



Australian  
Competition &  
Consumer  
Commission

Compliance with the Port Terminal Access  
(Bulk Wheat) Code of Conduct: information  
for industry participants

# **Guidelines on the ACCC's process for making and revoking exemption determinations**

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Australian Competition and Consumer Commission  
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### **Important notice**

This guide is designed to give you basic information; it does not cover the whole of the mandatory Code of Conduct and is not a substitute for professional advice. Moreover, because it avoids legal language wherever possible there may be generalisations about the application of the Code of Conduct.

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## Introduction

The *Port Terminal Access (Bulk Wheat) Code of Conduct* that commenced on 30 September 2014 (the Code) provides for an exemption process whereby a port terminal service provider may be exempted from certain provisions of the Code in relation to a specified port terminal facility. These guidelines set out the ACCC's process for considering whether to make an exemption determination.

An exempt port terminal service provider is not required to comply with the obligations in Parts 3 to 6 of the Code for the specified port terminal facility. These obligations include a non-discrimination requirement, dispute resolution for negotiations with access seekers regarding the terms of access, and ACCC approval of capacity allocation systems.

The ACCC may make a determination that a port terminal service provider is an exempt service provider, as provided by subclause 5(2) of the Code. In doing so, the ACCC must have regard to matters listed at subclause 5(3) of the Code (see box 1). The ACCC may revoke an exemption determination in accordance with subclause 5(6) of the Code if, after having regard to the matters in subclause 5(3), the ACCC is satisfied that the reasons for granting the exemption no longer apply.

A port terminal service provider may also be determined to be an exempt service provider if the Minister for Agriculture is satisfied the port terminal service provider is a cooperative that meets certain criteria at subclause 5(1) of the Code. This determination is made by the Minister. The ACCC does not have any role in these exemptions under subclause 5(1).

### **Box 1: Subclause 5(3) of the Code**

In making a determination under subclause (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.

These guidelines are published in accordance with subclause 5(9) of the Code and set out the ACCC's process for making or revoking an exemption determination. Unless the context requires otherwise, if a term is defined in the Code it has the same meaning in these guidelines as given to it in the Code.

