outside of the Quattro shareholders' networks.

- Both road and rail options are available to marketers to transport grain to Quattro's Port Kembla facility. However, due to the long distances involved rail is likely to be the more cost effective and preferred option. The ACCC understands that Quattro's shareholders have trains operating in NSW. However, the majority of export grain trains in NSW are utilised by Quattro's key competitor, GrainCorp. There are also a number of other trains operated by various rail providers to transport grain for export and domestic use.

- The ACCC considers that Quattro and its shareholders will face a significant level of competition upcountry and does not appear to have the ability to exercise market power in upcountry markets. Quattro's shareholders are therefore unlikely to be in a position to leverage market power from their upcountry networks into provision of port terminal services at Port Kembla.

- Containerised grain exports in NSW are significant, with wheat exports via containers representing around 20 per cent of total wheat exports from NSW.[108] This is lower than the proportion of container exports in Victoria (approximately 30 per cent). The ACCC considers that containerised exports represent a viable alternative export path for some grain produced in the Port Kembla catchment area. Containerised exports will therefore provide a further competitive constraint on Quattro's bulk export operations at Port Kembla.

- There is strong and consistent demand for grain in southern and central NSW for stock feed and flour milling.[109] 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 does not encompass the entire crop, leaving an exportable surplus.

The ACCC considers that if an exemption were granted to Quattro, it would not be to the detriment of current levels of competition in the grain acquisition market, or to upcountry and related markets.

A lower level of regulation could also enable Quattro to compete more effectively with GrainCorp in the provision of port terminal services. The ACCC notes that Quattro shareholders Emerald and Noble currently export very low volumes from Port Kembla. Once the Quattro facility is operational, Emerald and Noble may seek to export larger volumes and in doing so would provide increased competition for the current three largest exporters (GrainCorp, Cargill, and Glencore).

To the extent that the Quattro facility enables its shareholders to establish a stronger presence in grain exports at Port Kembla, it may also enable Quattro's shareholders to expand their upcountry networks and provide a greater degree of competition to the

[108] Data from Australian Crop Forecasters.

[109] See section 3.4 of this report.

GrainCorp as the dominant incumbent. This may also promote competition between GrainCorp, Quattro shareholders, and other exporters of bulk and containerised grain in related markets.

The ACCC notes concerns raised by NSW Farmers about Quattro's vertical integration with upcountry service providers Emerald and Cargill and the potential for exclusive closed loop practices, as well as the potential incentive for Quattro to use its vertical integration to favour its shareholders. The ACCC recognises the potential incentive for Quattro to use its vertical integration to favour its shareholders' operations. However, given that Quattro will be subject to competition from the dominant incumbent (GrainCorp) and there will be a significant level of spare capacity at Port Kembla, the ACCC considers that there will be sufficient competitive constraint to prevent Quattro exercising market power to the detriment of competitors in related markets. In particular, the ACCC considers that Quattro's incentives to compete with GrainCorp in order to maximise throughput at its facility will likely outweigh the potential for detrimental outcomes due to vertical integration. Due to the competitive constraints noted above, the ACCC considers that if an exemption were granted to Quattro at its Port Kembla facility, it would not be to the detriment of current levels of competition in the grain acquisition market, or to upcountry and related markets. Further, given the likelihood that Emerald and Noble will seek to export larger volumes given their stake in the Quattro Port Kembla facility, there will be at least four major exporters in the zone. There is likely to be five major exporters assuming Glencore continues to export significant volumes. This is an increase in competition relative to the current environment where there are three major exporters operating at Port Kembla. The ACCC considers that increased competition between exporters is also likely to result in increased competition to acquire farmers' grain.

Conclusion

In light of the above factors, the ACCC's draft view is that there will be significant constraints on Quattro and its shareholders such that competition at port and upcountry will not be reduced if an exemption were granted to Quattro at Port Kembla. The ACCC considers that given the existence of GrainCorp's port terminal and upcountry supply chain infrastructure along with a number of independent upcountry storage providers, exporters should have sufficient alternative options to continue to participate in the grain acquisition market if an exemption is granted to Quattro. Furthermore, the competitive situation in upcountry storage and handling will not be diminished by granting the exemption.

(c) the interests of exporters who may require access to port terminal services; and (d) the likelihood that exporters of bulk wheat will have fair and transparent access to port terminal services

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 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) other than according to 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.

Public submissions received from AGEA and Glencore in response to the ACCC's issues paper supported granting an exemption to Quattro's Port Kembla terminal.

As discussed in Chapter 2, Quattro is vertically integrated in wheat export to some degree as three of its four shareholders are bulk wheat exporters. Quattro will therefore have an incentive to favour its shareholders over other third party exports at its Port Kembla facility.

However, the ACCC considers there is also likely to be a significant amount of available capacity across both Port Kembla terminals, with strong competition from GrainCorp's Port Kembla terminal as well as (to a lesser extent) containerised exports. Therefore, the ACCC considers Quattro will have incentives to allow other parties to access capacity at its terminal in order to maximise throughput and compete with the GrainCorp facility. In particular, the ACCC's analysis in chapter 3 of port terminal services and the exporters using these services indicates that:

- Once Quattro commences operations, the Port Kembla terminals will have significant spare capacity at both peak and non-peak times. To date, Quattro's exporting shareholders have exported on average 600 tonnes per annum, which is less than Quattro's estimates of capacity at 1.1-1.3 mtpa.

- Quattro may have some incentives to prioritise access by its exporting shareholders Cargill, Emerald, and Noble. The ACCC notes that this will result in a minimum of three competing exporters receiving capacity at Quattro's facility, and that none of these exporters currently have a dominant position exporting grain from Port Kembla. Emerald and Noble have historically exported very small volumes from Port Kembla and will have an incentive to increase their annual exports. Cargill, while a more significant player, has on average exported 32 per cent of total exports which is less than the 42 per cent exported by GrainCorp. The ACCC therefore considers that an increase in port terminal capacity obtained by Quattro's shareholders will increase the level of competition faced by GrainCorp as the current dominant player.

