



Australian
Competition &
Consumer
Commission

Exempt service provider status assessments under the Port Terminal Access (Bulk Wheat) Code of Conduct

GrainCorp Operations Limited at Port Kembla

Quattro Ports at Port Kembla

Issues paper

7 May 2015

Australian Competition and Consumer Commission

23 Marcus Clarke Street, Canberra, Australian Capital Territory, 2601

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Summary

The Australian Competition and Consumer Commission (ACCC) is seeking views on whether it is appropriate for the ACCC to determine one or both of:

- GrainCorp Operations Limited (GrainCorp), and
- Quattro Ports (Quattro)

to be exempt service providers of port terminal services provided through their respective port terminal facilities at Port Kembla.

Exempt service providers are not required to comply with Parts 3 to 6 of the Port Terminal Access (Bulk Wheat) Code of Conduct (the Code) in relation to port terminal services provided through specified port terminal facilities. Accordingly, exempt service providers are not required to (among other things) have their process for allocating access to their port terminal services approved by the ACCC, allocate capacity according to the Code's non-discrimination and no hindering obligations, or publish information on expected port capacity, performance indicators, or stocks at port.

The Code states that in making a determination that a port terminal service provider (PTSP) is an exempt service provider the ACCC must have regard to the matters listed at subclause 5(3) of the Code. The ACCC will consider these matters in subclause 5(3), along with comments provided in response to this issues paper, prior to making its draft determinations.

GrainCorp and Quattro have provided submissions in support of exempt service provider status at Port Kembla. Further details of these submissions are set out as relevant in section 2 of this issues paper. Both submissions are available on the ACCC's website for interested parties to consider.

The ACCC invites comments in response to this issues paper by **5.00pm EST on 29 May 2015**. The ACCC asks submitting parties to clearly identify whether their submission relates to the GrainCorp or Quattro facility, or both.

Further information on the ACCC's exemption role is available at **Appendix A**.

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1. Introduction

The Code was made under section 51AE of the *Competition and Consumer Act 2010 (Cth)* (CCA). It commenced on 30 September 2014 and regulates the conduct of bulk wheat port terminal service providers.

The Code provides that the ACCC or the Minister for Agriculture may exempt a port terminal service provider from the application of Parts 3 - 6 of the Code in relation to port terminal services provided at 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.

This section sets out why the ACCC has a role assessing whether PTSPs should be determined to be exempt service providers, what that assessment process will involve, and how interested parties can participate in it.

1.1. How the ACCC will assess whether it is appropriate to determine either or both of GrainCorp and Quattro to be exempt service providers at Port Kembla

The ACCC is assessing whether it is appropriate to determine either or both of GrainCorp and Quattro to be exempt service providers of port terminal services at Port Kembla, New South Wales.

As the port terminal facilities at Port Kembla will be in close proximity and may compete with each other, the ACCC considers it appropriate and practical to make these assessments at the same time.

In deciding whether or not to determine a PTSP to be an exempt service provider, the ACCC is required to consider the matters listed at subclause 5(3) of the Code:

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

To inform its consideration of these matters, the ACCC considers that it is appropriate to seek the views of interested parties.

The ACCC is therefore conducting a public consultation process during which interested parties are invited to comment on specific questions and matters relating to the appropriateness of one or both of GrainCorp and Quattro receiving exempt service provider status at Port Kembla.

Following a consideration of the matters listed at subclause 5(3) and the views expressed by interested parties during the course of the ACCC's public consultation process, the ACCC will make its final determinations on whether to exempt or not exempt.

1.2. What a determination of a port terminal service provider as an exempt service provider means

PTSPs are required to comply with Parts 1 to 6 of the Code (that is, the entire Code). GrainCorp and Quattro are PTSPs at Port Kembla.

Exempt service providers are only required to comply with Parts 1 and 2 of the Code in relation to port terminal services provided by means of the specified port terminal facility.

Exempt service provider obligations under the Code are therefore more limited, and include requirements to publish certain information about how demand for port terminal capacity is managed and the current state of its shipping stem. These providers will not be required to comply with Parts 3 to 6 of the Code and therefore will not be required to (among other things):

- resolve disputes about access agreement negotiations via the Code-prescribed dispute resolution process, which includes arbitration (Part 3),
- provide access to port terminal services in accordance with the non-discrimination and no hindering obligations (Part 3),
- have their capacity allocation system approved by the ACCC (Part 4), or
- publish information regarding expected port capacity, performance indicators, and stocks at port (Part 5).

Exempt service providers will still be required to comply with general competition law.

1.3. Consultation

Interested parties are invited to provide their views on whether it is appropriate for one or both of GrainCorp and Quattro to be determined exempt service providers at Port Kembla.

Section 2 of this issues paper contains what the ACCC considers to be key questions and issues relevant to the ACCC's assessment, as well as information provided by GrainCorp and Quattro in support of exemption.¹

Interested parties are invited to respond to these questions, comment on the information provided by GrainCorp and Quattro, and provide any additional information they consider relevant to the ACCC's assessment.