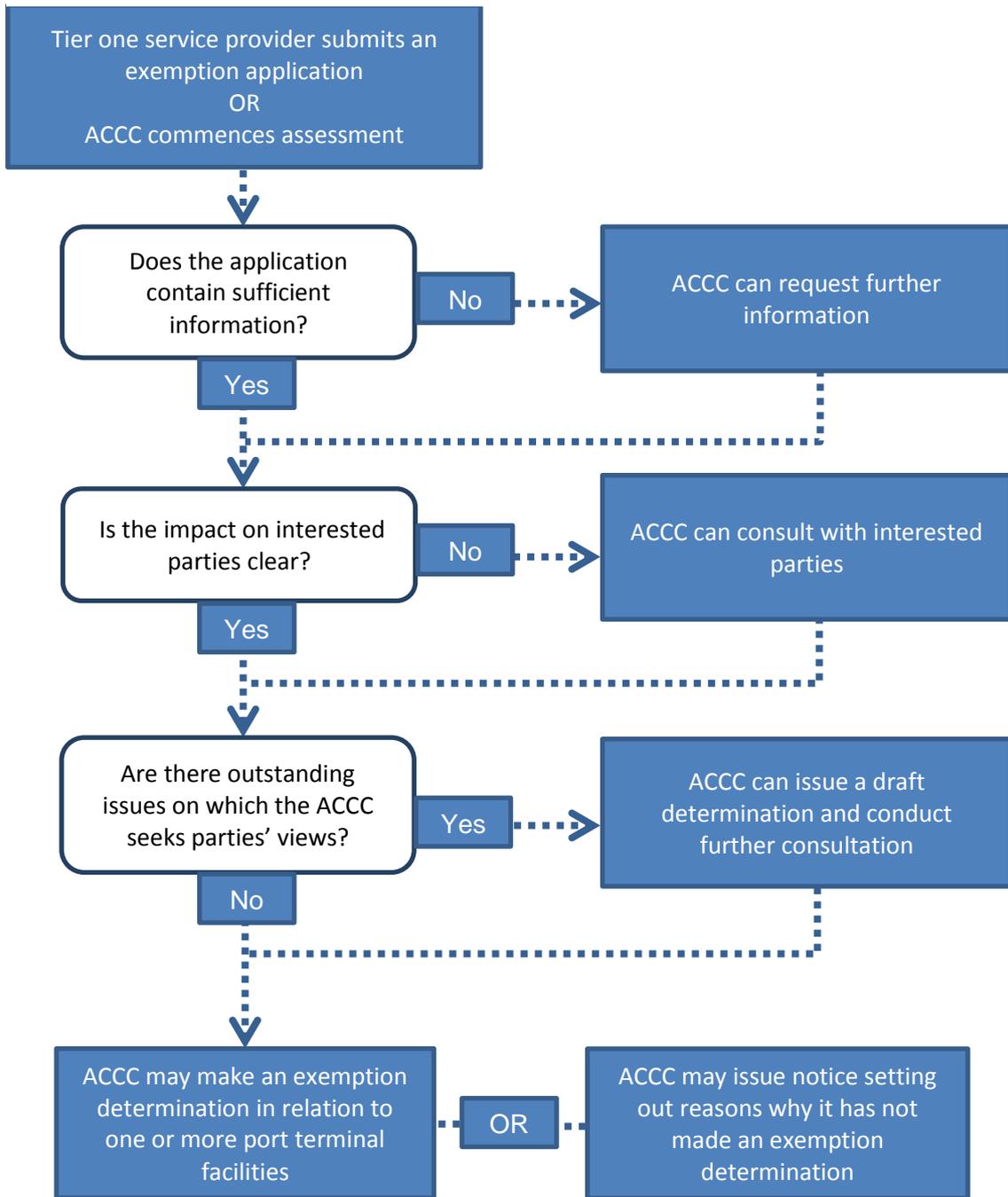
The ACCC may vary these guidelines from time to time, and will consult with parties subject to the Code on any substantive proposed changes. The ACCC will notify these parties of any changes as well as publishing the revised guidelines on the ACCC's website at [www.accc.gov.au/wheat](http://www.accc.gov.au/wheat).

## Making an exemption determination

Prior to making a determination under subclause 5(2) of the Code, the ACCC will undertake an exemption assessment process in which it will consider whether to make a determination having regard to the matters listed at subclause 5(3) of the Code. Each exemption assessment process is likely to be different and may include requests for information, consultation with interested parties, and a draft determination before the ACCC makes its final determination.

The following sections provide further detail about the potential stages in the ACCC's exemption assessment process. A diagram showing how each of the stages may typically interact is at Figure 1 below.

**Figure 1: Potential stages of an ACCC exemption assessment**



## **A port terminal service provider or the ACCC may initiate an exemption assessment**

To commence an exemption assessment, a port terminal service provider may submit an application to be an exempt service provider (an **exemption application**). This exemption application should include supporting documentation relevant to the ACCC's assessment. Further information on how to submit an exemption application, including what information is required, is on page 9 below.

Alternatively, the ACCC may decide to commence an exemption assessment without receiving an exemption application. In this case the ACCC will notify the port terminal service provider it has commenced an exemption assessment, and may invite the port terminal service provider to provide information relevant to the ACCC's assessment.

Where a port terminal service provider has submitted an exemption application in relation to more than one of its port terminal facilities, the ACCC will have regard to the matters listed at subclause 5(3) of the Code for each facility separately.

Some of these matters are similar to the matters listed at subsection 44ZZA(3) of the *Competition and Consumer Act 2010* (Cth) which the ACCC must have regard to in assessing access undertaking applications under Part IIIA. The ACCC's previous decisions in relation to Part IIIA access undertaking applications, including those in relation to access to wheat ports, are available on the ACCC's website at [www.accc.gov.au/wheat](http://www.accc.gov.au/wheat).