- The significant level of spare capacity expected to be available across the two Port Kembla terminals also suggests that smaller exporters are likely to be able to negotiate sufficient access at Quattro's terminal and/or GrainCorp's terminal. While Quattro may have incentives to prioritise access by its shareholders, it may also have incentives to attract additional exporters to use its facility to maximise throughput and recover its investment. For example, Glencore, ADM, CBH and JKI have historically exported from Port Kembla. Quattro may offer to provide access to these parties on favourable terms in order to attract them to use its facility rather than GrainCorp's facility, and thereby maximise throughput and profitability of its facility. In particular, Glencore has historically been a large exporter from Port Kembla and both Quattro and GrainCorp may see benefits in attracting Glencore's business. Should parties be unable to obtain capacity at Quattro's terminal, a significant level of spare capacity is expected to be available at GrainCorp's adjacent facility.

- Containerised exports represent a further alternative pathway to export grain from the Port Kembla catchment area.

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

(e) the promotion of the economically efficient operation and use of the port terminal facility; and (f) the promotion of efficient investment in port terminal facilities

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 its facility, and future investments 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.

Promotion of the efficient operation and use of Quattro's facility

Regarding the impact of Quattro's exemption on the efficient operation and use of its facility, Quattro submits:

> *The strong competition in Port Kembla and greater NSW region will drive efficient operation and use of port terminal facility. Quattro Port Kembla port terminal will increase competition in the region through increasing Port Kembla's port export capacity by over 40%. An exemption from the Code for Quattro Port Kembla will further promote economic efficiency.*[110]

Glencore also submits exemption will promote the efficient use of Quattro's facility:

> *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.*[111]

As outlined under the above discussion of subclauses 5(3)(b) and (g) of the Code, the ACCC's draft view is that the level of competition that Quattro will face due to GrainCorp's competing Port Kembla terminal and competition from containerised exports will drive the efficient operation and use of Quattro'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 Quattro from having to comply with Parts 3 to 6 of the Code will provide it with greater flexibility in the way it allocates capacity. For example, Quattro would be able to facilitate slot trades as well as additions and changes to its shipping stem at short notice. This greater flexibility makes it more likely that Quattro will be able to meet the different needs of its customers and therefore is likely to drive higher utilisation.

[110] Quattro, *Submission in support*, p. 15.

[111] Glencore, *Submission*, p. 2.

With preliminary estimates putting the cost of the Quattro development at $75 million,[112] Quattro will also have a commercial incentive to maximise the throughput of its facility. Quattro submits:

> *Quattro is an incorporated joint venture of four independent companies. Quattro has a commercial objective to generate a profit.*[113]

On this commercial imperative, Glencore submits:

> *Glencore considers that a key commercial objective for infrastructure owners at Port Kembla, other States and globally is to maximise the throughput and utilisation of their infrastructure.*[114]

NSW Farmers provides qualified support for the incentives faced by an infrastructure owner to maximize throughput:

> *While it is acknowledged that port terminal service providers have an incentive to optimise throughput of grain through its storage and logistics assets; this incentive is not mutually exclusive to behaviour that can impede competition for farmers' grain by increasing the costs and the risks faced by third party competitors.*[115]

While Quattro may have a number of strategic reasons for developing its own port terminal facility, it represents a significant upfront financial investment that will require ongoing financial support to remain viable. The ACCC therefore considers that Quattro will have a strong financial incentive to maximise throughput of its facility.
The ACCC acknowledges NSW Farmers submission that this motivation and anti-competitive conduct are not mutually exclusive. As noted in the discussion of subclauses 5(3)(c) and (d) of the Code the ACCC's draft view is that Quattro is likely to have incentives to provide access to its facility on reasonable terms in order to maximise throughput, and that the full level of regulation under the Code is not necessary to ensure fair and transparent access to Quattro's facilities.

Promotion of efficient investment in port terminal facilities

The ACCC considers that Quattro's exemption would promote efficient investment in port terminal facilities.

Quattro submits:

> *Quattro Port Kembla is itself a new investment in port terminal facilities, one which will bring an additional 1.3 million tonnes of annual export capacity to NSW. Quattro's ability to be economically sustainable relies heavily on the removal of regulatory restrictions which would burden Quattro with significant compliance costs in its initial start-up phase.*
>
> *Quattro submits that an exemption to the Code in relation to its Port Kembla facility would represent a positive signal to future investment in NSW port terminal facilities.*[116]

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[112] ABC News, $75 million upgrade at Port Kembla will double its grain export and make handling more efficient by rail, at http://www.abc.net.au/news/2014-08-20/nrn-port-kembla-upgrade/5683460.

[113] Quattro, *Submission in support*, p. 15.

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

[115] NSW Farmers, *Submission in response to Issues Paper*, p. 13.

[116] Quattro, *Submission in support*, p. 16.

The ACCC notes that Quattro's facility has been developed at a port where there was already spare capacity, including during peak periods.

Beyond stating its 'objective of becoming a leading Australian port developer and operator' Quattro has not submitted further on why it has considered developing a facility at a Port with spare capacity.[117]

The ACCC notes that there are many reasons why parties may see significant infrastructure investment in a non-capacity constrained environment is nevertheless a strategically sound decision. For instance, developers with an existing grain export business may place a premium on being assured of access to export services when required, and having the flexibility to secure and transfer that access at relatively short notice. Surety of access to export facilities may allow these exporters to deal more confidently with grain purchases and allow them to develop their global brand.

While not opposed to the development, NSW Farmers submits its concern that Quattro's investment may not be efficient and that the costs will be passed on to farmers:

> *…while NSW Farmers is not opposed to the duplication of grain storage and handling infrastructure, through investments such as Quattro's Port Kembla facility, concerns exist over the cost to industry arising from the requirement to cover the construction and maintenance costs of this facility. Specifically the concern is that in the absence of a properly functioning competitive market for port terminal services the cost of duplication will be borne by farmers regardless of whether the excess capacity is required to take advantage of Australia's bulk grain export opportunities.*[118]

The ACCC notes that a determination to exempt Quattro's facility will not change the fact that Quattro has made certain investments. The ACCC must consider whether a determination to exempt will promote efficient investment in port terminal infrastructure.

