



Draft determination

Cargill Australia Limited, Port Adelaide

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

2 March 2020

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1. Introduction

The Australian Competition and Consumer Commission (ACCC) has made a draft determination that Cargill Australia Limited (Cargill) should be an exempt service provider of port terminal services at Port Adelaide, Inner Harbour.

This draft determination relates to an exemption under clause 5(2) of the Port Terminal Access (Bulk Wheat) Code of Conduct (the Code). The Code was prescribed by the Competition and Consumer (Industry Code – Port Terminal Access (Bulk Wheat)) Regulation 2014 under section 51AE of the Competition and Consumer Act 2010 (Cth). The Code commenced on 30 September 2014 and regulates the conduct of bulk wheat port terminal service providers (PTSPs) to ensure that exporters of bulk wheat have fair and transparent access to port terminal services.

The Code provides that the ACCC or the Minister for Agriculture (the Minister) may exempt a PTSP from the application of 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.

If the ACCC makes a final determination consistent with this draft determination, Cargill 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 Cargill should be an exempt service provider of port terminal services at Port Adelaide, Inner Harbour. The ACCC welcomes views on all aspects of its draft determination.

Submissions are due by 5:00 pm EST on **15 May 2020**. 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

All PTSPs that are not exempt 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
- make current standard terms and reference prices for each port terminal facility that it owns or operates publically available on their website.

Part 3 of the Code requires a PTSP:

- not to discriminate in favour of itself or its trading business or hinder third party exporters' access to port terminal services;
- to enter into an access agreement or negotiate the terms of an access agreement with an exporter to provide services if an exporter has applied to enter into an access agreement and certain criteria are satisfied;
- to deal with disputes during negotiation via specified dispute resolution processes including mediation and arbitration; and
- to include a dispute resolution mechanism in its standard terms and to vary standard terms in accordance with a prescribed procedure.

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 a PTSP to regularly publish its expected capacity, stock at port information 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 general competition law.

The ACCC can determine a PTSP to be an "exempt service provider of port terminal services provided by means of a specified port terminal facility" under subclause 5(2) of the Code.

According to clause 3, '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 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.

Thus the port terminal facility is the machinery for loading the bulk wheat (i.e. the ship loader and associated facilities) located at the specific port and can include a mobile ship loader.

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 PTSP;
- (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 Cargill's operation at Port Adelaide, Inner Harbour against each of these matters is set out in section 2 of this document.¹

1.2. Exemption application by Cargill

In October 2019, Cargill wrote to the ACCC seeking to be determined an exempt service provider of port terminal services for bulk wheat exports at Port Adelaide, Inner Harbour.

Cargill had an agreement with LINX to load grain at LINX's facility at Port Adelaide, Inner Harbour, and also use, and will continue to use, Viterra ports.²

Cargill has acquired a mobile ship loader and is proposing to develop and commence port terminal services at Port Adelaide, Inner Harbour. Cargill estimates that the nominal capacity of this proposed facility will be 300,000 tonnes per year. Cargill proposes to engage LINX for stevedoring and to, effectively, operate Cargill's facility for it and Cargill may continue using the facilities of others, including Viterra.³

On 22 January 2020 LINX advised the ACCC that it intends to cease its operations at Port Adelaide, Inner Harbour for the time being. This is further considered at section 2.5.

The exemption application is available on the ACCC's website at <https://www.accc.gov.au/regulated-infrastructure/regulatory-projects/cargill-wheat-port-exemption-assessment/exemption-application>.

1.3. Further information

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

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ACCC

¹ Further details about the ACCC's process for making and revoking exemption determinations under the Code are in the ACCC's guidelines, available at <https://www.accc.gov.au/publications/process-guidelines-for-making-revoking-exemption-determinations>.

² Cargill Australia Limited, *Application for exemption under the Port Terminal Access (Bulk Wheat) Code of Conduct*, p. 3.

³ *ibid*, p. 3.

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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 Cargill to be an exempt service provider at Port Adelaide, Inner Harbour.

