



Draft Determinations

Bulk Cargo Services Pty Ltd

Wagner Corporation Pty Ltd

Exemption assessment of port terminal services
provided via Pinkenba port terminal facilities

9 November 2022

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Executive Summary

Under subclause 5(2) of the *Port Terminal Access (Bulk Wheat) Code of Conduct* (the Code), the Australian Competition and Consumer Commission (ACCC) has made draft determinations that Bulk Cargo Services Pty Ltd (BCS) and Wagner Corporation Pty Ltd (Wagner Corp) should be exempt service providers of port terminal services provided by means of their respective port terminal facilities at Pinkenba, Queensland.

If the ACCC makes final determinations consistent with these draft determinations, BCS and Wagner Corp (together, the Applicants) will be subject to a lower level of regulation, as they will not be required to comply with Parts 3 to 6 in the course of providing port terminal services via their respective port terminal facilities at Pinkenba.

In making its draft determinations the ACCC has:

- considered the level of competitive constraint the Applicants are subject to, and
- carefully considered the matters listed at subclause 5(3) of the Code.

This assessment was based on information available to the ACCC at the time of making these draft determinations.

Summary of views

The ACCC's draft views are that:

- The Applicants are subject to a high level of competitive constraint, primarily from the GrainCorp and Queensland Bulk Terminals (QBT) port terminal facilities at the Port of Brisbane. This competition provides the Applicants with incentives to provide exporters with fair and transparent access to their services, which will continue to exist if the Applicants are granted exemption from Parts 3 to 6 of the Code.
- Granting the Applicants exemptions will provide them greater control over how they provide their port terminal services. This may allow them to better tailor their services to the needs of specific exporters, and respond more flexibly to requests for services (or changes to services).
- Providing the Applicants with greater operational flexibility where they have competition-driven incentives to provide exporters fair and transparent access to their services is:
 - in the Applicants' legitimate business interests
 - likely to be in the public interest, including the public interest in having competition in markets, and may promote competition in upstream and downstream markets
 - likely to be in the interests of exporters who may require access to the Applicants' port terminal services
 - likely to promote the efficient operation of the Applicants' facilities and may promote efficient investment in port terminal facilities.
- Granting the Applicants exemptions will likely allow these 2 smaller-scale new entrant Port Terminal Service Providers (PTSPs) to compete more effectively in the market for bulk grain export port terminal services in the Pinkenba grain catchment area. The ACCC considers the entry of the Applicants as a pro-competitive development that should provide more choice to grain exporters and growers.

These draft views are based on the ACCC's analysis of the extent to which the Applicants compete with each other, and other providers of bulk grain export port terminal services. The ACCC has also considered the extent of any competitive constraint imposed by markets for containerised grain export port terminal services and domestic demand for grain (including bulk wheat). The ACCC's draft views on the level of competitive constraint the Applicants are subject to at Pinkenba are set out in chapter 2 of this document.

The ACCC's draft consideration of the matters that the ACCC is required to have regard to in deciding to grant an exemption (listed at subclause 5(3) of the Code) is set out in chapter 3. A high-level summary of the ACCC's draft consideration of the matters listed at subclause 5(3) of the Code is presented in table E.1 below.

Table E.1: Summary of the ACCC's draft consideration of the matters listed at subclause 5(3) of the Code

Subclause 5(3) matter	ACCC draft view
<p>a) the legitimate business interests of the port terminal service provider</p>	<p>The Applicants are subject to a high level of competitive constraint (including from each other and the large-scale GrainCorp and QBT port terminal facilities at the Port of Brisbane). This provides them with incentives to provide exporters with fair and transparent access to their bulk grain export port terminal services, incentives that will remain if granted exemption from Parts 3 to 6 of the Code.</p> <p>The ACCC considers that granting the Applicants exemptions will increase their operational flexibility and reduce their Code compliance costs. The ACCC therefore considers granting the Applicants exemptions would be in their legitimate business interests.</p>
<p>b) the public interest, including the public interest in having competition in markets</p> <p>g) the promotion of competition in upstream and downstream markets</p>	<p>If the Applicants are granted exemptions they will have greater flexibility in how they provide their port terminal services.</p> <p>The ability to operate more flexibly may allow the Applicants to compete more effectively in the Pinkenba grain catchment area. The additional flexibility may also allow the Applicants to accommodate the needs of different kinds of exporters (including new and smaller-scale exporters).</p> <p>The ACCC considers that increasing the competitiveness of new entrant PTSPs and promoting exporter participation in the Pinkenba grain catchment area is likely in the public interest, including the public interest in having competition in markets. It may also promote competition in upstream and downstream markets, however the extent of this is unclear at this time.</p>
<p>c) the interests of exporters who may require access to port terminal services</p>	<p>The ACCC considers that the Applicants have incentives to exercise the increased operational flexibility they would have if granted exemptions to the benefit of all grain exporters. This increased operational flexibility may also allow the Applicants to meet the needs of different kinds of exporters (particularly new and smaller-scale exporters).</p> <p>For these reasons the ACCC considers granting the Applicants exemptions is in the interests of exporters who may require access to the Applicants' port terminal services.</p>
<p>d) the likelihood that exporters of bulk wheat will have fair and transparent</p>	<p>The Applicants have competition-driven incentives to provide exporters fair and transparent access to their port terminal services and will continue to have these incentives if granted exemptions.</p>

<p>access to port terminal services</p>	<p>The Applicants are also not grain exporters or associated entities of grain exporters. This means that the Applicants do not have the ability to favour themselves as exporters or any associated entity exporters in the course of providing port terminal services.</p> <p>For these reasons the ACCC considers that granting the Applicants exemptions will not negatively impact the likelihood that exporters will have fair and transparent access to the Applicants' respective port terminal services.</p>
<p>e) the promotion of the economically efficient operation and use of the port terminal facility</p> <p>f) the promotion of efficient investment in port terminal facilities</p>	<p>The ACCC considers that the Applicants have competition-driven incentives to provide the benefits of increased operational flexibility to all exporters. The ACCC considers that avoiding the application of unnecessary regulation may encourage the Applicants to invest efficiently in their existing facilities, and may promote efficient investment in port terminal facilities more broadly.</p>
<p>h) whether the port terminal service provider is an exporter or an associated entity of an exporter</p>	<p>The Applicants are not exporters or associated entities of exporters. The Applicants therefore do not have the ability to favour themselves as grain exporters or any associated entity grain exporters in the course of providing port terminal services.</p>
<p>i) whether there is already an exempt service provider within the grain catchment area for the port concerned</p>	<p>In 2015 the ACCC determined GrainCorp and QBT to be exempt service providers in relation to their respective port terminal facilities at the Port of Brisbane.</p> <p>The ACCC considers that the Port of Brisbane grain catchment area is the same as the Pinkenba grain catchment area, and therefore considers that there are 2 exempt service providers in the Pinkenba grain catchment area.</p> <p>The ACCC considers it appropriate that the Applicants be subject to the same level of regulation as GrainCorp and QBT in the competitive market for bulk grain export port terminal services in the Pinkenba grain catchment area.</p>
<p>j) any other matters the ACCC considers relevant</p>	<p>The ACCC does not consider that there are any other matters relevant to this assessment.</p>

Consultation on these draft determinations

Stakeholder submissions assist the ACCC to undertake its assessment of exemption applications. The ACCC encourages stakeholders to make submissions in response to these draft determinations. The process for making a submission is set out in section 1.4 of this document.

Submissions must be received before **5:00pm (AEST), 23 November 2022**.