Regarding the NSW Farmers submission that the cost of duplicate facilities will be borne by farmers, the ACCC acknowledges that duplicative investment can be inefficient. However in this situation Quattro as a new entrant will be looking to develop its market share, including attracting business away from the incumbent service provider. In these circumstances the ACCC considers that any intention by the new entrant to recoup its fixed costs through higher charges will be constrained by the competition it faces from the incumbent facility.

Further, containerised exports shipped out of New South Wales are no longer regulated, and make up 20 per cent of total wheat exports. This will also place some constraint on Quattro's bulk export programme. If Quattro is not required to comply with Parts 3 to 6 of the Code it will be placed on a more level playing field with container exports, as well as with domestic users, and may promote further efficient investment in its bulk wheat facilities.

Conclusion

The ACCC's draft view is that Quattro's exemption will:

- allow it to provide more flexible services and meet the demands of its customers, likely leading to more efficient operation and use of Quattro's facility

- demonstrate that new entrants will likely be provided with the flexibility to compete with dominant incumbent service providers

[117] Quattro, *Submission in support*, p. 2.

[118] NSW Farmers, *Submission in response to Issues Paper*, p. 9.

- place Quattro on a more level playing field with the container and domestic markets, which are not regulated.

Accordingly, the ACCC considers that exemption will promote the efficient operation and use of Quattro's infrastructure, and encourage efficient future investment in port terminal facilities.

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

Subclause 5(3)(h) of the Code requires the ACCC to have regard to whether an applicant for exempt service provider status is vertically integrated in grain exportation. 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 in providing access to its services.

Quattro is an incorporated joint venture between Noble Resources, Qube, Emerald Grain and Cargill Australia.

On the extent of its vertical integration, Quattro submits:

> *Quattro in its own right is not an exporter of grain. Although three of Quattro's investors are exporters of grain, it is expected that they will collectively utilise less than two thirds of Quattro Port Kembla's export capacity.*
>
> *In addition, as stated above, Quattro's ability to grant preference to its investors (to the detriment of other exporters) is restricted by the fact that Quattro operates in the largest and most competitive domestic grain market in Australia; one with numerous supply chain alternatives. With the excess up-country and export facility currently available at GrainCorp's Port Kembla and Newcastle facility, Quattro is naturally incentivised to provide transparent and fair access in order to promote use of its new facility.*[119]

The ACCC notes that three of Quattro's shareholders (Cargill, Emerald and Noble) are active grain exporters. Qube will provide logistics for the Quattro venture and does not export grain.

The ACCC acknowledges that Quattro's first motivation will be to satisfy the export requirements of Emerald, Cargill and Noble, and will therefore likely provide preferential access to those parties. The ACCC notes that these parties otherwise compete against one another in the grain acquisition and export market and that none of Quattro's shareholders own a controlling interest in the Quattro facility.

As discussed, the ACCC considers that Quattro will have strong commercial incentives to attract third-party exporters in order to drive utilisation of its facilities and profit from its investment. The ACCC acknowledges that Quattro would have not regulatory obligation to provide those third parties with any particular standard of service. Accordingly, while the ACCC does not consider that Quattro has incentives to operate a closed loop facility it would have the discretion to increase prices and decrease the level of service to certain parties.

On the other hand, given the likely level of spare capacity at GrainCorp's facility following Quattro's entry, Quattro is likely to find it necessary to provide access on favourable commercial terms in order to attract third-party customers.

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[119] Quattro, *Submission in support*, p. 16.

The ACCC acknowledges that in the absence of an obligation to comply with Parts 3 to 6 of the Code, small exporters may be less likely to secure favourable terms than those with the ability to export larger volumes. The ACCC notes that to date smaller exporters at Port Kembla have not been a significant presence and on average accounted for approximately six per cent of total exports. Nevertheless, these exporters have been able to perform relatively small-scale shipping programs at Port Kembla. Further, historical shipping data is not necessarily reflective of future market shares. The ACCC considers that the increase in total available port capacity, coupled with the PTSPs ability to more flexibly allocate that capacity, may incentivise historically small-scale exporters to increase their tonnages, and new players for market share emerge. The ACCC also considers that in the event that small-scale exporters unable to secure access on reasonable terms at Quattro's facility, they will likely be able to secure access at GrainCorp's facility.

Conclusion

The ACCC's draft view is that although Quattro is vertically integrated with three grain exporters who may secure preferential access to the facility, these three exporters compete with each other in the bulk export and grain acquisition markets. Quattro may also face strong commercial incentives to attract third-party customers due to the level of spare capacity and competition from GrainCorp's facility.

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

(i) whether there is already an exempt service provider within the grain catchment area for the port concerned

The ACCC generally considers that, where there is already an exempt service provider within a grain catchment area, or where the Code does not otherwise apply to a service provider in a catchment area, this may support an exemption. The ACCC will, however, consider this matter on a case by case basis, taking into account the full extent of competitive constraint affecting each facility.

The ACCC discusses the relevant grain catchment area for Quattro's Port Kembla terminal in chapter 3 and considers that the area generally includes southern and central NSW. The ACCC considers that the catchment area for Quattro's Port Kembla terminal will be the same as for GrainCorp's Port Kembla terminal, but that there is limited overlap between this catchment area and the catchment areas for the Melbourne and Newcastle port terminals.

Therefore, while there are currently exempt service providers at Melbourne and Newcastle, these ports provide a very limited degree of competition to the Port Kembla terminals.

Currently there are no bulk wheat port terminal service providers servicing the Port Kembla catchment area that are exempt under the Code.

The ACCC is, however, concurrently assessing an exemption application for GrainCorp's Port Kembla facility (see chapter 5). Based on its preliminary assessment, the ACCC's draft view is that it will be appropriate to exempt GrainCorp's Port Kembla terminal concurrently with Quattro becoming covered under the Code. The ACCC is seeking industry views on its draft views on GrainCorp's Port Kembla terminal. Even in the absence of such an exemption for GrainCorp, the ACCC considers that there are a number of reasons that support an exemption of Quattro's Port Kembla terminal as discussed in this chapter.

