



Australian
Competition &
Consumer
Commission

Draft determination

Riordan Grain Services, Port of Geelong

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

22 June 2017

1. Introduction

The Australian Competition and Consumer Commission (ACCC) has made a draft determination that Riordan Grain Services (Riordan) should be an exempt service provider of port terminal services at Berth 3, Lascelles Wharf, Port of Geelong.

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

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

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

Consultation on this draft determination

The ACCC is seeking views on its draft determination that Riordan should be an exempt service provider of port terminal services at Berth 3, Lascelles Wharf, Port of Geelong. The ACCC welcomes views on all aspects of its draft determination.

Submissions are due by 5:00pm EST on **7 July 2017**. If a party intends to make a submission and is concerned about meeting this timeframe they may contact the ACCC before the due date to discuss an extension. Further information on how to make a submission is in the Appendix.

1.1. Exempt service providers

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

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

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

¹ See subclause 4(6) of the Code.

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

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

The ACCC's assessment of Riordan's operation at Berth 3, Lascelles Wharf, Port of Geelong against each of these matters is set out in section 2 of this document.²

Exemption granted to CBH by the Minister for Agriculture

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

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

1.2. Exemption application by Riordan

In May 2017, Riordan wrote to the ACCC seeking to be determined an exempt service provider of port terminal services for bulk wheat exports at the Port of Geelong. Riordan operates out of Berth 3 at Lascelles Wharf. This is a multiuse public berth owned and operated by Geelong Ports.³

The exemption application is available on the ACCC's website at <https://www.accc.gov.au/regulated-infrastructure/wheat-export/wheat-export-projects/Riordan-grain-services-port-of-geelong-wheat-port-exemption-assesment>.

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

³ Riordan Exemption Application - public version, p. 4.

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

Ms Katie Young
A/g Director
Infrastructure & Transport - Access & Pricing Branch
ACCC
GPO Box 520
MELBOURNE VIC 3001
Ph: 03 9290 6980
Email: katie.young@acc.gov.au

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

This section sets out the ACCC's assessment, having regard to the matters at subclause 5(3) of the Code, of whether it should determine Riordan to be an exempt service provider at Berth 3, Lascelles Wharf, Port of Geelong.

2.1. Legitimate business interests of Riordan

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.

Riordan submits that:

Exemption will encourage not only RGS but others to pursue innovative supply chain solutions for export of grain out of Australia.⁴

Riordan also notes that:

Exemption will reduce the compliance burden on RGS and encourage smaller scale operators to pursue innovation in agricultural supply chain.⁵

The ACCC also considers that exempting Riordan at the Port of Geelong would:

- increase its operational flexibility
- reduce its Code compliance costs, particularly noting that Riordan is currently not regulated under the Code and would otherwise be required to develop an entirely new compliance program.

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

As such the ACCC's draft view is that exempting Riordan at the Port of Geelong would be in its legitimate business interests. The ACCC considers that the legitimate business interests of Riordan should be considered against the reasons for having regulation in place and the level of competitive constraint faced by Riordan. The level of competitive constraint faced by Riordan and other matters relevant to an exemption are considered further below at sections 2.2-2.6.

⁴ Riordan Grain, *Riordan Grain Services application for exemption from the Port Terminal (Bulk Wheat) Code of Conduct*, p. 6.

⁵ *ibid.*

2.2. The public interest and competition in markets

In deciding whether to grant an exemption, subclauses 5(3)(b) and (g) of the Code require the ACCC to have regard to the public interest, including the public interest in having competition in markets, and the promotion of competition in upstream and downstream markets. Subclause 5(3)(i) also requires the ACCC to have regard to whether there is already an exempt service provider within the grain catchment area for the port concerned.

The ACCC considers these matters all relate to the degree of competitive constraint faced by the PTSP in the provision of port terminal services, and the likely effect of an exemption on competition in bulk wheat port terminal services and related markets.

Riordan submits that:

Exemption will increase competition and reduce regulatory compliance on RGS and others to pursue innovation in agriculture and drive supply chain efficiencies.⁶

Riordan also notes that:

RGS is providing an alternative supply chain for farmers to access niche export markets and increasing competition for bulk loading of grain out of the Geelong region.⁷

Riordan states that it exports grain drawn from the same catchments area as the GrainCorp Geelong and Emerald Melbourne facilities. The grain catchment area for the Riordan facility may also be limited by the fact that, unlike other bulk wheat export facilities in Victoria, all intake of commodities to the port is by road and there is no rail access.

Prior to Riordan commencing operations at Berth 3, Lascelles Wharf, Geelong in 2016, GrainCorp and Emerald were the only providers of bulk wheat port terminal services in Victoria. As the much larger incumbents, GrainCorp and Emerald are likely to remain the dominant providers of port terminal services in Victoria.

GrainCorp and Emerald at their Melbourne and Geelong facilities have already been granted exemptions. If Riordan is not granted an exemption under the Code, it would be subject to a higher level of regulation than its main competitors.

The ACCC considers that having different regulatory arrangements for competing PTSPs may lead to distortions in competition and efficiency. Where one PTSP has already been granted an exemption, this may support an exemption for a competing PTSP if the level of competitive constraint is sufficient to prevent that PTSP exerting market power.

In addition, Victoria has strong domestic and container markets for grain. They will provide a significant degree of competition to Riordan's bulk wheat export operations.

Riordan's entry at the port level of the supply chain is supported by their existing upcountry storage network.⁸ This may provide growers new opportunities when deciding how to store and market their grain.