1. Introduction

The Code is set out in Schedule 1 of the *Competition and Consumer (Industry Code – Port Terminal Access (Bulk Wheat)) Regulation 2014* and is a prescribed mandatory conduct for the purposes of section 51AE of the *Competition and Consumer Act 2010* (Cth). It commenced on 30 September 2014 and regulates the conduct of PTSPs to ensure that exporters of bulk wheat have fair and transparent access to port terminal services.¹

The Code provides that the ACCC or the Minister for Agriculture (the Minister) may determine that a PTSP is an ‘exempt service provider’.

1.1. Exempt service providers

PTSPs that are not exempt service providers are required to comply with Parts 1 to 6 of the Code (that is, the entire Code).

PTSPs that are determined by the ACCC or the Minister to be exempt service providers are:

- only required to comply with Parts 1 and 2 of the Code; and
- not required to comply with Parts 3 to 6 of the Code.

Part 1 of the Code contains general provisions about the Code.

Part 2 of the Code requires all PTSPs to:

- deal with exporters in good faith;
- publish and make available a port loading statement;
- publish policies and procedures for managing demand for their services; and
- publish current standard terms and reference prices for each port terminal facility that it owns or operates.

Part 3 of the Code requires a PTSP:

- not to discriminate in favour of its own trading business or an exporter that is an associated entity, and not hinder an exporter’s access to port terminal services;
- to enter into an access agreement with an exporter regarding its port terminal services (or negotiate the terms of such an agreement) if an exporter makes a request and certain criteria are satisfied;
- to deal with disputes about the terms of an access agreement via specified dispute resolution processes including mediation and arbitration; and
- to include a dispute resolution mechanism in its standard terms and to vary its standard terms in accordance with a specified procedure.

Part 4 of the Code requires a PTSP to have, publish and comply with a port loading protocol which includes a capacity allocation system (and requires that the capacity allocation system must be approved by the ACCC if it involves the allocation of port terminal capacity more than 6 months in advance).

Part 5 of the Code requires a PTSP to annually publish the expected capacity of its port terminal facility for the following 12 months, publish updates on the available capacity of its

¹ Port Terminal Access (Bulk Wheat) Code of Conduct, clause 2.

port terminal facility on at least a weekly basis, and publish certain information on volumes of grain stored at port and key performance indicators.

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

Exempt service providers are still required to comply with the general competition law provisions in Part IVB of the *Competition and Consumer Act 2010* (Cth).

1.2. Assessment of Wagner Corporation as a PTSP

The ACCC understands that Wagner Corp's new bulk grain export operation at its Pinkenba wharf will involve multiple parties owning, renting and potentially operating bulk grain loading equipment. The ACCC understands that the equipment used to load grain could change as frequently as on a shipment-by-shipment basis.

The ACCC considers this operational approach does not neatly fit within the Code's definition of a PTSP which requires a party to be the owner or operator of a port terminal facility (that is, 'a ship loader' that is 'at a port').

In relation to the ownership of the bulk grain loading equipment (including ship loaders) that will be used to load bulk grain, Wagner Corp has submitted that bulk grain will be loaded via:

Loading equipment hired by Rain-Ag, Wagner Corporation or third party as the case may be from time-to-time.²

In relation to the physical operation of the relevant equipment, Wagner Corp has submitted that:

South Australian Stevedoring will physically operate the infrastructure pictured under the supervision and direction of RainAg.³

In relation to how grain exporters will seek access to bulk grain export port terminal services at Wagner Corp's Pinkenba wharf, Wagner Corp has submitted that exporters will be able to seek access via Rain-Ag or Wagner Corp directly, confirming the following potential scenarios:

Rain-Ag contact Wagner Corporation and request a booking slot at the Wharf for a 7 day period, OR Wagner Corporation is contact [sic] by an independent third-party to book a slot at the wharf.⁴

Wagner Corp has also confirmed that it will be the party that ultimately considers exporter requests for access to bulk grain export port terminal services, submitting that:

Wagner Corporation as wharf owner will consider requests for access to bulk grain export services.⁵

The ACCC's draft view is that Wagner Corp is a PTSP

The ACCC's draft view is that Wagner Corp is the appropriate party to be captured as the PTSP in relation to the bulk grain export operation at its Pinkenba wharf. The ACCC's draft view is that Wagner Corp is the operator of a port terminal facility (and therefore a PTSP) for the purposes of the Code because:

² Wagner Corporation, *Wagner Corporation Pinkenba Wharf Grain Export Process*, p. 1.

³ Wagner Corp, *Application for exemption from the Competition and Consumer (Industry Code – Port Terminal Access (Bulk Wheat)) Regulation 2014*, 12 October 2022, p. 6.

⁴ Wagner Corp, *Wagner Corporation Pinkenba Wharf Grain Export Process*, p. 1.

⁵ Wagner Corp, *Application for exemption*, p. 6.

- Wagner Corp controls access to the bulk grain export port terminal services which are being delivered from its Pinkenba wharf. The ACCC considers that the Code applying to the party who controls access to these services is consistent with the Code's purpose (to ensure that exporters of bulk wheat have fair and transparent access to port terminal services).
- Wagner Corp appears best placed to comply with the Code's obligations. For example, Wagner Corp has submitted that it will be the party that considers exporter requests for access to port terminal services (either directly or via Rain-Ag) and is therefore the only party that will receive information about all upcoming bulk grain shipments at its wharf (allowing it to comply with the 'port loading statement' obligation in Part 2 of the Code).

If the ACCC receives information in the future that indicates other parties should be subject to the Code's obligations in relation to the bulk grain export operation at Wagner Corp's Pinkenba wharf, the ACCC can consider whether the Code should apply to those parties at that time.

1.3. Applications for exemption by Bulk Cargo Services and Wagner Corporation

Currently, Parts 1 to 6 of the Code apply to the Applicants' provision of port terminal services at their respective facilities at Pinkenba.

Following pre-lodgement discussions:

- On 26 August 2022 BCS submitted an application to the ACCC seeking to be an exempt service provider of port terminal services provided via its port terminal facility at Pinkenba
- On 12 October 2022 Wagner Corp submitted an application to the ACCC seeking to be an exempt service provider of port terminal service provided via its port terminal facility at Pinkenba.

Aspects of these applications are referenced in this document as relevant. The full applications are available on the ACCC's website at: <https://www.accc.gov.au/regulated-infrastructure/wheat-export>.

1.4. Consultation on these draft determinations

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

The ACCC prefers that submissions be sent via email in Microsoft Word format (although other text readable document formats will be accepted). Submissions should be sent to both of the following email addresses:

transport@acc.gov.au

teresa.ryan@acc.gov.au

Please address submissions to:

Mr Matthew Schroder
 General Manager
 Infrastructure & Transport - Access & Pricing Branch
 ACCC
 GPO Box 3131
 Canberra ACT 2601

Due date for submissions

Submissions must be received before **5:00pm (AEST), 23 November 2022**.

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 assess the exemption application 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 publication *ACCC & AER Information Policy: collection and disclosure of information*, available on the ACCC website.

Further information

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

Teresa Ryan
Assistant Director
Infrastructure & Transport – Access & Pricing Division
Phone: 08 8213 3411
Email: teresa.ryan@acc.gov.au

or:

Scott Sanderson
Senior Analyst
Infrastructure & Transport – Access & Pricing Division
Phone: 03 9658 6527
Email: scott.sanderson@acc.gov.au

2. Competitive constraint faced by Bulk Cargo Services and Wagner Corporation at Pinkenba

The ACCC considers that the level of competitive constraint faced by a PTSP is relevant to its consideration of several of the matters listed at subclause 5(3) of the Code.