(j) any other matters the ACCC considers relevant

The ACCC does not consider that there are any other matters relevant to its assessment of Quattro's Port Kembla terminal exemption application.

5 ACCC exemption assessment of GrainCorp's Port Kembla port terminal

This chapter sets out the ACCC's draft 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 Port Kembla facility. The ACCC's assessment is set out against the matters in subclause 5(3)(a) to (i) of the Code, which the ACCC must have regard to in assessing an exemption application.

The ACCC considers that the presence of Quattro's Port Kembla terminal makes a significant difference to the assessment of whether or not it is appropriate to reduce the level of regulation applying to GrainCorp at Port Kembla. Although the ACCC considers it is likely that Quattro will commence operations and provide a degree of competitive constraint on GrainCorp's business, Quattro's facility is still under construction and it has not yet commenced operations. The ACCC has therefore considered the appropriateness of exempting GrainCorp with and without Quattro's presence.

(a) the legitimate business interests of the port terminal service provider

GrainCorp submits that exemption is in its legitimate business interests because 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; and*
- *Reduce the level of regulation and cost of compliance.*[120]

As noted in the ACCC's discussion of whether exemption would be in Quattro's legitimate business interests (pp. 50-52), the ACCC considers that while there is 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 these benefits will be in a PTSP's legitimate business interests where there are reasons why it is not necessary for the PTSP to be subject to all of the Code's obligations. For example, 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 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. However, an exemption could be expected to reduce GrainCorp's ongoing regulatory compliance costs, which may be increasingly significant over the longer term.

In 2013 GrainCorp signed long term agreements for 1.4 mtpa capacity at Port Kembla 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 degree of

[120] GrainCorp, *Submission in support*, p. 4.

flexibility in these negotiations. If GrainCorp were subject to sufficient competitive constraint, allowing this flexibility would be consistent with its legitimate business interests.

Conclusion

It is the ACCC's draft view that an exemption for GrainCorp would increase its operational flexibility and decrease its Code compliance costs.

The ACCC considers that if there are reasons why it is not necessary for GrainCorp to be subject to the full level of regulation in the Code, such as if GrainCorp faces a sufficient level of competitive constraint, an exemption would be in GrainCorp's legitimate business interests. The ACCC's consideration of the level of competitive constraint and other matters relevant to an exemption is set out below.

(b) the public interest, including the public interest in having competition in markets; and (g) the promotion of competition in upstream and downstream markets

The ACCC considers that subclauses 5(3)(b) and (g) of the Code relate to the promotion of competition in markets, including the market for bulk wheat port terminal services as well as for upstream, downstream and related markets.

Relevant upstream markets include the grain acquisition market, where grain is acquired prior to it being exported or on-sold, as well as other markets discussed in chapter 3 such as grain storage and handling services and the transport of grain to port. Other related markets are also discussed in chapter 3 including 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.

Competition in bulk wheat export operations

The ACCC considers that the degree of competition faced by GrainCorp's Port Kembla terminal is currently limited. However, the ACCC considers that GrainCorp's Port Kembla terminal will face a significant level of competition from Quattro's proposed Port Kembla facility once it is operational.

As noted in the ACCC's analysis of port terminal services in chapter 2, and consideration of upcountry and related markets in chapter 3:

- Analysis of the relevant catchment areas in chapter 3 indicates that there is little overlap in the grain catchment areas for the Port Kembla terminals and the Melbourne and Newcastle port terminals. The long distances that wheat is transported in NSW mean that road is a less viable alternative and exporters are more reliant on rail access. While some substitution between the Port Kembla terminals and the Melbourne and Newcastle ports may still occur in practice, in doing so exporters will likely face higher transport costs to shift grain from the Port Kembla grain catchment area to alternative ports. Emerald's Melbourne port terminal and NAT and Louis Dreyfus' facilities at Newcastle therefore provide only a limited degree of competition for GrainCorp's Port Kembla terminal.

- In average and low throughput years capacity utilisation rates at GrainCorp's Port Kembla facility are relatively low and there is likely to be a significant amount of spare capacity available for use by third party exporters, even during peak periods. In high throughput years there is some level of capacity constraint at GrainCorp's Port

Kembla facility. However, in the absence of one or more clear alternative port terminals, spare capacity may not provide a sufficient incentive for a port terminal service provider to offer reasonable terms of access to its competitors in the export market.

However, once the Quattro facility is operational:

- Quattro will provide broadly similar services to GrainCorp's existing facility and will accommodate similar sized vessels. GrainCorp's existing facility will have some competitive advantage due to faster loading rates. Both terminals will be located in adjacent berths and will have equivalent road and rail access. The ACCC expects that the grain catchment area for the two Port Kembla terminals will be identical and that these facilities will be in direct competition for exporters' volumes.

- The ACCC expects that Quattro shareholders will shift their volumes from GrainCorp's Port Kembla terminal to the Quattro terminal. In the absence of Quattro shareholder volumes, there will be a significant level of spare capacity available at GrainCorp's Port Kembla terminal, even in high throughput years. Overall, there is likely to be a significant level of spare capacity available both on an annual basis and during peak periods across the two Port Kembla terminals. This significant level of spare capacity suggests that GrainCorp will face commercial incentives to compete with Quattro's facility to maximise throughput volumes at its facility. In particular, Glencore has historically been a large exporter from Port Kembla, and both Quattro and GrainCorp may see benefits in attracting Glencore's business. The ACCC considers that third party exporters will be able to obtain capacity at one or both of the Port Kembla terminals at peak times of year, and will not be required to shift all capacity to a time not conducive to obtaining a good price for grain internationally.