2.1. Legitimate business interests of Cargill

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.

Cargill submits that:

Exemption from regulation under Parts 3 to 6 of the Code will provide Cargill with a higher level of operational flexibility and allow Cargill to maximise efficiencies resulting from the use of its new mobile grain ship loader.⁴

ACCC view

The ACCC considers that exempting Cargill at Port Adelaide, Inner Harbour would reduce its Code compliance costs, particularly noting that Cargill is currently not regulated under the Code and would otherwise be required to develop an entirely new compliance program.

The ACCC also 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 Cargill at Port Adelaide, Inner Harbour would be in its legitimate business interests. The ACCC considers that the legitimate business interests of Cargill should be considered against the reasons for having regulation in place and the level of competitive constraint faced by Cargill. The level of competitive constraint faced by Cargill and other matters relevant to an exemption are considered further below at sections 2.2 to 2.5.

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.

⁴ *ibid*, p. 6.

Cargill submits that:

Cargill's development of a new facility creates an alternative export supply chain in South Australia, a matter for which there is strong exporter, grower, and marketer support.⁵

Cargill also notes that:

Significantly, the development of an alternative supply chain from the point of grain production to ship loading would increase competition in the upstream markets of grain storage and grain trading.⁶

ACCC view

The ACCC believe there will be sufficient constraint on Cargill's operation at Port Adelaide, Inner Harbour to warrant making the exemption, as per the current arrangement involving LINX. To date Cargill has exported a small amount of grain using the LINX facility and had an overall 6 per cent share of the South Australian bulk export market in 2017-18.⁷ The ACCC notes that Cargill is a large global exporter and, while its share of the SA bulk wheat export market declined from 20 per cent in 2011-12 to 6 per cent in 2017-18, was still Australia's sixth largest exporter in the 2017-18 season.

Cargill's decision to purchase its own purpose built loader should make for a more flexible and efficient operation than it had in place with LINX. The ACCC notes that the efficiency of LINX's facility was limited as it was not a purpose built grain loader. Cargill's decision to enter the port terminal services market in this way may provide scope to engage further in the upstream wheat purchasing market and expand its downstream export activity. Historically it has previously participated to a greater extent in the SA upstream and downstream markets.

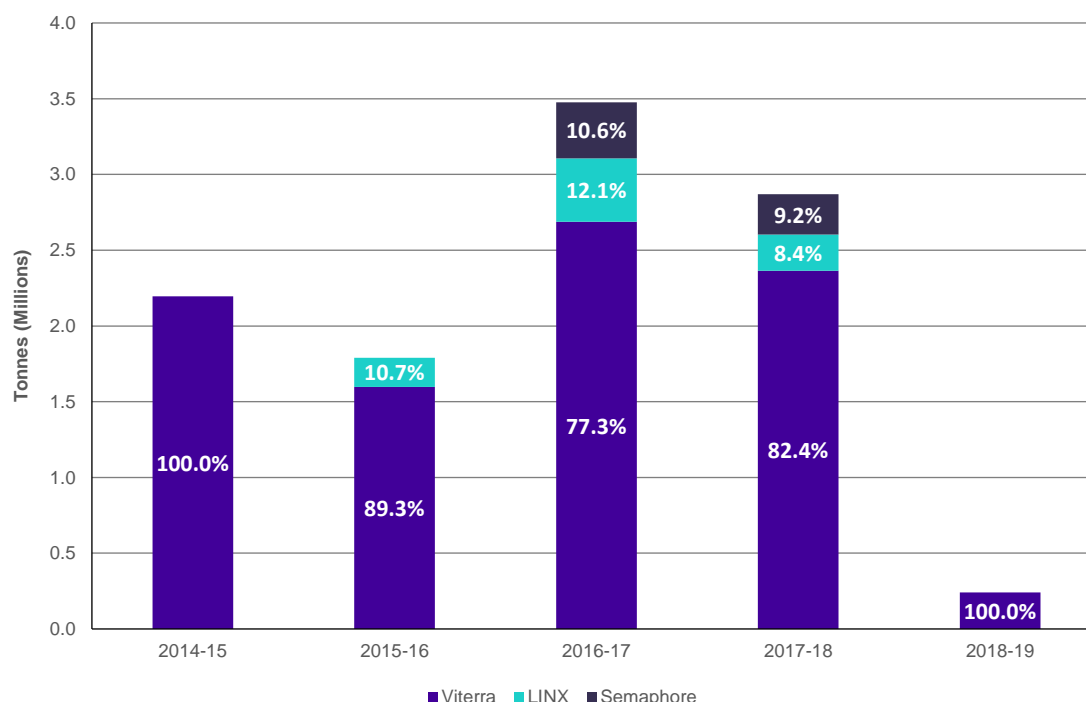
Recent export data below demonstrates the level of constraint Cargill will face at Port Adelaide, Inner Harbour from other PTSPs.