To assess the level of competitive constraint that the Applicants are subject to, the ACCC has considered:

- the grain catchment area that the Applicants operate in (the Pinkenba grain catchment area), including the extent to which it 'overlaps' with the grain catchment areas of other ports (section 2.1),
- the sources and level of competitive constraint that the Applicants are subject to in the Pinkenba grain catchment area, including from other providers of bulk grain export port terminal services, and relevant markets for containerised grain export port terminal services and domestic demand (section 2.2 to 2.4).

The ACCC's draft assessment of the grain catchment areas relevant to this assessment and the level of competitive constraint faced by the Applicants are drawn on in chapter 3 (the ACCC's draft consideration of the matters it must consider in granting an exemption, listed at subclause 5(3) of the Code).

2.1. The Pinkenba grain catchment area and the extent to which it overlaps with the grain catchment areas of other ports

An assessment of grain catchment areas is required to determine whether and to what extent other port terminal facilities compete with port terminal facilities at Pinkenba. The identification of the general area where a PTSP is likely to source grain from is also relevant to the assessment of whether port terminal facilities at Pinkenba are subject to a level of competitive constraint from local markets for containerised grain export port terminal services and domestic consumption.

The ACCC notes that the Code does not define 'grain catchment area', however understands that the grains industry generally refers to it as a geographic area within which it is typically economically viable for grain to move to a particular port for export. Grain catchment areas generally relate to the established transportation links, including rail networks and road pathways, that connect each port terminal facility to grain growing regions, as well as associated upcountry grain storage facilities.

The ACCC recognises that there is a level of fluidity to grain catchment areas. However, the ACCC considers that the extent to which it is economically viable for exporters (or growers) to move grain from certain geographic areas to different ports is relevant to the assessment of the extent to which PTSPs impose competitive constraint on each other.

2.1.1. Assessment of the Pinkenba grain catchment area and the PTSPs that compete in it

The ACCC considered the grain catchment area for the Port of Brisbane in the context of its assessment of applications for exemption by GrainCorp and QBT in 2015 (the 2015 Port of

Brisbane exemption assessments).⁶ The ACCC's draft view is that the grain catchment area for Pinkenba is the same as the grain catchment area for the Port of Brisbane.

In assessing the Port of Brisbane grain catchment area in 2015 the ACCC considered the views of stakeholders and Grain Trade Australia (GTA) 'Locational Differentials'. A Location Differential is a value attributed to an upcountry bulk grain storage and handling facility.⁷ These values are representative of transport costs to move grain from a specific upcountry site to various port terminal facilities for export.

In the 2015 assessment, the ACCC concluded that:

- the grain catchment area for the Port of Brisbane spans across most of the grain growing regions of southern Queensland and certain parts of northern NSW,⁸
- the grain catchment areas for GrainCorp's and QBT's facilities at the Port of Brisbane are similar, however QBT's is likely to be smaller as it is more limited to locations where road transport is competitive,⁹
- there is only limited overlap between the grain catchment areas for the Port of Brisbane and the Port of Newcastle and therefore PTSPs operating at the Port of Newcastle (GrainCorp and Newcastle Agri Terminal) impose a very limited degree of competitive constraint on GrainCorp and QBT at the Port of Brisbane.¹⁰

As illustrated by figure 2.1 below the ACCC notes that the Applicants' facilities at Pinkenba are located in close proximity to the GrainCorp and QBT facilities at the Port of Brisbane.

⁶ Documents relevant to this assessment including applications for exemption by GrainCorp and QBT, are available on the ACCC website at: <https://www.accc.gov.au/regulated-infrastructure/wheat-export/exemption-from-parts-of-the-wheat-port-code/port-of-brisbane-wheat-ports-exemption-assessments>.

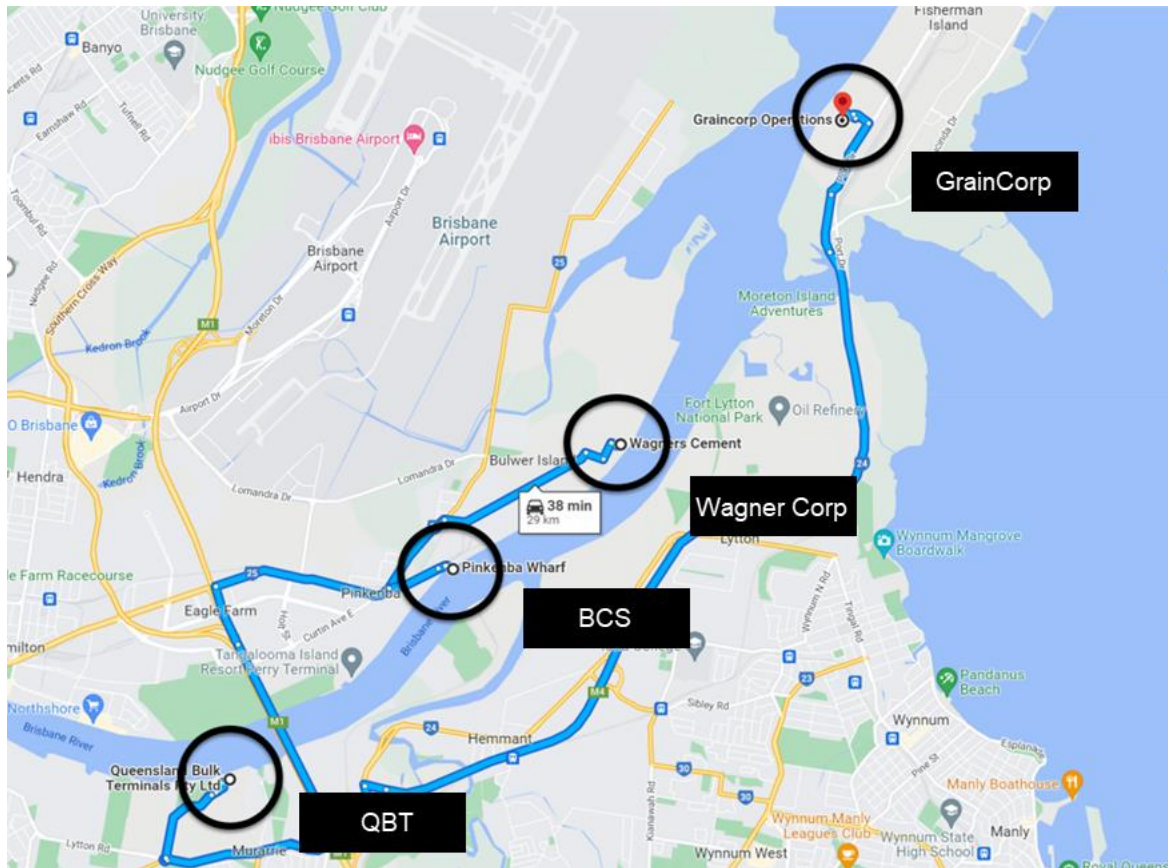
⁷ Grain Trade Australia, *Understanding GTA Location Differentials*, 20 April 2018. Available at: https://www.graintrade.org.au/fact_sheets.

⁸ ACCC, *Draft determinations: GrainCorp Operations Limited and Queensland Bulk Terminals at the Port of Brisbane*, 27 August 2015, pp. 31-38.

⁹ ACCC, *Final determinations: GrainCorp Operations Limited and Queensland Bulk Terminals at the Port of Brisbane*, 24 September 2015, p. 13.

¹⁰ ACCC, *Final determinations: GrainCorp Operations Limited and Queensland Bulk Terminals at the Port of Brisbane*, 24 September 2015, p. 13, p.18.

Figure 2.1: Map of port terminal facilities at Pinkenba and the Port of Brisbane



Both Applicants submitted that the grain catchment area for Pinkenba is the same as the grain catchment area for the Port of Brisbane identified by GrainCorp in its 2015 application for exemption.