¹ Submissions by GrainCorp and Quattro are available on the ACCC's website at: <http://accc.gov.au/>.

1.3.1. Making a submission

Please address submissions to:

Mr Matthew Schroder
General Manager
Infrastructure & Transport - Access & Pricing Branch
ACCC
GPO Box 520
MELBOURNE VIC 3001
Email: transport@acc.gov.au

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

1.3.2. Due date for submissions

Submissions must be received before 5.00pm EST on **Friday 29 May 2015**.

1.3.3. Confidentiality of information provided to the ACCC

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

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

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

1.3.4. Further information

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

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2. Matters for comment

As noted, the ACCC will consider whether to determine one or both of GrainCorp and Quattro as exempt service providers in relation to services provided at their Port Kembla port terminal facilities, having regard to the matters listed in subclause 5(3) of the Code.

Interested parties are encouraged to reference these Code matters in their response.

2.1. Current and recent regulations

In making a determination to exempt or not exempt a PTSP, the ACCC is required to consider that PTSP's legitimate business interests. Therefore the ACCC is seeking views on how removing the obligation to comply with Parts 3 to 6 of the Code would impact on GrainCorp and Quattro's respective business interests.

GrainCorp

GrainCorp submits that exempt service provider status at Port Kembla would:

- Allow GrainCorp to compete commercially for the export of bulk grain;
- Support operational flexibility to improve service and reduce supply chain costs;
- Provide equity with the competing container packers that are not regulated;
- Reduce the level of regulation and cost of compliance.²

GrainCorp submits that port efficiency and investment are related. GrainCorp submits that determining it to be an exempt service provider at Port Kembla will:

Support lower supply chain costs by allowing GrainCorp to operate its Port Terminals flexibly. More flexibility and efficient operations at port will allow increased investment in improving port and supply chain infrastructure.³

Quattro

Quattro submits that Parts 3 to 6 of the Code are an impediment to Quattro's legitimate business interests. Of the requirements in Part 3 of the Code, Quattro submits:

These requirements place an undue burden on Quattro as a new entrant into the market. Quattro Port Kembla is expected to have an annual throughput of between 1.1 to 1.3 million tonnes, and in order for the business model to be feasible, Quattro will need the flexibility to secure offtake commitments from exporters, initially from its own investors, and subsequently from other exporters.⁴

Quattro also submits that exempt service provider status would:

- Allow Quattro and its investors to compete commercially for the export of bulk grain, especially in the critical start-up period;
- Support operational flexibility to improve service and reduce supply chain costs;

² GrainCorp Operations Limited, *Submission – Port Kembla: Exemption from Port Terminal Access (Bulk Wheat) Regulation*, New South Wales, 2015, p.4.

³ GrainCorp, p. 3.

⁴ Quattro Ports, *Submission – Quattro's Application for Exemption from Parts 3 – 6 of the Port Terminal Access (Bulk Wheat) Code of Conduct*, 2015, p. 14.

- Provide small operators and exporters improved access to fobbing capacity which has been limited by the terms and conditions imposed by the existing bulk handling companies;
- Provide equity with the competing export container packers that are not regulated; and
- As a new start-up company minimise the level of regulation and costs imposed by such to allow Quattro to more effectively compete against operators with established systems.⁵

Key questions and issues

1. *How and to what extent do you think that the legitimate business interests of GrainCorp and Quattro are affected by having to comply with Parts 3 to 6 of the Code when providing port terminal services at Port Kembla?*
2. *In what ways would an exemption for GrainCorp and/or Quattro impact on:*
 - *the efficient operation and use of their respective port terminal facilities?*
 - *the likelihood of efficient investment in port terminal facilities?*

2.2. Access to port terminal services

Subclause 5(3) specifically requires the ACCC to consider the interests of exporters who may require access to the relevant port terminal services when determining whether to exempt a PTSP. Therefore the ACCC is seeking views on how removing obligations on either or both of GrainCorp and Quattro to comply with Parts 3 to 6 of the Code will impact on the interests of access seekers, including their ability to secure fair and transparent access.

GrainCorp

On the likelihood of GrainCorp providing fair and transparent access to port terminal services at Port Kembla in the event of exemption, GrainCorp submits that:

GrainCorp is commercially incentivised to provide fair access to its Port Kembla Port Terminal for all exporters, as it has significant excess capacity at the port and faces strong competition from alternative markets for grain:

1. **Significant excess capacity:** the Central and Southern regions of NSW will have, with the new Quattro Port Terminal, 5.6Mt of annual elevation capacity to handle an average bulk grain export task of 1.3Mt (10 year average). Average utilisation at the Port Kembla terminal is already a low 23%.
2. **Alternative markets:** bulk grain export competes with the cost competitive domestic and containerised grain export markets. These alternative markets account for most of NSW's average grain production (at least 75%).⁶

Quattro

Quattro is an incorporated joint venture between Noble Resources, Qube, Emerald Grain and Cargill Australia. With the exception of Qube, Quattro's investors are grain exporters. Quattro submits that its corporate structure and new-entrant status provide incentives to provide fair and transparent access:

⁵ Quattro Ports, *Submission – Quattro's Application for Exemption from Parts 3 – 6 of the Port Terminal Access (Bulk Wheat) Code of Conduct*, 2015, p. 14.