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. 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 its analysis of upcountry and related markets in chapter 3, the ACCC considers that:

- GrainCorp has a strong presence in the provision of storage and handling services across southern and central NSW. GrainCorp faces competition in some areas from facilities owned by GrainFlow, a subsidiary of Cargill, and Emerald Grain. There are several other companies with integrated storage operations in the Port Kembla catchment area also offering container packing or transport services, or both. Nevertheless, the ACCC notes that GrainCorp is the dominant provider of storage and handling services in the catchment area, operating 79 per cent of sites identified by GTA as freight-advantaged to Port Kembla despite a reduction in the total number of GrainCorp sites under its Project Regeneration. The ACCC therefore considers there is currently not sufficient competition in upcountry storage and handling that would provide a constraint on GrainCorp's ability to exercise market power while it remains a monopoly PTSP at Port Kembla.

- In the absence of any competitive or regulatory constraint on GrainCorp's operations at Port Kembla, GrainCorp may be able to utilise its market power at Port Kembla to further increase its dominance in upcountry networks. However, the ACCC considers that parties seeking to export grain from Port Kembla do currently have some alternative options to using GrainCorp's upcountry network, and future users of Quattro's facility will likely be able to take advantage of these alternatives. The ACCC therefore considers that GrainCorp's dominance upcountry is unlikely to limit Quattro's ability to compete with GrainCorp in the provision of port terminal services. Further, to the extent that the Quattro facility enables its shareholders to establish a stronger presence in grain exports at Port Kembla, it may also enable Quattro's shareholders to expand their upcountry networks and provide a greater degree of competition to the GrainCorp as the dominant incumbent.

- Both road and rail options are available to marketers to transport grain to GrainCorp's Port Kembla facility. However, due to the long distances involved rail is likely to be the more cost effective and preferred option. GrainCorp utilises the majority of export grain trains in NSW, estimated at 53 per cent. However, the ACCC understands that Quattro's shareholders have trains operating in NSW and there are also a number of other trains operated by various rail providers to transport grain for export and domestic use.

- Containerised grain exports in NSW are significant, with wheat exports via containers representing around 20 per cent of total wheat exports from NSW.[121] This is lower than the proportion of container exports in Victoria (approximately 30 per cent). The ACCC considers that containerised exports represent a viable alternative export path for some grain produced in the Port Kembla catchment area. Containerised exports therefore provide some competitive constraint on GrainCorp's bulk export operations at Port Kembla.

- There is strong and consistent demand for grain in southern and central NSW for stock feed and flour milling.[122] 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 does not encompass the entire crop, leaving an exportable surplus.

The ACCC notes concerns raised by NSW Farmers about vertical integration and the potential for exclusive closed loop practices, as well as the potential incentive for GrainCorp to use its vertical integration to favour its own export operations.

The ACCC recognises the potential incentive for GrainCorp to use its vertical integration to favour its own export operations. In the absence of a directly competing facility the ACCC considers this incentive is likely to be of concern. However, with the introduction of Quattro's facility and the subsequent increase in competition and spare capacity at port, the ACCC considers that competitive pressures will constrain GrainCorp's ability to exercise market power to the detriment of competitors in related markets. In particular, the ACCC considers that GrainCorp's incentives to compete with Quattro to maximise throughput at its facility will likely outweigh the potential for detrimental outcomes at port due to vertical integration.

Due to the competitive constraints noted above, the ACCC considers that if an exemption were granted to GrainCorp at its Port Kembla facility once Quattro's facility is capable of

[121] Data from Australian Crop Forecasters.

[122] See section 3.4 of this report.

handling bulk wheat, it would not be to the detriment of current levels of competition in the grain acquisition market, or to upcountry and related markets. There are currently three major exporters at Port Kembla with 96 per cent of volumes on average (GrainCorp, Cargill and Glencore). As noted in relation to the Quattro exemption assessment, once the Quattro facility is operational, it is likely that Emerald and Noble will seek to export larger volumes at the Quattro facility given their stake in the facility. Given their investment in the facility, Quattro shareholders will have an incentive to increase their volumes and will likely compete more vigorously to acquire farmers' grain. The ACCC also notes the concern raised about a lack of choice for certain growers about the upcountry sites that they can deliver grain to.[123] While the ACCC recognises that particular growers may face this problem, a decision to not exempt GrainCorp's Port Kembla facility will not result in any additional constraint upcountry and will not address any market power GrainCorp may currently have in particular upcountry locations. The purpose of the Code is to regulate the conduct of port terminal service providers to ensure that exporters of wheat have fair and transparent access to port terminal services. Where GrainCorp faces sufficient competitive constraint at port, it is likely to provide access to third party exporters on reasonable terms. Therefore, the ACCC does not consider that a decision to grant an exemption once Quattro's facility is capable of handling bulk wheat would lead to a detrimental impact on overall competition in upcountry storage and handling. As noted above, Quattro shareholders Emerald and Cargill may also seek to expand their current upcountry storage and handling networks once the Quattro facility is operational, providing increased competition upcountry.

Conclusion

Overall, the ACCC considers that there are currently limited competitive constraints in relation to bulk wheat export port terminal services at GrainCorp's Port Kembla terminal. Existing constraints chiefly arise due to the presence of containerised exports. Furthermore, differences in transportation costs between Port Kembla and the Newcastle and Melbourne terminals suggest that other existing ports will not generally constrain the behaviour of GrainCorp in respect of its Port Kembla facility.

The ACCC's draft view is that, in the absence of a clear competitor, GrainCorp does not face sufficient competitive constraint at its Port Kembla facility. It is therefore possible that granting an exemption in the absence of a sufficient level of competitive constraint may allow GrainCorp to leverage its monopoly position at Port Kembla to increase its dominance in upcountry storage and handling to the detriment of its competitors.

The ACCC considers that in an environment where there is a lack of effective competition, and in this case, the absence at this time of a direct competing facility that is accessible for similar freight rates, GrainCorp may have an incentive to increase prices or decrease the quality of service to access seekers at Port Kembla.

Accordingly, in the absence of a competing port terminal facility, competition may not be promoted if GrainCorp were granted an exemption at its Port Kembla facility, and having regard to subclause 5(3)(b) of the Code, an exemption at GrainCorp's Port Kembla facility may not be appropriate if there is not sufficient competition in markets.