⁵ *ibid*, p. 7.

⁶ *ibid*, p. 8.

⁷ ACCC, *Bulk grain ports monitoring report 2018-19*, December 2019, p. 62. Cargill's 6 per cent share of the South Australian bulk export market in 2017-18 includes exports loaded by both LINX and Viterra.

Figure 1: Grain loaded by PTSP at Port Adelaide



Source: PTSP loading statements; and ACF Shipping stem and market share report.

Overall it remains the ACCC view that Viterra is the dominant PTSP at Port Adelaide, where it has two port operations (the smaller Inner Harbour and the more desirable deep water Outer Harbor facility). The ACCC considers that since Viterra's Port Adelaide port terminal facilities are significantly larger than the alternate PTSP facilities (at Port Adelaide), and that Viterra is an associated entity of SA's largest exporter Glencore who is unlikely to use an alternative supplier of port terminal services, Viterra will subsequently remain the dominant provider of port terminal services at Port Adelaide.

Cargill will also face competition from a second operator, Semaphore, who is also an exempt PTSP under the Code. Semaphore operates a small-scale facility, exporting 0.37 and 0.27 million tonnes of grain in 2016-17 and 2017-18 respectively, similar to Cargill's anticipated capacity of 300,000 tonnes.

In addition, Cargill is proposing to operate a mobile ship loader compared to a fixed permanent port terminal facility. As explored in the ACCC's recent monitoring report, the level of constraint posed overall by mobile ship loaders is not yet clear. There are clear benefits to competition in the market from the use of mobile ship loaders in the market. They have reduced barriers to entry for new PTSPs, with lower construction and establishment costs.⁸ Further, mobile ship loaders can be transported to load grain at various berths and ports. In its submission, Cargill has not indicated that it intends to operate out of multiple berths or ports. However, the extent to which mobile loaders present an ongoing competitive constraint remains unclear and recent trends suggest mobile loaders are less incentivised to operate when production had been low. In 2018-19 when production was marred by drought neither Semaphore nor LINX shipped.⁹

⁸ Department of Agriculture and Water Resource, *Review of the wheat port access code of conduct*, October 2018, p. 24.

⁹ ACCC, *Bulk grain ports monitoring report 2018-19*, December 2019, p. 2.

PTSPs also face competitive constraints from the local domestic market. Though the ACCC does not receive data on where domestic consumption is consumed within a state, the ACCC notes that SA as a whole has the smallest domestic market in Australia, where it consumes 1.2 million tonnes of grain. SA's domestic consumption has been fairly constant since the 2014-15 season and, once this domestic demand has been met, grain will typically need to be exported either via containers or in bulk. However, as has been demonstrated by the poor growing conditions along the east coast in the 2018-19 and 2019-20 seasons, grain can move in large quantities for interstate domestic consumption in certain market conditions.

In addition the ACCC notes that SA PTSPs operating at Port Adelaide face a minor competitive constraint from the container market. The container market has little to no presence in other parts of SA as 94 per cent of SA's container exports have been loaded at Port Adelaide since the 2014-15 season. Over this same time period Port Adelaide has, on average, exported 0.3 million tonnes of grain via container per season, which is significantly below Port Adelaide's average bulk exports of 2.1 million tonnes.