⁶ GrainCorp, p. 4.

Quattro has a commercial objective to generate a profit. Qube, with a [c-i-c]% interest in Quattro does not export grain, and therefore a substantial level of impartiality will be maintained in the selection of customers and allocation of port services.

Further, any incentive for Quattro to apply self-preferential treatment is moderated by countervailing competitive pressures. Quattro must be permitted to introduce flexibility in the way that it allocates capacity in order to attract exporters from the incumbent GrainCorp facility.⁷

Quattro notes that its bulk grain terminal at Port Kembla is expected to be 'completed and operational toward the end of 2015'.⁸ Quattro submits that it is commercially imperative that Quattro be determined an exempt service provider at Port Kembla prior to the facility becoming operational:

Once Quattro's new terminal at Port Kembla is complete and operational, it will need to compete with GrainCorp's existing terminal located at the same port, a mere 300 metres away. To do so effectively, Quattro will need the flexibility to offer cost effective alternatives to exporters.⁹

Quattro adds:

The time and cost of upfront compliance with the Code will hinder Quattro in its critical start-up period. Without existing commitments and an established customer base, the obligation to enter protracted negotiations for access, and submit to costly arbitration can be exploited by competitors to impede Quattro's operational efficiency at a time when Quattro will need to make rapid commercial decisions in response to competitive market pressures.¹⁰

Key questions and issues

3. *If one or both of GrainCorp and Quattro are not required to comply with Parts 3 to 6 of the Code (including the dispute resolution, non-discrimination, and capacity allocation system approval obligations), would exporters still expect to be able to negotiate access to port terminal services at Port Kembla on reasonable commercial terms?*
4. *Given that GrainCorp is a vertically integrated firm and that Quattro's investors include vertically integrated exporters, would GrainCorp and/or Quattro still be likely to negotiate fair and transparent access arrangements with third party exporters in the absence of the full level of regulation in the Code? Why or why not?*
5. *Should an exemption be granted to GrainCorp at Port Kembla before the Quattro port terminal facility becomes operational? What are the risks with this approach (if any)?*

2.3. Port Kembla grain catchment area

In order to assess the level of competition between providers of port terminal services at Port Kembla the ACCC considers that it is necessary to examine the grain catchment area or port zone that feeds the port.

GrainCorp

GrainCorp describes the Port Kembla port zone as:

⁷ Quattro, p. 15.

⁸ Quattro, p. 2.

⁹ Quattro, p. 3.

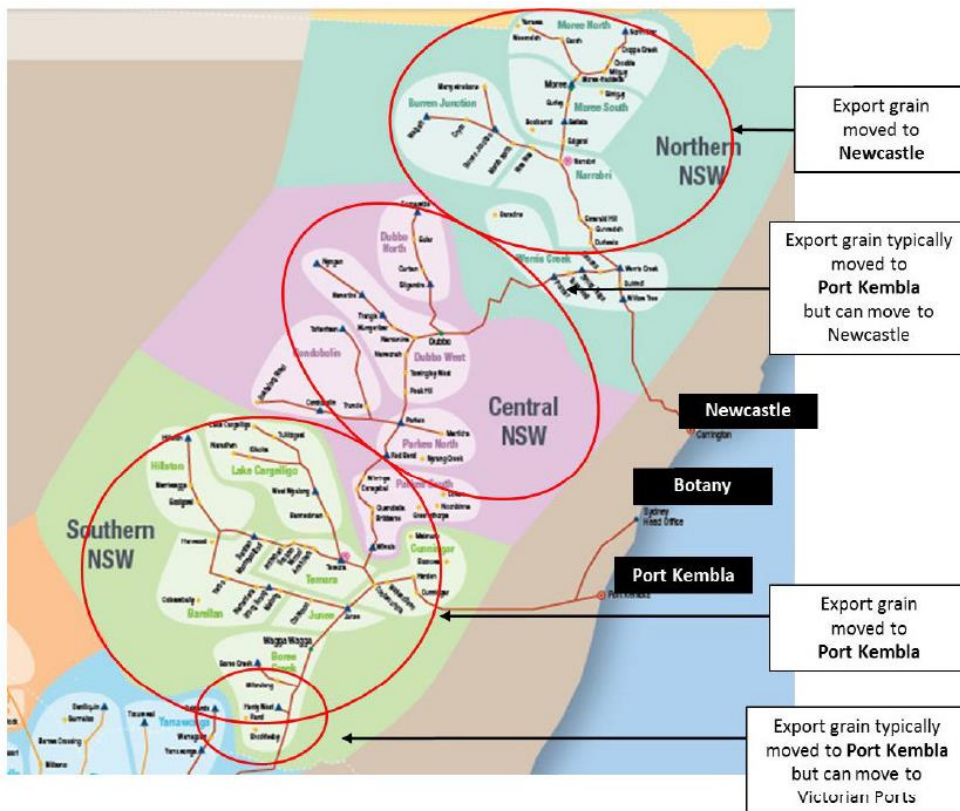
¹⁰ Quattro, p. 5.