However, the ACCC considers that Quattro's Port Kembla facility is likely to have a significant effect on the level of competition in the provision of port terminal services at Port Kembla. In the short to medium term, GrainCorp is likely to remain the dominant provider of port terminal services due to its incumbent status and larger port terminal capacity. However, the ACCC considers that competition from Quattro is likely to constrain GrainCorp's ability to exercise market power in the provision of port terminal services, particularly given the

[123] NSW Farmers, Submission, pp. 10-12.

significant level of spare capacity expected to be available across the two Port Kembla facilities.

To the extent that the Quattro facility enables its shareholders to establish a stronger presence in grain exports at Port Kembla, it may also enable Quattro's shareholders to expand their upcountry networks and provide a greater degree of competition to the GrainCorp as the dominant incumbent upcountry.

In light of the above factors, the ACCC's view is that the increased competitive constraint likely to be provided by Quattro's Port Kembla facility, combined with the existing competitive constraint from containerised exports, is likely to provide sufficient constraint on GrainCorp's operations at its Port Kembla facility. This competitive constraint would likely be sufficient to maintain at least the current level of competition in upcountry storage and handling.

With the arrival of Quattro's facility, the ACCC considers that exporters will likely have sufficient alternative options to GrainCorp's Port Kembla terminal and upcountry assets to continue to participate in the grain acquisition market if an exemption were granted. In these circumstances, the ACCC considers that it will be appropriate to exempt GrainCorp's Port Kembla facility from the time that Quattro is covered by the Code and also granted an exemption.

Furthermore, the competitive situation in upcountry storage and handling would not be diminished by granting the exemption at such a time, although growers in particular locations may continue to have limited options for delivering their grain other than through GrainCorp's network.

(c) the interests of exporters who may require access to port terminal services; and (d) the likelihood that exporters of bulk wheat will have fair and transparent access to port terminal services

If an exemption were granted to GrainCorp at its Port Kembla terminal, the interests of exporters requiring access to port terminal services will not be affected if they can still compete in the grain export market on their relative merits. 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 Port Kembla facility. The ACCC is considering 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 Port Kembla facility.

Public submissions received from AGEA and Glencore in response to the ACCC's issues paper supported granting an exemption to GrainCorp's Port Kembla terminal.

The ACCC's 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. In the absence of competition, there is limited constraint on a firm's incentives to favour its own trading arm over third party customers.

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) over others other than according to 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.

The ACCC's views on the incentives for GrainCorp to not to favour its own trading arm over third party exporters at its Port Kembla facility draw on the analysis in chapters 2 and 3. Relevant findings from this chapter include:

- Over the last five years GrainCorp's trading arm has been the largest exporter through its Port Kembla terminal, exporting 42 per cent of total volumes on average. Other exporters do appear to have been able to access significant capacity, with the next largest exporters having been Cargill, with 32 per cent, and Glencore, with 22 per cent. These proportions are largely similar during the peak period, indicating that to date GrainCorp has not prevented its competitors gaining access to the Port Kembla terminal during peak periods. Together, these three largest exporters comprise approximately 96 per cent of total exports from Port Kembla.

- GrainCorp's Port Kembla facility has generally been underutilised, particularly during low and average production years and during non-peak times of the year. Given this, GrainCorp would likely be incentivised to increase throughput at its Port Kembla facility during these times.

- However, during peak times in particularly large harvest years there may be some capacity constraint at Port Kembla, and GrainCorp may have an incentive to favour itself in order to provide its own trading arm with the opportunity to obtain the best possible prices for grain in downstream markets.

- Cargill and Glencore, the next largest exporters at Port Kembla, represent a significant proportion of total throughput. Should GrainCorp wish to maintain this throughput, these large customers should have the ability to negotiate with GrainCorp for access to sufficient port capacity. Based on its current reliance on third party customers to provide throughput, GrainCorp would be unlikely to completely foreclose third party access and either settle for significantly less throughput at its terminal or make up a significant degree of throughput through its own grain network.

- Exporters other than GrainCorp, Cargill and Glencore make up a small proportion of total throughput at Port Kembla (approximately 6 per cent on average). Smaller exporters, including Quattro shareholders Emerald and Noble, would likely be able to access spare capacity at GrainCorp's facility during non-peak times and low or average production years. However, smaller exporters may face difficulties accessing highly demanded peak shipping slots in a large harvest year. If GrainCorp could increase grain through its upcountry networks to the Port Kembla terminal, it would seem likely that these smaller exporters would be the most vulnerable in terms of gaining access to sufficient capacity.

- Containerised exports represent an alternative pathway to export some grain from the Port Kembla catchment area, and therefore provide some competitive constraint on GrainCorp's bulk export operations at Port Kembla.

Once Quattro commences operations, the Port Kembla terminals will have significant spare capacity at both peak and non-peak times. At this time, the ACCC considers that:

- GrainCorp will be subject to a greater level of competitive constraint, as competition from Quattro's Port Kembla facility will add to existing competition from containerised exports. GrainCorp will therefore have increased incentives to allow other parties to access capacity at its terminal in order to maximise throughput and compete with the Quattro facility.

- The significant level of spare capacity expected to be available across the two Port Kembla terminals suggests that smaller exporters would also be more likely to be able to negotiate sufficient access at GrainCorp's terminal and/or Quattro's terminal. Should parties be unable to obtain capacity at GrainCorp's terminal, spare capacity is expected to be available at Quattro's adjacent facility.

The ACCC considers that given the need for GrainCorp to secure some throughput from other marketers in most years, it is unlikely that GrainCorp would completely foreclose access to its facility even in the absence of the competing Quattro facility. However, in the absence of a clear substitute port which could service a number of marketers from the Port Kembla catchment area, GrainCorp may have an incentive to alter its terms and conditions of access for third party exporters to maximise profits.