BCS submitted that:

The grain catchment area provisioning export grain handled by BCS (Refer Appendix 3) is largely from Northern New South Wales and the central Queensland growing region (Refer Appendix 4).¹¹

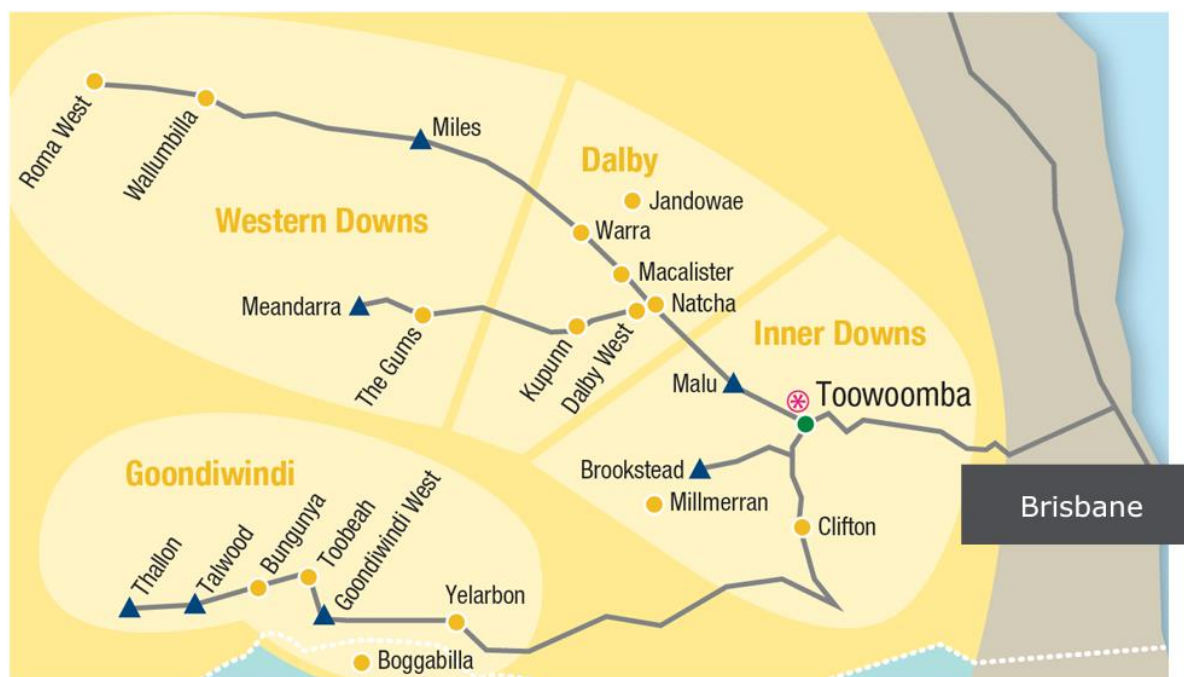
Wagner Corp submitted that:

The Pinkenba Wharf is located in Brisbane, close to both the Port of Brisbane and the Wilmar Gavilon terminal operated by QBT. The new Grain Export Equipment will therefore service the same grain catchment as the Brisbane Port Zone identified by GrainCorp in its application for exemption in 2015 (per Figure 1 below).¹²

¹¹ Bulk Cargo Services, *Application for Exemption*, 26 August 2022, p. 3.

¹² Wagner Corp, *Application for exemption*, 12 October 2022, p. 1.

Figure 2.2: Map of Port of Brisbane grain catchment area submitted by GrainCorp in its 2015 application for exemption, referenced by the Applicants



2.1.2. ACCC draft view on the Pinkenba grain catchment area and the PTSPs that compete in it

The ACCC's draft view is that the grain catchment area for Pinkenba is the same as the grain catchment area for the Port of Brisbane. Consistent with the view expressed in the 2015 Port of Brisbane exemption assessments, the ACCC's draft view is that:

- the Pinkenba grain catchment areas spans across most of the grain growing regions of southern Queensland and certain parts of northern NSW.
- there is limited overlap between the Pinkenba grain catchment area and the grain catchment area for the Port of Newcastle.

As PTSPs operating at the Port of Newcastle (GrainCorp and Newcastle Agri Terminal) likely impose a very limited degree of competitive constraint on PTSPs operating in the Pinkenba grain catchment area, these draft determinations focus primarily on the level of competitive constraint imposed by PTSPs operating at Pinkenba and the Port of Brisbane.

2.2. Level of competitive constraint imposed by other providers of bulk grain export port terminal services in the Pinkenba grain catchment area

The ACCC considers that competing PTSPs provide the most direct form of competitive constraint to an applicant for exempt service provider status.

Noting the ACCC's view set out in section 2.1.2, the ACCC considers the port terminal facilities most relevant to this assessment are those operated by BCS and Wagner Corp at Pinkenba, and GrainCorp and QBT at the Port of Brisbane. In addition to competing port terminal PTSPs at the Port of Brisbane, the Applicants also likely face some level of competition from GrainCorp and NAT at Port of Newcastle.

The ACCC considers that the following matters are relevant to the assessment of the level of competitive constraint imposed by competing PTSPs to an applicant for exempt service provider status:

- the nature of the services offered by competing PTSPs
- the likely amount of spare capacity competing PTSPs have to offer.

2.2.1. The nature of the services offered by competing PTSPs

The ACCC considers the level of competitive constraint imposed by competing PTSPs depends in part on the nature of the services that those PTSPs provide.

If an applicant is competing with a PTSP that can provide services that are equivalent to or potentially more efficient than its own, that competing PTSP would be expected to impose a high level of competitive constraint on the applicant. This is because where an applicant's existing and potential customers can secure equivalent (or potentially more efficient and additional) services from a competitor, it will likely have strong incentives to offer exporters fair and transparent access to its services.

Table 2.1 sets out the nature of the services offered by BCS and the competing GrainCorp and QBT facilities at the Port of Brisbane. Wagner Corp's operational approach (likely involving the use of multiple ship loaders) means the characteristics of its facility are likely to vary over time. The ACCC notes however that the characteristics of Wagner Corp's facility are expected to be similar to BCS' (for example, grain will be loaded via a mobile ship loader, grain will be received by road only, see section 2.2.2 below).

Table 2.1: Overview of port terminal facilities at Pinkenba and Port of Brisbane

	BCS	GrainCorp	QBT
Rail receipt	No	Up to 2,200 t/hr	No
Road receipt	Up to 200 t/hr	Up to 400 t/hr	Up to 350 t/hr
Loader rate	200-225 t/hr	Up to 2,200 t/hr	Up to 1,200 ht/hr
Storage capacity	31,500	112,700	70,000
Vessel capacity	Up to 30,000	Up to 70,000	Up to 55,000
Vessel type	Up to Handimax	Up to Panamax (QBT's estimate)	Average Handymax
PTSP estimate of annual capacity	360,000	2,000,000	960,000

Source: BCS, GrainCorp and QBT applications for exemption.

In relation to the port terminal services that the Applicants offer compared to those offered by GrainCorp and QBT, as illustrated by Table 2.1 GrainCorp and QBT are able to:

- offer exporters more efficient loading services (through the use of fixed ship loaders)¹³
- offer exporters more at-port storage
- offer exporters the ability to load larger vessels
- in the case of GrainCorp, offer exporters the ability to deliver grain by rail.

The ACCC considers that the ability of GrainCorp and QBT to provide equivalent (or additional services) with greater efficiency imposes a high level of competitive constraint on the Applicants. That is, the ACCC considers that the Applicants have and will continue to have strong incentives to provide exporters fair and transparent access to their respective facilities to attract and maintain exporter use of these facilities.