... grain growing regions in Central and Southern NSW supply most of the export Grain to Port Kembla. In Central NSW, this includes receival and storage country sites located within the Dubbo, Condobolin and Parkes growing regions. In Southern NSW, this includes country sites located in the Junee, Boree Creek, Hillston, Barellan, Temora, Lake Cargelligo and Cunningham growing regions.

However, grain from Central NSW sometimes moves to the Port of Newcastle where exporters have the option of shipping through three bulk export terminals, being GrainCorp's Carrington facility, the Louis Dreyfus Commodity Terminal, and the Newcastle Agri Terminal

Grain production in Central and Southern NSW also supply grain to containers through Port Botany.¹¹

Figure 1: NSW growing regions and typical route to export market – GrainCorp submission



Source: GrainCorp submission in support, p. 6.

Quattro

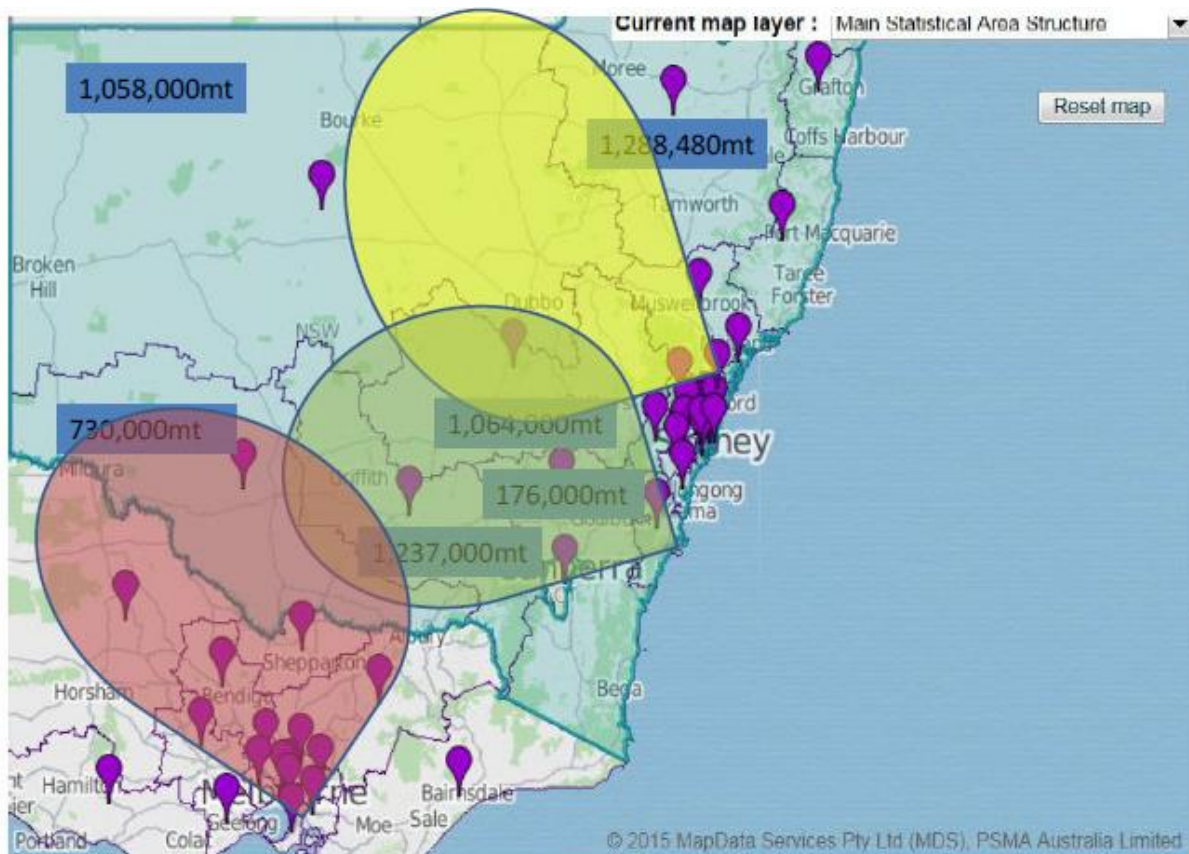
Quattro also submits that the Port Kembla port zone overlaps with other port zones:

The natural drawing arc of Port Kembla based on least cost logistics allows both the Newcastle and Victorian zones to contest grain in nearby upcountry sites, and much of the competition depends on pricing differentials between each zone.¹²

¹¹ GrainCorp, p. 6.