On average domestic consumption and container exports account for 16 and 4 per cent of SA grain production respectively over the 2014-15 to 2018-19 period. Subsequently, while the ACCC recognises that while both the domestic and container markets represent a competitive constraint, this constraint is likely to be limited.

The prospect of Cargill participating in the market (as owner of the loader) should also promote competition in the upcountry storage market, with Cargill having a greater incentive to use its existing network and potentially facilitate the export of others who store grain in its network.¹⁰ As owner of the loader Cargill should be able to provide greater certainty of service at port for both its own operations and other third parties.

Finally, the ACCC considers that having different regulatory arrangements for competing PTSPs when not required 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. If Cargill is not granted an exemption under the Code, it would be subject to a higher level of regulation than Semaphore, its most similar competitor, which has an existing exemption.

The ACCC considers that Viterra and Semaphore will provide a significant degree of competition to Cargill's bulk grain export operations. The ACCC considers that Cargill's operation across multiple stages of the bulk grain supply chain may provide growers with new opportunities when considering storage and marketing of their grain and increase competition along the bulk grain export supply chain. The ACCC's draft view is that exempting Cargill at Port Adelaide, Inner Harbour is in the public interest and will not be detrimental to competition in the market because:

- In the absence of full regulation under the Code, Cargill will continue to face a significant competitive constraint from Viterra's facilities, especially from the port terminals at Port Adelaide. Semaphore also offers a degree of competition. Cargill is therefore unlikely to be able to exert market power in the provision of port terminal services at Port Adelaide.
- Granting an exemption to Cargill would be consistent with previous exemptions granted to LINX and Semaphore who currently hold similar market share and market power compared to Cargill's proposed operation. This is despite LINX ceasing operations.

¹⁰ <https://www.cargill.com.au/en/grain-storage-and-handling>.

- Granting an exemption to Cargill may promote competition in grain storage particularly where Cargill operate storage facilities.

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, Cargill submits:

Generally, exporters (Cargill included), welcome the introduction of an alternate supply chain and this typically boosts flexibility and competition in the market place for bulk grain export services out of the port.¹¹

Cargill also submits that:

Notably, given that Cargill is a new entrant service provider, and this market is currently serviced by a monopoly service provider, Cargill has strong incentives to provide fair and transparent access in order to attract and maintain a customer base for its available capacity.¹²

Additionally, Cargill anticipates that the facility will have excess capacity which it will make available to third parties on a commercial basis.¹³

ACCC view

The ACCC notes that Cargill has historically been a significant exporter from South Australia. However, their share of overall exports from South Australia has declined from 20 per cent in the 2011-12 shipping year to 6 per cent in the 2017-18 shipping year.¹⁴ Cargill did not export through Port Adelaide in the 2018-19 shipping year.¹⁵

The ACCC considers that granting an exemption to Cargill is likely to be in the interests of both Cargill and other exporters in the market. The continuation of an alternate export pathway for SA grain is a positive development for exporters and growers. The presence of an alternate export pathway will also alleviate potential constraint at the other immediate facilities, and also benefit other exporters seeking certainty of services at port.

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

Noting that Cargill is a vertically integrated PTSP and will be incentivised to provide greater access to its own trading entity, the ACCC considers that, given the competitive constraint

¹¹ Cargill Australia Limited, *Application for exemption under the Port Terminal Access (Bulk Wheat) Code of Conduct*, p. 11.

¹² *ibid.*

¹³ *ibid.*, p. 10.

¹⁴ ACCC, *Bulk grain ports monitoring report 2018-19*, December 2019, p. 62.

¹⁵ *ibid.*, pp.65-66.

faced by Cargill in the port terminal services market, it will provide access to other exporters on fair and reasonable terms in the absence of regulation provided by the Code.