The ACCC notes that while the nature and efficiency of the services offered by GrainCorp and QBT mean that they impose a high level of competitive constraint on the Applicants, the ACCC considers that the services provided by the Applicants represent valuable additional export pathways in the Pinkenba grain catchment area.

Variable nature of Wagner's port terminal facility

Wagner Corp has submitted that its port terminal facility will not involve the a single ship loader being used to load bulk grain at its Pinkenba wharf. Rather, port terminal services will be delivered via a mobile ship loader that is owned or rented by Wagner, Rain-Ag or another party on a case-by-case basis. As such, the characteristics of Wagner's facility have not been included at table 2.1.

Wagner Corp has however submitted in relation to its port terminal facility that:

- the expected capacity of its facility will be no more than 300,000mt per annum,¹⁴
- it does not have on-site grain storage or rail receivable capabilities.¹⁵

2.2.2. Likely amounts of spare capacity offered by competing PTSPs

The ACCC considers that the amount of capacity available at competing port terminal facilities can impact the strength of a PTSP's incentives to provide fair and transparent access to its services.

The ACCC generally considers that an exporter's ability is to shift all or part of their business to the PTSP that can best accommodate its needs depends on:

- the number of PTSPs competing in a particular grain catchment area, and
- the amount of port terminal capacity available to exporters competing in that grain catchment area.

The ACCC considers that where a PTSP is aware that its competitors can meet all or part of its customers' capacity needs, this likely provides the PTSP with strong incentives to provide exporters fair and transparent access to services.

¹³ Wagner Corp did not submit on its likely loader rate however did submit that a mobile ship loader will be used to load grain. Accordingly, it will not be able to load grain as efficiently as GrainCorp and QBT can via their respective fixed ship loaders.

¹⁴ Wagner Corp, *Application for exemption*, p. 1.

¹⁵ Wagner Corp, *Application for exemption*, p. 3.

Table 2.2 demonstrates that even with record exports from the GrainCorp and QBT facilities in the 2021–22 shipping year,¹⁶ these facilities have typically had significant amounts of spare capacity in both peak and off-peak periods.¹⁷

Table 2.2: Estimated capacity and capacity utilisation figures for Pinkenba and Port of Brisbane port terminal facilities (2014–15 to 2021–22)

Facility	Estimated capacity ¹⁸	Average exports	Average peak utilisation	Average off-peak utilisation
GrainCorp	2.01mt	0.53mt	22%	17%
QBT	0.96mt	0.12mt	31%	20%
BCS	0.42mt			
Wagner Corp	0.30mt			

Adding the estimated capacity of the Applicants' facilities to the estimated capacity of GrainCorp and QBT's facilities, there will be an estimated 3.69 million tonnes of bulk grain export port terminal capacity in the Pinkenba grain catchment area against an average annual export task of 0.65 million tonnes.

The ACCC considers that in most shipping years the Applicants will be offering services to exporters who will have the ability to have their capacity needs met by GrainCorp and/or QBT. Combined with the fact that GrainCorp and QBT can offer more efficient and diverse services, the ACCC considers that the likely high levels of spare capacity available at these competing facilities provides the Applicants with strong incentives to provide fair and transparent access to their port terminal services.

2.2.3. ACCC draft view on level of competitive constraint imposed by other PTSPs on the Applicants at Pinkenba

The ACCC's draft view is that the Applicants are subject to a high level of competitive constraint from competing PTSPs in the Pinkenba grain catchment area.

The basis for the ACCC's draft view is that:

- The Applicants compete for grain with GrainCorp and QBT in the Pinkenba grain catchment area.
- QBT and particularly GrainCorp offer more efficient and diverse services than the Applicants (both provide faster loading rates, higher volumes of at-port storage and the ability to load larger vessels, in the case of GrainCorp the ability to receive grain via rail).
- QBT and GrainCorp typically have high levels of spare capacity in both peak and non-peak periods. This means that in most years exporters considering using the Applicants' facilities will have the ability to secure the more efficient and diverse services offered by GrainCorp and QBT.

¹⁶ The peak utilisation rate was well above average at both Fisherman Islands GrainCorp and Brisbane QBT in 2021-22 at 64% and 75% respectively.

¹⁷ The peak shipping period is the period where exporter demand for bulk grain shipment port terminal services is highest, typically from 1 February until 31 May each year. The off-peak shipping period is therefore 1 June until 31 January. However, the ACCC has observed that the peak period appears to be extending into later months. In recent record bulk export years, the ACCC has observed continued high export levels after the peak period.

¹⁸ Estimated capacity reflects estimates provided by BCS, GrainCorp and QBT in their respective applications for exemption.

2.3. Level of competitive constraint imposed by markets for containerised grain exports

Grain can be exported either in bulk or via containers. The ACCC understands that:

- containerised grain export markets allow growers and exporters to access international customers who demand high quality and niche grain products in relatively small volumes (compared to the bulk market);
- some international customers are unable to receive grain via bulk shipments due to limitations in port infrastructure or lack of finances, and so receive grain via containers; and
- exporters may also respond to price signals in the global container trade and bulk vessel markets.

As such, the ACCC does not consider containerised grain exports to be a perfect substitute for bulk grain exports. However, containerised grain exports may provide a viable alternative export path for some growing regions, niche and high-quality products, or for particular destinations.

2.3.1. Level of competition the Applicants face from markets for containerised grain export port terminal services

Queensland has on average the second highest proportion of containerised grain exports in Australia. Most of Queensland's containerised grain exports are facilitated at the Port of Brisbane (that is, in the Pinkenba grain catchment area).

Table 2.3 demonstrates that a significant amount of grain exported from the Pinkenba grain catchment area (which is the same as the grain catchment area for the Port of Brisbane) is exported via containers. Overall, since the 2014–15 shipping year 33% of all grain exported out of the Pinkenba grain catchment area was exported via containers. However, in 2021–22 (a record production and bulk export year in Queensland), container exports represented 13% of total shipments.

Table 2.3: Comparison of bulk and containerised grain exports from the Pinkenba grain catchment area (2014–15 to 2021–22)

	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20	2020-21	2021-22	Total
Bulk	0.84	0.83	1.23	0.33	0.06	0.11	1.40	2.35	4.80
Containerised	0.41	0.42	0.58	0.26	0.18	0.16	0.44	0.36	2.50

2.3.2. ACCC draft view on the level of competitive constraint the Applicants face from markets for containerised grain export port terminal services

The ACCC's draft view is that given a relatively high proportion of grain exported from the Pinkenba grain catchment is via containers from the Port of Brisbane, the market for containerised grain export port terminal services likely imposes a considerable level of competitive constraint on the Applicants. The ACCC notes however that the level of constraint is likely to vary across years and for certain commodity types.

The ACCC notes that the types and volumes of grain exported via containers will depend on production volumes and market demand in particular shipping years. For example, in the high production 2020–21 and 2021–22 shipping years where international demand for bulk

grain was also high, containers represented a smaller proportion of overall exports. Further, as reported in the *Bulk grain ports monitoring report– data update 2020-21* a shortage of containers (and associated disrupted global shipping operations) has affected containerised grain export markets. Greater access to containers and the resumption of more typical shipping practices is likely to take several years. Therefore, while the average volume of containerised bulk grain exports from the Port of Brisbane since 2014–15 suggests containerised grain exports will impose a considerable level of competitive constraint on the Applicants, it may be impacted by container availability in the near-term and may have impacted 2021–22 container volumes.

2.4. Level of competitive constraint imposed by domestic demand

The ACCC notes that domestic demand affects the amount of grain that is available for export. The ACCC understands that Australia’s domestic markets are generally considered within the industry to have ‘first call’ on grain, with the amount of grain remaining after demand in domestic markets has been satisfied often referred to as the ‘exportable surplus’.