¹² Quattro, p. 11.

Figure 2: NSW Catchment Areas - Quattro submission



Source: Quattro submission in support, p. 11.

Key questions and issues

6. What regions should be considered part of the Port Kembla port zone? That is, where is bulk wheat exported from Port Kembla typically sourced from?

2.4. Competition in bulk wheat port terminal services

As noted, the ACCC considers that in determining whether to exempt a PTSP an important consideration is whether a PTSP is incentivised to provide fair and transparent access due to competitive pressures. One of these potential pressures is from other PTSPs.

The ACCC therefore seeks to assess the current and reasonably anticipated levels of competition in port terminal services at Port Kembla. In particular, the ACCC is considering the levels of capacity, demand and spare capacity at each of the Port Kembla facilities.

GrainCorp

GrainCorp submits that Port Kembla will have significantly more capacity available than the historical average export tasks.

GrainCorp submits that:

Average utilisation of bulk port elevation at Port Kembla will be only 23%, (based on an average bulk export task of 1.3Mt); or 53% (based on the peak bulk export task of 3.0Mt).¹³

Figure 3: Estimated total bulk export capacity in NSW - GrainCorp submission

Port Elevator	Capacity	Portion	Utilisation	
	Tonnes	Share	Avg Export / Capacity	Peak Export / Capacity
GNC Port Kembla	4,300,000	77%		
Qube Quattro	1,300,000	23%		
Total Capacity	5,600,000	100%	23%	53%
Bulk Exports			1,269,996	2,973,902

Source: GrainCorp submission in support, p. 13

GrainCorp submits that surplus capacity at Port Kembla is spread across the year:

Average monthly utilisation of capacity ranges from 20% to 40%. In 6 of the 12 months, Quattro Port Terminal would have enough capacity to handle all of the Port Kembla port zone's export task.¹⁴

Quattro

As noted at section 2.3, Quattro submits that Port Kembla's port zone overlaps to a certain extent with the Newcastle port zone..

Quattro submits:

Quattro Port Kembla port terminal will increase competition in the region, increasing Port Kembla's port export capacity by over 40%. This will increase NSW port export capacity up to 7.7 million tonnes in total, compared to estimated average production available for export of c.3.9 million tonnes.¹⁵

Figure 4: NSW Port Export Capacity - Quattro submission

Export Capacity	
Port Kembla	
GrainCorp Port Kembla	3.1 Previously demonstrated
Quattro Port Kembla	1.3
Total Port Kembla	4.4
Newcastle	
GrainCorp Newcastle	1.9 Previously demonstrated
Newcastle Agri Terminal	1.5
Total Newcastle	3.4
Total NSW Port Capacity	7.7

Source: Quattro submission in support, p. 8

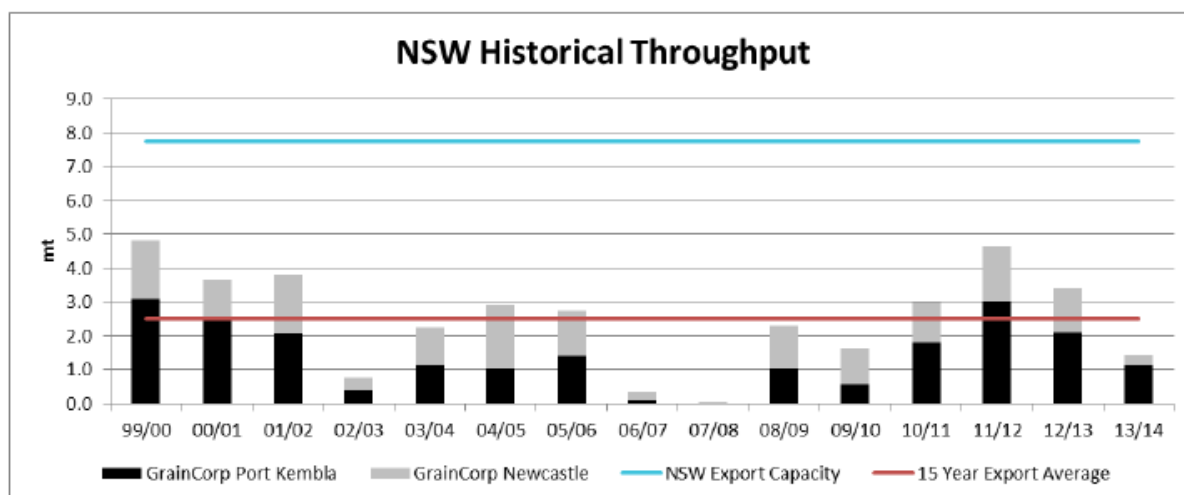
Quattro submits that available capacity will far exceed demand by reference to the export task across NSW:

¹³ GrainCorp, p. 13.

¹⁴ GrainCorp, p. 14.

¹⁵ Quattro, p. 8.