## **ACCC may request further information**

If the ACCC considers that it requires additional information from the port terminal service provider in order to properly assess whether the provider should be an exempt service provider, the ACCC may issue a written notice requesting that information. This notice, and the port terminal service provider's response, will be published on the ACCC's website (subject to the redaction of any confidential information in accordance with the ACCC's general confidentiality policy).

## **ACCC may consult with interested parties**

The ACCC may also consult with persons it considers reasonable and appropriate for the purposes of assessing the potential effects of the determination. This consultation may be in the form of a public consultation notice document calling for written submissions, stakeholder forums, meetings with interested parties, or a combination of these. The length of the consultation period will vary depending on the complexity of the issues, previous consultation with users on the proposal and the time of the year, for example.

## **ACCC may issue a draft determination**

The ACCC may form a preliminary view regarding whether the port terminal service provider should be an exempt service provider at the specified port terminal facilities. If the port terminal service provider has applied for an exemption in relation to multiple port terminal facilities, the ACCC may form a preliminary view in relation to each of the facilities.

Situations in which the ACCC may issue a draft determination include where there is contention about the likely impact of allowing a port terminal facility to be exempt from the relevant obligations or where there are other outstanding issues that the ACCC considers may benefit from further comment by industry.

Where the ACCC issues a draft determination it will provide an opportunity for parties to comment on the draft determination and the reasons underpinning the ACCC's preliminary view. The ACCC will then make a final decision on whether the port terminal service provider should be an exempt service provider for the specified port terminal facilities.

The length of the consultation period on a draft determination will extend the ACCC's timeframe for assessing an application for exemption.

## **ACCC may issue an exemption determination**

Following an exemption assessment, the ACCC may make a determination in writing that a port terminal service provider is an exempt service provider at a specified port terminal facility.

If the assessment relates to multiple port terminal facilities, the ACCC's exemption determination may relate to only some of those facilities. For example, a port terminal service provider may apply for an exemption in relation to two of its port terminal facilities, 'Port A' and 'Port B', where Port A is subject to significant competition from nearby facilities and Port B is not. The ACCC may determine that an exemption will be granted at Port A but not at Port B. The ACCC's exemption assessment will have regard to each of the matters at subclause 5(3) of the Code for each facility.

The ACCC's exemption determination will be accompanied by the reasons why it has determined that an exemption should be granted for each of the specified port terminal facilities.

Subclause 5(8) of the Code requires that the port terminal service provider advise the public of a determination on its website within 10 business days.

If a port terminal service provider has submitted an exemption application and the ACCC decides not to make a determination granting an exemption, the ACCC will provide the port terminal service provider with a notice setting out its reasons for that decision. This notice does not prevent the port terminal service provider from submitting future exemption applications in relation to that facility.

## **Timeframe for exemption assessments**

Where a port terminal service provider submits an exemption application, the ACCC will seek to conduct its exemption assessment and decide whether to make an exemption determination within 12 weeks. This timeframe may be extended where the ACCC:

- consults on the exemption application, and/or
- requests information from the port terminal service provider.

In general, where a port terminal service provider submits an exemption application the ACCC will notify the port terminal service provider within two weeks of receiving the application whether it intends to issue a consultation notice, and the length of the consultation period. The length of any consultation period(s) will extend the ACCC's timeframe for the exemption assessment.

The total time taken by the ACCC will depend on whether the port terminal service provider responds to requests for information by the ACCC in a timely manner. It will also likely depend on the complexity of the relevant markets and other issues relevant to consideration

of whether an exemption is appropriate, including issues raised by other industry participants.

## Reviewing and revoking an exemption determination

The ACCC may review an exemption determination with a view to revoking it as provided by subclause 5(6) in certain circumstances. The ACCC's process for reviewing and revoking an exemption determination will be similar in many respects to its process for conducting an exemption assessment and making a determination as outlined above.