Given the differences in the type of grain required for each market, the domestic market is often not a directly interchangeable market with the bulk export market. For example, the domestic feed market demands lower protein wheat compared to the overseas milling market’s demand for the bulk export of high protein wheat. However, the ACCC understands that this is client driven and therefore grain preferences may shift.

While usually producing one of the smallest crops, Queensland has a relatively large domestic market, usually third in volume behind NSW and Victoria. In the 2021–22 shipping year domestic consumption represented 49% of Queensland’s grain usage. Domestic consumption often exceeds the state’s production volumes, and therefore Queensland often relies on transfers from other states to meet demand.

BCS referenced this high level of domestic demand relative to production, submitting that:

The size of the domestic consumptive demand limits any ability for BCS to exercise power over the Brisbane port zone.¹⁹

Wagner Corp did not submit on the extent of competitive constraint imposed by the domestic market.

2.4.1. ACCC draft view on the level of competition the Applicants face from domestic demand

In previous exemption assessments some stakeholders have expressed the view that since the domestic market has ‘first call’ on grain, it does not place a competitive constraint on the bulk export market.²⁰ However, consistent with views previously expressed by the ACCC, the ACCC continues to consider that the presence of the domestic market imposes some constraint on bulk export markets.

The ACCC notes that data on domestic demand for grain specifically in the Pinkenba grain catchment area is not readily available.

¹⁹ BCS, *Application for Exemption*, p. 5.

²⁰ See page 151 of the April 2021 Viterra Final Determinations. Available at: <https://www.accc.gov.au/regulatinfrastructure/wheat-export/wheat-export-projects/viterra-wheat-port-exemption-assessment/final-determinations-innerharbour-outer-harbor-wallaroo-and-port-giles>.

Given Queensland's domestic consumption can exceed its production, the ACCC's draft view is that the Queensland domestic market likely imposes some degree of competitive constraint on the Applicants at Pinkenba.

2.5. ACCC draft view on the overall level of competitive constraint the Applicants face at Pinkenba

The ACCC's draft view is that the Applicants are subject to:

- a high level of combined competitive constraint from other providers of bulk grain export port terminal services (primarily from GrainCorp and QBT at the Port of Brisbane, but also from each other's small-scale operations)
- a considerable level of competitive constraint from the market for containerised grain exports at the Port of Brisbane, and
- an additional level of competition from the southern Queensland market for domestic consumption.

The ACCC's draft view is that overall the Applicants are subject to a high level of competitive constraint which provides them with strong incentives to provide exporters fair and transparent access to their respective port terminal services. The ACCC's draft view is that because these incentives are competition-driven, they will not be impacted by being granted exemption from Parts 3 to 6 of the Code.

3. Draft consideration of whether the Applicants should be granted exemption

This chapter sets out the ACCC's draft assessment of whether it should determine, under subclause 5(2) of the Code, one or both of the Applicants to be exempt service providers in relation to their respective port terminal facilities at Pinkenba. This assessment draws on the findings in chapters 2 regarding the level of competitive constraint faced by the Applicants.

Subclause 5(3) of the Code provides that in making a determination under subclause 5(2) the ACCC must have regard to the following matters:

- 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 below is set out against the matters which the ACCC must have regard to in subclauses 5(3)(a) to (j) of the Code.

Overlapping nature of subclause 5(3) matters

The ACCC notes that a number of the subclause 5(3) matters 'overlap' to some extent. For example, the ACCC considers that:

- the interests of exporters who may require access to port terminal services (subclause 5(3)(c)) includes an interest in having fair and transparent access to port terminal services (subclause 5(3)(d)); and
- exporters securing fair and transparent access to port terminal services (subclause 5(3)(d)) will likely promote efficient investment in port terminal facilities (subclause 5(3)(f)) and competition in relevant upstream and downstream markets (subclause 5(3)(g)).

The ACCC also considers that a PTSP's legitimate business interests needs to be balanced against a number of other subclause 5(3) matters, including other specific interests that the ACCC is required to consider. Unlike the examples of overlap noted above (subclauses 5(3)(c) and 5(3)(d); 5(3)(d), 5(3)(f) and 5(3)(g)), the ACCC does not consider that these

interests will always be aligned and the ACCC's assessment includes balancing these interests.

For example, the ACCC considers that the legitimate business interests of the PTSP (subclause 5(3)(a)) will not necessarily align with the public interest in having competition in markets (subclause 5(3)(b)) and the interests of exporters who may require access to port terminal services (subclause 5(3)(d)), if the PTSP is not subject to sufficient competition in the provision of port terminal services.

(a) the legitimate business interests of the PTSP

In deciding whether to exempt a PTSP, subclause 5(3)(a) of the Code requires the ACCC to have regard to the PTSP's legitimate business interests.

Relevant submissions by the Applicants

BCS submitted that:

Whilst BCS is committed to servicing grain exporters from the PCUB, the obligations imposed on service providers by The Code are significant and costly. An exemption for [from] Parts 3-6 of The Code would allow BCS to continue to provide the Export Services effectively, on a competitive basis whilst supporting growth and flexibility to its operations.²¹

Wagner Corp submitted that:

Given the limited nature of the Grain Export Equipment (i.e. permission to use mobile grain ship-loading equipment on a general cargo wharf), the regulatory costs associated with compliance are disproportionately high.²²

Wagner Corp is concerned that the application of the Code will impose costs and inflexibility on the operations at Pinkenba, in circumstances where grain exporting is a limited part of the total operations at the wharf (which are principally focussed on the import of cement clinker). Amongst other things, these features of the Code are likely to impose operational constraints on the Grain Export Equipment.²³

ACCC draft consideration

The ACCC considers that an exemption will be in a PTSP's legitimate business interests where there are sound 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 recognises that regulation imposes costs, both direct and indirect, on the regulated business. To the extent that compliance with the obligations under Parts 3 to 6 of the Code results in such costs, the ACCC considers that this is appropriate to the extent necessary to ensure that the Code's purpose is achieved (that is, ensuring that exporters of bulk wheat have fair and transparent access to port terminal services).

The ACCC is not in a position to assess the direct (or indirect) costs Parts 3 to 6 the Code impose upon the Applicants (or any other PTSP) and specific estimates were not submitted by the Applicants. In relation to the direct costs of the Code, the ACCC accepts that the costs of compliance with the full Code are likely significant and that being granted an

²¹ BCS, *Application for Exemption*, p. 5. PCUB refers to the Pinkenba Common User Berth.

²² Wagner Corp, *Application for exemption*, p. 4.

²³ Wagner Corp, *Application for exemption*, p. 4.

exemption from Parts 3 to 6 of the Code would substantially reduce a PTSP's direct costs of complying with the Code. The Department of Agriculture, Fisheries and Forestry²⁴ provided estimates on compliance costs prior to the commencement of the Code, as follows:

The mandatory code at its introduction was estimated to impose a lower direct cost of \$360,000 per year for operators subject to the full provision of the Code and only \$20,000 per year for exempt operators.²⁵

In addition to direct regulatory costs, the ACCC acknowledges that Parts 3 to 6 of the Code have the potential to reduce a PTSP's flexibility to respond to its customers, imposing indirect costs. The ACCC also considers that increased operational flexibility could also benefit other parties, particularly exporters, in circumstances where exporters are able to secure fair and transparent access to port terminal services.

The ACCC considers that compliance costs may be particularly significant for smaller-scale PTSPs only operating a single port terminal facility, given that compliance costs will be proportionately higher compared to overall costs and revenue. A larger PTSP operating multiple port terminal facilities may be able to spread compliance costs over its facilities. The Applicants operate one small-scale facility each therefore their compliance costs may be proportionally higher for these operations.