Figure 5: NSW Port Historical Throughput - Quattro submission



Source: Quattro submission in support, p. 9

Key questions and issues

7. To what extent will the port terminal services provided by Quattro represent a viable competitive alternative to the services offered at GrainCorp's facility, and vice versa?
8. What characteristics or factors are relevant in comparing the services provided at GrainCorp and Quattro's respective port terminal facilities? How do these characteristics or factors affect the level of competition between the port terminal facilities?
9. For wheat produced in the Port Kembla port zone, to what extent are other ports a genuine alternative destination to Port Kembla (i.e. do PTSPs at Port Kembla compete against PTSPs at the Port of Newcastle and Victorian ports)?
10. Are there capacity constraints at Port Kembla or is capacity currently underutilised? If capacity is constrained, when and how often does this occur, and what factors affect this? To what extent will this change when Quattro commences operations at Port Kembla?

2.5. Competition in upstream, downstream and related markets

The ACCC's assessment of whether it is appropriate to exempt one or both of GrainCorp and Quattro requires the consideration of the public interest (including the level of competition between providers of port terminal services at Port Kembla), and the promotion of competition in upstream in downstream markets.

In order to make that assessment, the ACCC considers that it is relevant to:

- assess the level of competition in the container export and domestic markets and the extent to which these markets impact on the level of competition between providers of port terminal services at Port Kembla, and
- assess the level of competition in the bulk export supply chain and the extent to which it impacts on the level of competition between providers of port terminal services at Port Kembla.

2.5.1. Domestic and container markets for wheat

The ACCC considers that the domestic and container export markets compete with the bulk export market for wheat.

Accordingly, the ACCC considers that assessing the extent to which these markets compete with bulk wheat export is relevant to the assessment of how much competition PTSPs face at Port Kembla.

GrainCorp

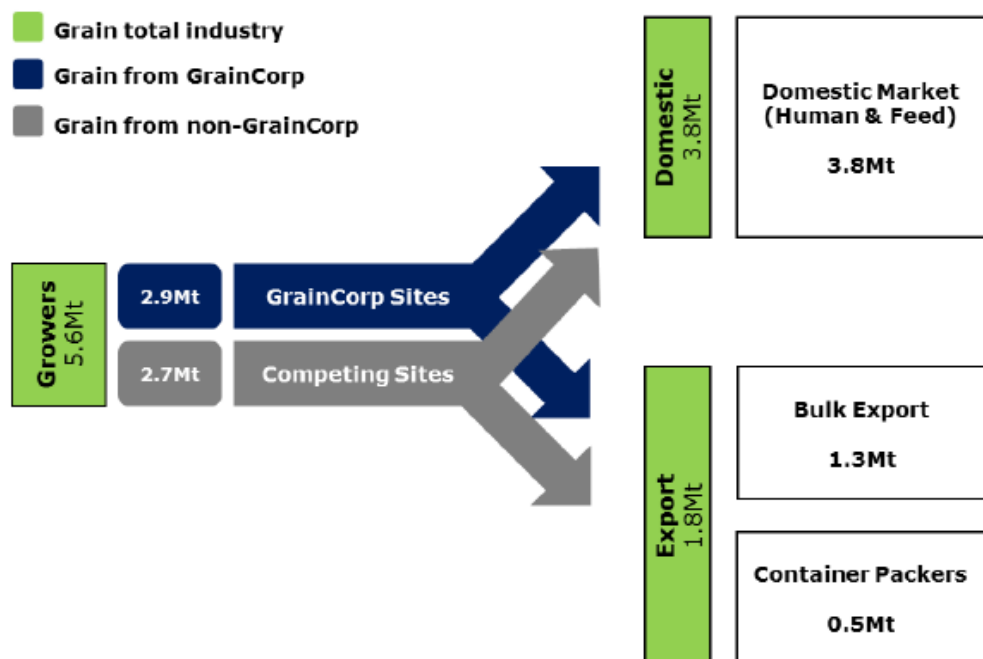
GrainCorp submits that these alternative markets represent a significant competitive pressure for PTSPs:

bulk grain export competes with the cost competitive domestic and containerised grain export markets. These alternative markets account for most of NSW's average grain production (at least 75%).¹⁶

GrainCorp also submits that:

Growers have a range of marketing options for their grain including grain processing, animal feed processors and feedlots, container packers and bulk export markets. The domestic and container markets have the ability to pay a higher price than the bulk export market, due to less supply chain infrastructure.¹⁷

Figure 6: NSW port zone supply and demand - GrainCorp submission



Source: GrainCorp submission in support, p. 8.

¹⁶ GrainCorp, p. 5.

¹⁷ GrainCorp, p. 5.