The ACCC's draft view is that granting an exemption to GrainCorp's facility in the absence of the competitive constraint expected to be provided by Quattro's facility may be detrimental to the interests of exporters requiring access to GrainCorp's Port Kembla terminal.

However, the ACCC considers that, to compete with Quattro's facility, GrainCorp will have incentives to provide access to its facility on reasonable terms in order to maximise throughput. The ACCC's draft view is that the full level of regulation under the Code will not be required to ensure fair and transparent access to GrainCorp's facilities.

(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

Regarding the impact on the efficient operation and use of GrainCorp's facility, GrainCorp submits that exemption would:

> *Support lower supply chain costs by allowing GrainCorp to operate its Port Terminals flexibly. More flexibility and efficient operations at port will allow increased investment in improving port and supply chain infrastructure.*[124]

As noted in the ACCC's draft 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 investment in 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 those alternative markets, GrainCorp submits:

> *…bulk grain export competes with the cost competitive domestic and containerised grain export markets. These alternative markets account for most of NSW's average grain production (at least 75%).*[125]

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

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[124] GrainCorp, *Submission in support*, p. 4.
[125] GrainCorp, *Submission in support,* p. 5.

However, the ACCC considers that the extent of competitive pressures and therefore the incentive on GrainCorp to invest will be significantly influenced by whether or not Quattro commences operations.

Conclusion

The ACCC's draft view is that, without competition being provided by Quattro, GrainCorp may not have sufficient incentives to efficiently operate, use and invest in infrastructure. There may be some incentives for GrainCorp to invest and operate an efficient facility, but in an environment without a clear competing facility, there are risks that these incentives may not be sufficient.

The ACCC's draft view is that the degree of competition that GrainCorp would face from Quattro, combined with the competitive pressures from other downstream markets (as outlined in the discussion of the matters at subclause 5(3)(b) and 5(3)(g) of the Code) is likely to promote the efficient operation of, use of, and investment in, GrainCorp's facility in the absence of full regulation under the Code.

For instance, with the introduction of the Quattro facility at Port Kembla, GrainCorp would not only be facing competition from alternate markets, but from an alternative supplier of bulk port terminal services. GrainCorp would therefore likely face even greater incentives to operate its facility efficiently as well as maintain and improve its infrastructure so as to maximise throughput.

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

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 NSW. However GrainCorp's ability to exercise market power in NSW and Port Kembla is limited given:*
>
> - *Variable grain production;*
> - *Strong competition from competing alternative domestic and container packing markets, particularly in low production years;*
> - *Excess country storage capacity;*
> - *Excess container packing capacity;*
> - *Excess port elevation capacity; and*
> - *Impending competition for port elevation services for bulk grain from Qube's Quattro Grain Port Terminal (**Quattro**) at Port Kembla (expected to be operational for the coming harvest).*[126]

[126] GrainCorp, *Submission in support*, p. 3.

Conclusion

The ACCC notes that GrainCorp's vertical integration creates incentives to favour its own trading division.

The ACCC considers that GrainCorp's vertical integration would be problematic without Quattro's presence. The ACCC notes that without Quattro's arrival there will be less spare capacity at GrainCorp's facility, and exporters would have no other alternatives to export bulk grain. In these circumstances GrainCorp would be more likely to provide preferential access to its trading division.

Accordingly, the ACCC considers that in the absence of Quattro's facility and the additional capacity it is expected to provide, GrainCorp's vertically-integrated status may detract from some exporters ability to secure fair and transparent access at Port Kembla.

However, in view of the amount of likely available capacity at Port Kembla with the arrival of Quattro, the ACCC considers that Quattro's entry will limit the extent to which GrainCorp is able to favour its own exporting business. That is, the amount of likely spare capacity will create an incentive for GrainCorp to attract the business of third party exporters. GrainCorp will therefore need to balance any incentive to favour its own trading division against its desire to maximise the use of its facility.

(i) whether there is already an exempt service provider within the grain catchment area for the port concerned

The ACCC discusses the relevant grain catchment area for GrainCorp's Port Kembla terminal in chapter 3 and considers that the area generally includes southern and central NSW. The ACCC considers that the catchment area for GrainCorp's Port Kembla terminal will be the same as for Quattro's Port Kembla, but that there is limited overlap between this catchment area and the catchment areas for the Melbourne and Newcastle port terminals.

Therefore, while there are currently exempt service providers at Melbourne and Newcastle, these ports provided a very limited degree of competition to the GrainCorp's Port Kembla terminal.

At present, no bulk wheat port terminal services provider servicing the Port Kembla catchment area is exempt under the Code.

The ACCC is, however, concurrently assessing an exemption application for Quattro's Port Kembla facility (see chapter 4). The ACCC's draft view is that GrainCorp and Quattro should be exempt service providers in relation to services provided at their respective Port Kembla terminals once Quattro is covered by the Code. The ACCC is seeking industry views on this draft decision.

(j) any other matters the ACCC considers relevant

Following consideration of the matters at subclauses 5(3)(a)-(i) of the Code, the ACCC has formed the draft view that an exemption for GrainCorp's Port Kembla facility would not be appropriate in the absence of the increased competitive constraint expected to be provided by Quattro's facility. However, the ACCC expects that with the addition of Quattro's facility at Port Kembla there is likely to be sufficient spare capacity and overall competitive constraint (from Quattro's facility and containerised exports) to support an exemption for GrainCorp at its Port Kembla terminal.

The ACCC has therefore considered the timing implications for an exemption for GrainCorp's facility given that Quattro's facility is not yet operational. Specifically, the ACCC has considered whether it would be appropriate to grant an exemption to GrainCorp at its Port Kembla facility prior to, at the same time as, or some time after completion of Quattro's facility.

The ACCC notes GrainCorp's submission that the Quattro terminal is currently not subject to the Code and is able to negotiate with customers without the Code's prescribed access requirements and transparency. GrainCorp submits that it is currently competitively constrained by operating within the requirements of the Code. As noted above, while the Code provides some flexibility to negotiate the terms of access, if GrainCorp were granted an exemption prior to renegotiating its current long term agreements, it would have a greater degree of flexibility in those negotiations.