ACCC draft view

The ACCC's draft view is that an exemption is in the legitimate business interests of the Applicants.

If the Applicants are determined to be exempt service providers, they could be expected to engage more freely in commercial negotiations with exporters and offer tailored access agreements. They would also face reduced direct and indirect Code-compliance costs, largely due to having greater flexibility in how they provide their services.

Given the Applicants have competition-driven incentives to provide exporters fair and transparent access to their services (which would be unaffected by being granted exemptions), the ACCC's draft view that the increase in operational flexibility and reduction in Code-compliance costs is in the Applicants' legitimate business interests.

However, the ACCC considers that the Applicants' legitimate business interests must be balanced against the other matters the ACCC must have regard to in subclause 5(3) of the Code.

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

In deciding whether to exempt a PTSP, subclause 5(3)(b) requires the ACCC to consider the public interest, including the public interest in having competition in markets, and subclause 5(3)(g) requires the ACCC to consider the promotion of competition in upstream and downstream markets.

²⁴ Then the Department of Agriculture and Water Resources.

²⁵ AEGIC, *Australia's grain supply chains – costs, risks and opportunities*, October 2018, p. 35.

Relevant submissions by the Applicants

BCS submitted that:

Granting an exemption to BCS and subsequently removing the onerous obligations of Parts 3-6 of The Code will permit BCS, even in a limited capacity, to increase competition in the market, pursue innovation in agriculture and drive supply chain efficiencies.²⁶

and

It is unlikely that BCS receiving an exemption would lessen competition in upstream and downstream markets. The size of the domestic consumptive demand limits any ability for BCS to exercise power over the Brisbane port zone.²⁷

Wagner Corp submitted that:

The availability of the Grain Export Equipment provides exporters with a new and competitive alternative to the major grain (and exempt) exporters from Brisbane – GrainCorp and QBT.²⁸

and

Wagner Corp do not own or operate any up-country storage or grain rail haulage services, so the Grain Export Equipment provides an entirely independent export option for Queensland grain exporters and traders, compared with other integrated options.

Wagner Corp anticipates that the operation of a smaller, independent export facility will be of particular benefit to smaller Queensland grain exporters and traders.²⁹

ACCC draft consideration

Competition in relevant markets for bulk grain export port terminal services

The ACCC considers that competition in relevant markets for bulk grain export port terminal services will be promoted by:

- applying Parts 3 to 6 of the Code to PTSPs that are not subject to a level of competitive constraint which provides them with incentives to provide exporters fair and transparent access to their services (that is, using regulation to ensure that a range of exporters are able to access services fairly and transparently)
- removing the application of Parts 3 to 6 of the Code to PTSPs that are subject to a level of competitive constraint which provides them with incentives to provide exporters fair and transparent access to their services.

As noted in chapter 2 the ACCC's draft view is that the Applicants are subject to a high level of competitive constraint in the market for bulk grain export port terminal services in the Pinkenba grain catchment area. This provides them with strong, competition-driven incentives to provide exporters with fair and transparent access to their services, which will not be impacted by being granted exemptions.

The ACCC's draft view is in these circumstances exempting the Applicants from having to comply with Parts 3 to 6 of the Code may increase their competitiveness in the market for bulk grain export port terminal services in the Pinkenba grain catchment area. For example, granting the Applicants exemptions may positively impact the number and nature of

²⁶ BCS, *Application for exemption*, p. 4.

²⁷ BCS, *Application for exemption*, p. 5.

²⁸ Wagner Corp, *Application for exemption*, p. 4.

²⁹ Wagner Corp, *Application for exemption*, p. 4.

exporters that are able to participate in the Pinkenba grain catchment area. Further, the additional operational flexibility the Applicants would have if granted exemptions would be valued by exporters. The ACCC's draft view is that granting the Applicants exemptions may promote competition in the market for bulk grain export port terminal services in the Pinkenba grain catchment area.

Competition in upstream and downstream markets

The ACCC considers that promoting competition in markets for bulk grain export port terminal services may promote competition in upstream and downstream markets. This is because maximising the demand for bulk grain export port terminal services in a grain catchment area will likely increase demand for goods and services in related markets. For example, the higher the overall demand for bulk grain export port terminal services in a particular grain catchment area, the higher the demand will be for grain, grain transportation services and grain storage and handling services.

As noted above, the ACCC's draft view is that granting the Applicants exemptions may promote exporter participation in the Pinkenba grain catchment area. Accordingly, the ACCC considers that granting the Applicants exemptions may promote competition in upstream and downstream markets that would benefit from increased demand for bulk grain export port terminal services (for example, the grain acquisition market, markets for grain storage and handling and grain transportation services).

While the ACCC's draft view is that granting the Applicants exemptions may promote competition in upstream and downstream markets, the ACCC considers that the extent of this impact is not clear at this time.

ACCC draft view

The ACCC's draft view is that:

- granting the Applicants exemptions will likely promote the Applicants' competitiveness as new entrant PTSPs and may promote exporter participation in the market for bulk grain export port terminal services in the Pinkenba grain catchment area
- promoting competition between PTSPs and exporter participation in the Pinkenba grain catchment area is in the public interest, including the public interest in having competition in markets, and may promote competition in upstream and downstream markets.

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

Subclause 5(3)(c) requires the ACCC to consider the interests of exporters who may require access to port terminal services in deciding whether to exempt a PTSP.

Relevant submissions by the Applicants

BCS submitted that:

Exemption will allow BCS to enter the grain export market as a service provider which undoubtedly, positively impacts grain exporters by not only increasing export capacities state wide, but also by endorsing a competitive market.³⁰

³⁰ BCS, *Application for exemption*, p. 5.

Wagner Corp submitted that:

The availability of the Grain Export Equipment provides exporters with a new and competitive alternative to the major grain (and exempt) exporters from Brisbane – GrainCorp and QBT.³¹

ACCC draft consideration

The ACCC considers that the obligations in Parts 3 to 6 of the Code seek to create certainty over how PTSPs provide their port terminal services. In order to provide this certainty these obligations restrict a PTSPs operational flexibility in certain ways.

For example, PTSPs that are required to comply with Parts 3 to 6 of the Code are required to, among other things:

- have a port loading protocol that includes a capacity allocation system,
- manage demand for its port terminal services in accordance with that port loading protocol (and capacity allocation system)
- if the PTSP proposes to allocate capacity more than 6 months in advance, have its capacity allocation system (and any subsequent variations) approved by the ACCC.

The ACCC considers that where a PTSP is not subject to a level of competition that provides it with incentives to provide exporters fair and transparent access to its services, the application of the obligations in Parts 3 to 6 are required to provide certainty over the fairness and transparency of access provided by that PTSP. In these circumstances the ACCC considers that to the extent the obligations in Parts 3 to 6 restrict a PTSP's operational flexibility, this is necessary to ensure that the Code's purpose of ensuring that exporters of bulk wheat have fair and transparent access to port terminal services is promoted. In these circumstances the ACCC considers that the application of Parts 3 to 6 of the Code to a PTSP is in the interests of exporters who may require access to port terminal services.

On the other hand, where a PTSP is subject to a level of competitive constraint that provides it with incentives to provide exporters with fair and transparent access to its services, the ACCC considers that the application of Parts 3 to 6 to the PTSP is unnecessary. In these circumstances the ACCC considers that any restrictions on a PTSP's operational flexibility would not be in the interests of exporters of bulk wheat.

ACCC draft view

As noted in section 2.5, the ACCC's draft view is that the Applicants are subject to a high level of competitive constraint that provides them with incentives to provide exporters fair and transparent access to their services.