Quattro

Quattro also submits that the domestic and container markets are significant competitors to bulk wheat exporters for grain:

Table 2: Grain Available for Export

	mt	
Production - 20 year avg		
Port Kembla Zone	3.8	
Newcastle Zone	3.0	
VIC/QLD Zone	1.6	
Total NSW	8.5	
Less: NSW Domestic Demand	4.0	5 year average
Less: Port Botany Containers	0.6	5 year average
Avg production available for export	3.9	

Source: Quattro submission in support, p. 8.

Key questions and issues

11. To what extent do domestic demand and containerised exports provide a competitive constraint on bulk wheat exports at Port Kembla? In your response, please answer the following questions:

- does any one of these options generally pay a higher price?
- other than price, what other factors will a grower have regard to when deciding on a potential alternative to selling to a bulk exporter?

12. Do any of these markets have a 'first call' on grain, particularly in years of low production?

2.5.2. Competition in upcountry supply chain and impact on access to port terminal services (transport and upcountry storage services)

Bulk wheat exporters are required to access several services along the supply chain before they are required to use port terminal services. Typical services used by exporters in order to export include:

- storage and handling services (upcountry or potentially on-farm storage),
- transport services (by road or rail from farm or storage to domestic market or port), and
- port terminal services.

Practically speaking, an exporter will almost always be required to access transport and/or storage services in order to export bulk wheat.

Access to these services therefore may have an impact on an exporter's ability to access port terminal services. Accordingly, the ACCC considers that the level of competition in the upcountry supply chain is relevant to the level of competition in market for port terminal services.

The ACCC notes, however, that its interest in competition in the upcountry supply chain is limited to the extent to which it impacts on fair and transparent access to port terminal services.

Upcountry storage

On the market for upcountry storage, GrainCorp submits:

- The large range of marketing options in NSW has supported a substantial and competitive country storage network.¹⁸
- NSW has significant excess country storage capacity as outlined in Figure 15. GrainCorp estimates that Central and Southern NSW has total storage capacity of 14Mt. Average utilisation of country storage is only 41% based on an average grain production of 5.6Mt.¹⁹
- GrainCorp faces competition from around 40 major independent country silos. These country silos are owned by competitors including major grain exporters Cargill, Emerald, Glencore and Louis Dreyfus.²⁰
- GrainCorp also faces significant competition from on-farm storage. NSW is estimated to have in excess of 6Mt of on-farm storage, of which around 4Mt is located in southern and central NSW.²¹

Figure 7: Estimated total country capacity in central and southern NSW - GrainCorp submission

Country Storage	Capacity	Portion	Utilisation	
	Tonnes	Share	Avg Production / Capacity	Peak Production / Capacity
GrainCorp	6,500,000	48%	86%	148%
Other bulk handlers	2,919,000	22%	192%	330%
On-farm	4,100,000	30%	137%	235%
Total	13,519,000	100%	41%	71%
Production			5,597,383	9,644,685

Source: GrainCorp submission in support, p. 16.

Quattro submits that it does not own any upcountry storage facilities in its own capacity and that there is 'a significant degree of competition in upcountry storage'.²² Quattro submits that the upcountry storage and handling network has greater capacity than the volume of grain produced with over 170 upcountry storage sites in New South Wales, and that:

Cargill and Emerald own in total c.15 upcountry storages in NSW, of which 7 naturally sit within Port Kembla's catchment area. This represents a small portion of the total upcountry storage facilities available in NSW.²³

Transportation services

On the market for transport services, GrainCorp submits:

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

¹⁸ GrainCorp, p. 16.

¹⁹ GrainCorp, p. 16.

²⁰ GrainCorp, p. 16.

²¹ GrainCorp, p. 17.

²² Quattro, p. 10.

²³ Quattro, p. 10.

is moved in bulk wagons, Louis Dreyfus use flat wagons with specially built 'containers' to handle bulk grain.²⁴

Quattro submits:

...bulk grain exporters operating in the Port Kembla Zone have access to rail resources to move their grain from upcountry to Port. Rail resources are available from Qube, Pacific National, Southern Shorthaul Rail (currently operating for Weston Milling) and Freightliner (recently acquired by Genesse Wyoming). Aurizon is also able to operate in the space should there be sufficient demand.²⁵

Key questions and issues

13. *What level of competition is there between upcountry storage and handling facilities in the Port Kembla grain port zone? Do third party facilities or on-farm storage provide a competitive constraint?*
14. *What transport services do producers and exporters use to transport wheat to Port Kembla for export? How much wheat is transported to Port Kembla by rail and how much by road? What level of competition is there in the provision of these transport services?*
15. *How does the level of competition in upcountry storage and transportation currently impact on an exporter's ability to secure fair and transparent access to port terminal services at Port Kembla?*
16. *How would an exemption for one or both of GrainCorp and Quattro impact on competition in the upcountry and transportation markets, and the upcountry supply chain as a whole?*

²⁴ GrainCorp, p. 8.

²⁵ Quattro, p. 12.

Appendix A: Exemption assessments under the Code

The Code, prescribed under section 51AE of the *Competition and Consumer Act 2010* (CCA), commenced on 30 September 2014. The Code replaced the previous regulatory framework provided for by the *Wheat Export Marketing Act 2008* (WEMA), which required vertically integrated providers of port terminal services (including) GrainCorp to provide the ACCC with access undertakings.