⁶ *ibid.*

⁷ *ibid.*, p. 2.

⁸ <http://riordangrains.com.au/grain-storage/>.

The ACCC's draft view is that exempting Riordan at Berth 3, Lascelles Wharf Port of Geelong is in the public interest and will not be detrimental to competition in markets because:

- GrainCorp and Emerald are currently the dominant providers of port terminal services in Victoria and are already exempt at their Melbourne and Geelong facilities. GrainCorp and Emerald also have significant upcountry storage and handling assets across Victoria. The Riordan operation should promote further competition in the market and along the supply chain.
- In the absence of full regulation under the Code, Riordan will continue to face a significant competitive constraint from the Emerald and GrainCorp facilities, the strong domestic and container market in Victoria and the threat of further competition from other new entrants.

The ACCC's consideration of these matters supports granting an exemption to Riordan at Berth 3, Lascelles Wharf, Port of Geelong.

2.3. Interests of exporters and access to port terminal services

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

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

In relation to the interests of exporters, Riordan submits:

Exemption will encourage others to pursue supply chain solutions and enable access to improved quality and pricing opportunities that increased competition and supply chain innovations can provide.⁹

The ACCC notes that that Riordan only exports intermittently and does not have storage facilities at port. This may limit the amount of access available to other exporters. Riordan has also indicated that other operations of this nature could also be developed at Berth 3.

However, Riordan's entry into the market may make additional capacity available at the competing Victorian facilities. Exporters' ability to obtain access to port terminal facilities there may be improved overall.

The ACCC considers that granting an exemption to Riordan is likely to be in the interests of Riordan and more broadly other exporters in the market.

The ACCC also considers that deciding not to grant an exemption and applying the full level of regulation under the Code to Riordan is likely to provide little practical benefit to other exporters in the market.

⁹ *ibid*, p. 6.

2.4. Economically efficient operation and efficient investment

In deciding whether to exempt a PTSP, subclauses 5(3)(e) and (f) of the Code requires the ACCC to have regard to the promotion of the economically efficient operation and use of the port terminal facility and efficient investment in port terminal facilities.

Riordan submits:

Reducing compliance will enable efficient operation of the facility and encourage others to pursue similar supply chain innovation.¹⁰

Granting Riordan an exemption will mean that its compliance related operating costs will be lower and it will have greater operational flexibility, which will likely promote the efficient operation of the Berth 3 facility for bulk wheat exports.

The ACCC also recognises that unnecessary regulation may discourage investment in port terminal facilities. The ACCC considers that the competitive discipline provided by GrainCorp and Emerald will be sufficient to encourage Riordan to make efficient investments, and deter inefficient investments, in its operation.

An exemption may also create incentives for GrainCorp and Emerald to make efficient investments in their port terminal facilities, in order to compete with Riordan (to the extent that the Riordan operation will provide competitive tension), at port and/or in related markets.

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

2.5. Existing exempt service provider within the grain catchment area

In deciding whether to exempt a PTSP, subclause 5(3)(i) of the Code requires the ACCC to have regard to the whether there is already an exempt service provider within the grain catchment area for the port concerned.

Riordan submits that:

Both Graincorp Geelong and Emerald Melbourne are exempt service providers from The Code and are in the catchment area for Lascelles Wharf.

The presence of exempt service providers within the same grain catchment area supports the granting of an exemption to Riordan.

2.6. Other matters

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

¹⁰ *ibid.*

3. Monitoring

Having considered the matters under subclause 5(3) of the Code, including the level of competition Riordan currently faces, the ACCC has formed the draft view that Riordan should be exempt from Parts 3 to 6 of the Code. However, the ACCC recognises that it is not possible to ensure particular market outcomes following an exemption decision. Similar to the ACCC's approach to monitoring the level of competition following exemption determinations regarding port terminals in other port zones, the ACCC also considers it appropriate for it to continue to monitor the bulk wheat terminals in Victoria.

The ACCC intends to pursue two main monitoring activities:

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

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

Under subclause 5(6) of the Code, the ACCC can revoke an exemption determination it has made if, after having regard to the matters in subclause 5(3), it is satisfied that the reasons for granting the exemption no longer apply.

The ACCC notes that it has released its inaugural bulk wheat ports monitoring report in December 2016, which considered the impacts of the ACCC's previous exemption decisions in 2015.

The report found that port terminal owners did not appear to be obstructing access or receiving a disproportionate share of port terminal capacity, following the exemptions.

However, the report noted that this was not a particularly high production or export year, and while stakeholders are reporting that most port terminal operators are demonstrating greater flexibility in their engagement with access seekers, the ACCC is reserving judgement until the system is faced with a large harvest.

The ACCC will consult on the 2016/17 harvest year ahead of the release of its next report in December 2017.

4. Draft determination

The ACCC has made a draft determination that Riordan should be an exempt service provider of port terminal services at Berth 3, Lascelles Wharf, Port of Geelong.

Appendix: Making a submission

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

Submissions should be addressed to:

General Manager
Infrastructure & Transport – Access & Pricing Branch
ACCC
GPO Box 520
Melbourne VIC 3001
Email: transport@acc.gov.au

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

Submissions are due by 5:00pm EST on **7 July 2017**. The ACCC recognises this is a relatively short consultation period, and if a party intends to make a submission and is concerned about meeting this timeframe they may contact the ACCC before the due date to discuss an extension.

Confidentiality of information provided to the ACCC

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

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

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