As the Applicants are subject to a high level of competitive constraint, the ACCC considers the greater operational flexibility associated with an exemption can be expected to be exercised to the benefit of all exporters. Therefore, the ACCC's draft view is that granting an exemption to the Applicants is likely to be in the interests of exporters who may require access to port terminal services.

³¹ Wagner Corp, *Application for exemption*, p. 4.

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

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

Relevant submissions by the Applicants

BCS submitted that:

Exemption will reduce the compliance burden on BCS, supporting its entry into the export grain market as a service provider to exporters. Fair and transparent access to port terminal services by way of BCS's Export Services will be offered to grain exporters equally across the market and BCS does not intend to offer its Export Services exclusively.³²

Wagner Corp submitted that:

Wagner Corp is not a grain trader or exporter and does not own or operate any up country grain storage or handling facilities, or associated rail operations. Both the owner and operator of the Grain Export Equipment therefore have no economic incentive to limit or restrict access to the Grain Export Equipment by grain exporters or traders.³³

ACCC draft consideration

The ACCC considers that the following are key considerations in the assessment of the likelihood that exports will have fair and transparent access to port terminal services:

- the level of competitive constraint a PTSP is subject to, and
- whether the PTSP is an exporter or the associated entity of a grain exporter.

The ACCC considers that where a PTSP is subject to a high level of competitive constraint it will have strong incentives to provide exporters fair and transparent access to its services without Parts 3 to 6 of the Code applying.

As noted at section 2.5 the ACCC's draft view is that the Applicants are subject to a high level of competitive constraint that provides them with incentives to provide exporters with fair and transparent access to their services.

Where a PTSP has competition-driven incentives, the ACCC considers that granting a PTSP an exemption is unlikely to negatively impact the likelihood that exporters of bulk wheat will have fair and transparent access to port terminal services.

The ACCC considers that where a PTSP is also a grain exporter or the associated entity of a grain exporter, that PTSP likely has incentives to discriminate in favour of itself or the associated entity in the course of providing bulk grain export port terminal services.

The ACCC understands that the Applicants are not grain exporters and are not associated entities of grain exporters. The Applicants therefore do not have the ability to discriminate in favour of themselves as grain exporters in the course of providing exporters access to their port terminal services.

³² BCS, *Application for Exemption*, p. 4.

³³ Wagner Corp, *Application for exemption*, p. 1.

ACCC draft view

The ACCC's draft view is that because:

- the Applicants are subject to a high level of competitive constraint which provides them with incentives to provide exporters with fair and transparent access to their services, and
- the Applicants are not grain exporters or associated entities of grain exporters,

granting the Applicants exemptions is unlikely to negatively impact the likelihood that exporters of bulk wheat will have fair and transparent access to their port terminal services.

(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

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

Relevant submissions by the Applicants

BCS submitted that:

Exemption will reduce the compliance burden on BCS, enable efficient operation of the port terminal facility and encourage other operators to pursue similar supply chain innovation. Additionally, exemption will further support BCS's increased use of the port terminal facility since engaging in grain export.³⁴

Wagner Corp submitted that:

Ensuring that this equipment does not become subject to heavy-handed regulation under Parts 3-6 of the Code will therefore promote investment and increase diversity of export options for grain exporter [*sic*] and traders.³⁵

ACCC draft consideration

The ACCC considers that where PTSPs are subject to a high level of competitive constraint they will likely have strong incentives to provide exporters with fair and transparent access to their services. In these circumstances the ACCC considers that PTSPs will also likely have incentives to provide the benefit of the additional operational flexibility they have with an exemption to a range of exporters.

In addition to being in the legitimate business interests of the PTSP and the interests of exporters who may require access to services, the ACCC considers that granting a PTSP an exemption with competition-driven incentives may promote the efficient operation of the PTSP's facility. This is because increasing the operational flexibility of the PTSP will likely result in that PTSP being able to better respond to customer requests which it is incentivised to do to compete with other facilities.

Because the Applicants have incentives to provide exporters with fair and transparent access to its services without Parts 3 to 6 of the Code applying to their operations, the ACCC considers that applying these obligations to the Applicants is unnecessary. The

³⁴ BCS, *Application for Exemption*, p. 4.

³⁵ Wagner Corp, *Application for exemption*, p. 5.

ACCC considers that avoiding the application of unnecessary regulation (and promoting the efficient use of port terminal facilities) in a competitive market may encourage the Applicants to invest efficiently in their existing facilities. This is because the Applicants may be more inclined to invest in a port terminal facility that they have a greater level of operational control over. The ACCC considers that granting exemptions to applicants that are subject to a high level of competitive constraint may also promote efficient investment in port terminal facilities more broadly.

ACCC draft view

The ACCC's draft view is that because the Applicants have competition-driven incentives to provide exporters with fair and transparent access to their services granting the Applicants exemptions:

- will likely promote the efficient operation and use of the Applicants' port terminal facilities
- may promote efficient investment in the Applicants' port terminal facilities and port terminal facilities more broadly.

(h) whether the PTSP is an exporter or an associated entity of an exporter

In deciding whether to exempt a PTSP subclause 5(3)(h) requires the ACCC to consider whether the PTSP is an exporter or an associated entity of an exporter.

Relevant submissions by the Applicants

BCS submitted that:

BCS is not an exporter or an associated entity of an exporter.³⁶

Wagner Corp submitted that:

Wagner Corp is not a grain trader or exporter and does not own or operate any up country grain storage or handling facilities, or associated rail operations.³⁷

ACCC draft view

The ACCC understands that the Applicants are not grain exporters or associated entities of any grain exporters. The Applicants therefore do not have the ability to favour themselves in the course of providing bulk grain export port terminal services.

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

Subclause 5(3)(i) of the Code requires the ACCC to have regard to whether there is already an exempt service provider within the grain catchment area for the facility concerned.

The ACCC generally considers that where a PTSP is competing with an exempt service provider within a grain catchment area, this supports the PTSP's case for exemption.

The ACCC considers that where a PTSP is not subject to a level of competitive constraint that provides it with incentives to provide exporters with fair and transparent access to its

³⁶ BCS, *Application for Exemption*, p. 5.

³⁷ Wagner Corp, *Application for exemption*, p. 1.

services, it may be appropriate that Parts 3 to 6 of the Code apply to the PTSP despite the presence of competing exempt PTSPs in the relevant grain catchment area.

On the other hand, where a PTSP does have competition-driven incentives to provide exporters with fair and transparent access to its services, the presence of exempt service providers in the relevant grain catchment area will support the case for the PTSP's exemption. This is because the ACCC considers that having different regulatory arrangements for PTSPs that all have incentives to provide exporters fair and transparent access to their services when not required may lead to distortions in competition and efficiency.

ACCC draft view

The ACCC notes that there are 2 exempt service providers within the Pinkenba grain catchment area (GrainCorp and QBT both at the Port of Brisbane). The ACCC also notes that the ACCC's draft view is that the Applicants are subject to a high level of competitive constraint (primarily from the exempt GrainCorp and QBT operations).

Accordingly, the ACCC's draft view is that the presence of GrainCorp's and QBT's exempt operations in the Pinkenba grain catchment area support the Applicants' cases for exemption. The ACCC considers it appropriate that 2 smaller-scale new entrant service providers be subject to the same level of Code regulation as the larger-scale GrainCorp and QBT operations.

(j) any other matters the ACCC considers relevant

The ACCC does not consider there to be any other matters relevant to this assessment.

4. Draft Determinations

4.1. Draft determination for Bulk Cargo Services

The ACCC's draft determination is that BCS should be an exempt service provider of port terminal services provided by means of its port terminal facility at Pinkenba.

4.2. Draft determination for Wagner Corporation

The ACCC's draft determination is that Wagner Corp should be an exempt service provider of port terminal services provided by means of its port terminal facility at Pinkenba.