Where the ACCC decides to review an exemption determination, the ACCC will notify the port terminal service provider that it has commenced a review, and may invite the port terminal service provider and other interested parties to provide information relevant to the ACCC's review.

If the ACCC forms a preliminary view that an exemption determination should be revoked, it will generally issue a draft revocation notice. This notice will set out the ACCC's consideration of the matters listed at subclause 5(3) of the Code and why the ACCC considers the reasons for granting the exemption may no longer apply.

The ACCC will provide an opportunity for parties to comment on a draft revocation notice. The ACCC will then make a final decision on whether the port terminal service provider's status as an exempt service for the specified port terminal facilities should be revoked.

If the port terminal service provider is an exempt port terminal service provider in relation to multiple port terminal facilities, the ACCC will separately consider whether the exemption determination should be revoked at each of the port terminal facilities.

Where the ACCC decides to revoke an exemption determination in accordance with subclause 5(6) of the Code, it will provide the port terminal service provider with a written **revocation notice**. This notice will state that the determination is revoked with effect from the end of the period of 3 months beginning on the date of the notice, as required by subclause 5(7). The notice will also be accompanied by the reasons why the ACCC considers that the reasons for granting the exemption no longer apply having regard to the matters at subclause 5(3) of the Code. The ACCC will publish this written revocation notice on its website.

Subclause 5(8) of the Code requires that the port terminal service provider advise the public of the ACCC's revocation notice on its website within 10 business days of being given the notice.

As noted above, the Minister for Agriculture may also determine that a port terminal service provider is an exempt service provider where it is a cooperative that meets certain criteria set out at subclause 5(1) of the Code. The ACCC cannot revoke a determination made by the Minister under subclause 5(1).

## How to submit an exemption application

A port terminal service provider may submit an exemption application in writing to the ACCC. Exemption applications should be addressed to:

The General Manager  
Infrastructure & Transport – Access & Pricing  
Infrastructure Regulation Division

Email: [transport@accc.gov.au](mailto:transport@accc.gov.au)

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

### ***What should be included in an exemption application?***

In order to ensure a timely assessment of an exemption application, the ACCC recommends that the port terminal service provider include in its initial application:

- a description of the port terminal facility, including:
  - the name of the facility
  - map(s) showing the location of the facility
  - whether the port terminal service provider is an exporter or whether it is an associated entity of an exporter, and in the latter case, identification of the exporter
- supporting documentation, which may include information and submissions regarding:
  - the annual capacity of the port terminal facility disaggregated by shipping window
  - current and prospective users of the port terminal facility
  - demand for capacity at the port terminal facility
  - any port terminal facilities owned or operated by other parties which the port terminal service provider considers provide a competitive constraint on the port terminal facility, and information about the nature of that constraint
  - any other potential sources of competitive constraint
  - the matters listed at subclause 5(3) of the Code.

The ACCC will publish the application and supporting documentation on its public website subject to confidentiality claims (see below).

## Confidentiality

Sections of documents submitted to the ACCC by an exemption applicant or other interested parties that are claimed to be confidential should be clearly identified. The ACCC will consider each claim of confidentiality on a case by case basis.

For information about the collection, use and disclosure of information provided to the ACCC, please refer to the ACCC publication *Australian Competition and Consumer Commission / Australian Energy Regulator Information Policy – the collection, use and disclosure of information*, available on the ACCC website.<sup>1</sup>

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<sup>1</sup> Available at [www.accc.gov.au](http://www.accc.gov.au).

## Further information

The ACCC has also published process guidelines in relation to its role approving capacity allocation systems under the Code. The Code, these guidelines, and other information relevant to the ACCC's role in regulating access to wheat ports (both under the Code and the previous access undertaking regime) is available on the ACCC's website at [www.accc.gov.au/wheat](http://www.accc.gov.au/wheat).

Please direct enquiries regarding these guidelines to:

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