2.4. Economically efficient operation and efficient investment

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 efficient investment in port terminal facilities.

Cargill submits:

An exemption will promote the efficient use of and investment in Cargill's new facility, which Cargill would require to have any opportunity to effectively compete against Viterra, and, to a lesser extent, Semaphore and LINX, given they are currently already exempt service providers.¹⁶

Cargill also submits:

Granting the exemption will allow Cargill to redirect resources efficiently (that would otherwise have been used for compliance with the full Code), and thereby reduce its costs and improve its flexibility in meeting customer demands. This in turn would encourage small scale entry into the grain supply chain.¹⁷

ACCC view

The ACCC recognises that unnecessary regulation may discourage investment in port terminal facilities. The ACCC considers that while LINX is leaving the market, the competitive discipline provided by Viterra and Semaphore will be sufficient to encourage Cargill to make efficient investments, and deter inefficient investments, in its operation.

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

Given the competitive constraint faced by Cargill the absence of unnecessary regulation will drive greater operational efficiency, in part because Cargill will be able to operate more flexibly.

The ACCC also notes that, as part of its submission to the Code review, it recommended that the Code be amended to require parties that jointly provide port terminal services, such as Cargill and LINX, to nominate the party most responsible for fulfilling relevant Code obligations and to clarify, for example, related matters of reporting process. Cargill's decision to enter the PTSP market and seek exemption in its own right should improve accountability and transparency surrounding the operation of the new loader.

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

¹⁶ Cargill Australia Limited, *Application for exemption under the Port Terminal Access (Bulk Wheat) Code of Conduct*, p. 12.

¹⁷ *ibid.*

2.5. Other matters

In deciding whether to exempt a PTSP, subclause 5(3)(j) of the Code requires the ACCC to have regard to any other matters the ACCC considers relevant. It is relevant to note that this exemption assessment and Cargill's entry into the PTSP market will coincide with another PTSP, LINX, ceasing operations as a PTSP.

Cargill submits:

The future of LINX's facility at Berth 29, which has had exempt service provider status since October 2017, is not known to Cargill at this time. Cargill has been the only active exporter at Port Adelaide LINX since the 2015-16 shipping year.¹⁸

In the event that LINX might exit this market as a result of Cargill using its own facility for export, an exemption status for Cargill's facility is necessary to maintain the already limited competitive constraints on Viterra at Port Adelaide.¹⁹

ACCC view

On 22 January 2020 LINX advised the ACCC that it intends to cease its operations at Port Adelaide for the time being. LINX noted that Cargill was its only customer at Port Adelaide and, as Cargill will be commencing its own operation, LINX will not be operating its own port terminal facility at Port Adelaide for the foreseeable future.

The ACCC considers LINX leaving the market to be a relevant matter. However, as LINX previously provided PTSP services to Cargill, there may not be any significant change in overall exports and the level of competition for grain or port terminal services from Port Adelaide.

Furthermore, the ACCC notes that even in the absence of LINX's presence as a PTSP at Port Adelaide there is sufficient competition and competitive constraints imposed on Cargill to support the exemption.

3. Monitoring

Having considered the matters under subclause 5(3) of the Code, including the level of competition Cargill currently faces, the ACCC has formed the draft view that Cargill 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 South Australia.

The ACCC intends to pursue two main monitoring activities:

- *Industry analysis* – this will include examining the shipping activity at each South Australian 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

¹⁸ *ibid.*, p. 5.

¹⁹ *ibid.*, p. 13.

may have in securing fair and transparent access to South Australian bulk wheat port terminals.

The ACCC would be concerned if its monitoring revealed a reduction in the level of competition either across South Australia 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.

4. Draft determination

Based on the findings and reasons outlined above the ACCC has made a draft determination that Cargill should be an exempt service provider of port terminal services at Port Adelaide, Inner Harbour.

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.

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 the following email address:

transport@acc.gov.au

Please address submissions to:

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

Submissions are due by 5:00 pm EST on **15 May 2020**.

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.