The purpose of the Code is defined at clause 2 as:

The purpose of this code is to regulate the conduct of port terminal service providers to ensure that exporters of bulk wheat have fair and transparent access to port terminal services.

Port terminal service providers must comply with the Code

The Code applies to PTSPs. A PTSP is defined as:

the owner or operator of a port terminal facility that is used, or is to be used, to provide a port terminal service.

where:

port terminal service means a service (within the meaning of Part IIIA of the CCA) provided by means of a port terminal facility, and includes the use of a port terminal facility.

and:

port terminal facility means a ship loader that is:

- (a) at a port; and
- (b) capable of handling bulk wheat;

and includes any of the following facilities, situated at the port and associated with the ship loader, that are capable of handling bulk wheat:

- (c) an intake/receival facility;
- (d) a grain storage facility;
- (e) a weighing facility;
- (f) a shipping belt.

Obligations on port terminal service providers

PTSPs are required to comply with all six Parts of the Code.

PTSPs that are determined by the ACCC or the Minister of Agriculture to be exempt service providers are 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 a port loading statement and policies and procedures for managing demand for their services, and make current standard terms and reference prices for each port terminal facility publically available on their website.

Part 3 of the Code 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, and
- to deal with disputes during negotiation via specified dispute resolution processes including mediation and arbitration.

Part 4 of the Code requires a PTSP to have, publish and comply with a port loading protocol which includes an ACCC approved capacity allocation system.

Part 5 of the Code requires PTSP to regularly publish expected capacity, stock information and key performance indicators.

Part 6 requires retaining records such as access agreements and variations to those agreements.

How a port terminal service provider can be determined an exempt service provider

Exempt service provider determination by the ACCC

Subclause 5(2) of the Code provides that the ACCC can determine a PTSP to be an exempt service provider of port terminal services provided by means of one or more of its port terminal facilities. Subclause 5(3) of the Codes provides that the ACCC must have regard to a list of matters in making a determination under subclause 5(2) of the Code. The ACCC can subsequently revoke an exemption determination under subclause 5(6) of the Code.

On 1 October 2014 the ACCC determined GrainCorp to be an exempt service provider at Carrington (Newcastle), New South Wales.

On 10 April 2015 the ACCC released draft determinations proposing to:

- make Emerald Grain Pty Ltd an exempt service provider of port terminal services provided at the Port of Melbourne and
- make GrainCorp Operation Limited an exempt service provider in relation to port terminal services provided at the Port of Geelong, and
- not make GrainCorp an exempt service provider of port terminal services provided at the Port of Portland.

Exempt service provider determination by the Minister for Agriculture

Subclause 5(1) of the Code provides that the Minister for Agriculture may determine that a PTSP is an exempt service provider if the Minister is satisfied that the provider is a cooperative that has:

- (a) grain-producer members who represent at least a two-thirds majority of grain-producers within the grain catchment area for the port concerned; and
- (b) sound governance arrangements that ensure the business functions efficiently and that allow its members to influence the management decisions of the cooperative.

The ACCC does not have any role in exemptions under subclause 5(1).

On 17 November 2014 the Minister for Agriculture found that Co-operative Bulk Handling Limited's (CBH) port terminal facilities located at the ports of Albany, Esperance, Geraldton and Kwinana satisfactorily meet the criteria for exemption under subclause 5(1) of the Code. The Minister therefore determined CBH to be an exempt service provider at those facilities and accordingly, CBH is not required to comply with Parts 3 - 6 of the Code when providing port terminal services from those facilities.

How the ACCC will conduct its assessment process

On 6 November 2014 the ACCC sent a letter to stakeholders which outlined its intention to assess exemptions on a geographic basis.²⁶

On 16 November 2014 the ACCC released its *Guidelines on the ACCC's process for making and revoking exemption determinations* (the Guidelines).²⁷

The Guidelines state that, when 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 vary where the ACCC conducts a public consultation process, and/or requests information from the port terminal service provider. Generally, the length of any consultation period(s) will extend the ACCC's timeframe for the exemption assessment.

Each exemption assessment process may be different and may include requests for information, consultation with interested parties, and a draft determination before the ACCC makes its final determination. The Guidelines, which are available on the ACCC website, provide further detail around the ACCC's process for making and revoking exemption determinations.

Indicative timeline for assessment

Submissions on this issues paper close on **29 May 2015**.

The ACCC anticipates that it will release draft determinations on GrainCorp and Quattro in July 2015 and final determinations in September 2015.

The ACCC notes that the timeframe for assessing the exemption applications will depend on the nature and timeliness of information provided by interested parties.

²⁶ The letter is available on the ACCC's website at <http://acc.gov.au/>.

²⁷ The guidelines are available on the ACCC's website at <http://acc.gov.au/>.