The ACCC understands that development of Quattro's Port Kembla terminal is well advanced and is currently expected to commence operations in late 2015. However, the ACCC considers there remains some uncertainty regarding operational matters such as exactly how much capacity the facility will provide. There also remains the possibility of delays in commencement.

Once Quattro's facility is complete, the ACCC considers there is likely to be sufficient certainty about the specific characteristics and capabilities of Quattro's facility and when its services will be available to exporters. Subject to industry views on these draft decisions, the ACCC considers that it is likely to be appropriate to grant exemptions to both GrainCorp and Quattro at that time. In the absence of material delays to the completion of Quattro's terminal, the ACCC expects that this decision would be made prior to GrainCorp's renegotiation of long term agreements with customers (current agreements expire in September 2016).

6 ACCC draft decisions

Given the above preliminary assessments of the matters at subclause 5(3) of the Code, the ACCC has made the following draft decisions.

Quattro's Port Kembla port terminal facility

The ACCC's draft decision is that Quattro should be an exempt service provider of port terminal services provided by means of its Port Kembla port terminal facility from the date it is covered by the Code.

GrainCorp's Port Kembla port terminal facility

The ACCC's draft decision is that GrainCorp should be an exempt service provider of port terminal services provided by means of its Port Kembla port terminal facility at the same time that Quattro is determined to be an exempt service provider.

7 ACCC monitoring and future assessments

The ACCC has formed the draft view that Quattro and GrainCorp's Port Kembla terminals will be subject to a sufficient level of competition to be exempt from Parts 3 to 6 of the Code, but that GrainCorp's Port Kembla facility should not be granted an exemption until Quattro's facility is covered by the Code. However, the ACCC recognises that it is not possible to ensure particular market outcomes following an exemption decision.

The ACCC therefore considers that it will be appropriate for it to monitor the Port Kembla wheat port terminals after making any exemption determination(s).

The ACCC considers that it will be important to examine the competitive outcomes at these facilities, and in upstream and downstream markets, that result for these facilities and the associated port zone in the future.

In particular, the ACCC will monitor the market concentration of exporters shipping wheat from both the Port Kembla terminals. The ACCC would be concerned if, in the future, one of the current major vertically integrated exporters increased their export market shares at their respective port facility at the expense of other exporters seeking access at these terminals. 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 has the ability under the Code to revoke exemptions once granted. Similar to the process for granting an exemption, the ACCC may revoke an exemption determination after having regard to the matters to matters (a) to (j) of subclause 5(3) of the Code, if it is satisfied that the reasons for granting the exemptions no longer apply. If the ACCC grants exemptions to one or both of the Port Kembla terminals and subsequently considers from its monitoring that competitive outcomes have not resulted, it may conduct an inquiry into whether an exemption should be revoked.

7.1 Monitoring

The ACCC's monitoring of the Port Kembla terminal services following any exemption determination(s) may include a number of aspects. In particular, the ACCC intends to pursue two main monitoring activities.

7.1.1 Industry analysis

The ACCC is provided with the shipping activity at port terminals under the Code, including GrainCorp's Port Kembla facility. Part 2 of the Code requires PTSPs to, among other things, provide daily ship loading statements to the ACCC. Both exempt and non-exempt port terminal operators must report this information to the ACCC (and publish it on their website) on a daily basis.

Through port loading statements, the ACCC is able to examine:

- the number and frequency of exporters using a port terminal
- the quantity and type of grain being exported
- the timing of shipments by exporters.

This information allows the ACCC to understand the nature and concentration of shipping activity and exporters' market shares throughout the year, and to compare these over time. In particular, the ACCC will be able to examine changes in the use of the facilities in a deregulated environment, and contrast it to the levels of market concentration and the outcomes achieved under the Code and the previous undertaking regime.

The ACCC notes that, from 1 October 2015, this loading statement information will also be required to be provided by any other port terminal facilities not currently covered by the Code, including the Quattro Port Kembla facility once it is complete. Accordingly the ACCC will be receiving data from both bulk export facilities at Port Kembla (and others across Australia) that will allow it to examine the industry in a thorough way. The ACCC can also utilise other industry data and information to assess the level of shipping activity at a particular port terminal.

While the ACCC does not consider that market shares are determinative of the competitive situation in a port zone, it considers that examining this information will give some indication of whether other third party exporters continue to be able to access the Port Kembla terminal facilities. There are currently three major exporters operating at Port Kembla. As noted above, the ACCC would be concerned by evidence that GrainCorp and/or one or more Quattro shareholders were respectively taking a much larger proportion of export capacity at the two ports at the expense of other exporters and potentially limiting the competition for grain grown by Australian farmers. The ACCC would also be concerned by evidence of an increased concentration of exports among exporters at Port Kembla, to the exclusion of other exporters.

In examining this data, the ACCC may utilise tools such as x-firm concentration ratios or the Herfindahl-Hirschmann Index (HHI), or calculate changes in such measures, to provide an indication of whether there are competition concerns. The ACCC will need to consider the appropriate methods of calculation for such measures, such as how to account for spare capacity and alternative export paths.

The ACCC notes that tools such as the HHI do not replace the ACCC's obligation to consider the full range of matters under clause 5(3) and 5(6) of the Code.

7.1.2 Consultation with industry

The ACCC also intends to periodically approach exporters at Port Kembla to seek information about their ability to access port terminal services at GrainCorp's and Quattro's respective port terminals in an environment subject to a lower level of regulation under the Code. This may include regularly scheduled meetings with other industry participants in upstream and downstream markets, such as farmers groups, to gauge the effect of granting the exemptions.

The ACCC also encourages industry participants to approach the ACCC directly with any concerns they may have in regards to securing fair and transparent access to GrainCorp's and Quattro's Port Kembla port terminal services.

If significant concerns are raised by industry (in any forum) about the ability of third party exporters to access one or both of the two facilities, the ACCC may conduct further market inquiries, or could consider a public process to assess whether to revoke an exemption for the relevant port terminal facility.