



# Bulk grain ports monitoring report – industry update

2020–21

September 2022



Australian Competition and Consumer Commission  
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# Glossary and abbreviations

2020–21 shipping year	The period of 1 October 2020 to 30 September 2021.
ABARES	Australian Bureau of Agricultural and Resource Economics and Sciences.
ACCC	Australian Competition and Consumer Commission.
ACF	Australian Crop Forecasters.
Bulk exports	Grain loaded onto a ship for export. Does not include grain exported in a bag or container that is not capable of holding more than 50 tonnes of grain.
Capacity	The total amount of grain in tonnes that can be loaded onto a ship during a shipping window, as determined by the port terminal service provider that owns or operates the port terminal facility.
CCA	<i>Competition and Consumer Act 2010</i> (Cth).
Coastal shipping	Shipments of bulk grain made between Australian ports.
Data update report	<i>ACCC Bulk grain ports monitoring report – data update 2020–21</i> .
Department	Department of Agriculture, Water and the Environment (as of 1 July 2022, the Department of Agriculture, Fisheries and Forestry).
East coast	New South Wales, Queensland, and Victoria.
Exporter	An entity seeking access to, or using, port terminal services for the purpose of exporting bulk grain. This term is also used in this report in relation to those entities which are also PTSPs (or the related entity of a PTSP) where relevant.
LTAs	Long term agreements – an agreement entered into for long term capacity between a port terminal service provider and an exporter.
Port loading statement	A document produced by port terminal service providers pursuant to clause 7 of the Code which contains certain information about each ship scheduled to load grain via the port terminal service provider’s port terminal facility. Commonly referred to as a ‘shipping stem’.
Mobile loader	A type of portable ship loader that can be set up and moved within and between ports as required.
Peak shipping period	The period where demand for bulk grain shipment port terminal services is highest, typically between 1 February and 31 May.
Port terminal facility	A ship loader that is at a port and capable of handling bulk wheat, including an intake/receival facility, a grain storage facility, a weighing facility and a shipping belt.
PTSP	Port terminal service provider – the owner or operator of a port terminal facility that is used, or is to be used, to provide a port terminal service. This term is also used in this report in relation to those entities which are also exporters (or the related entity of an exporter) where relevant.
Shipping year	The period from 1 October to 30 September the following year. References in this report to particular years such as ‘2020–21’ refer to the associated shipping year.

Supply chain	A network between companies and their suppliers to produce and distribute grain. This includes upcountry grain storage and handling, grain transportation and port terminal services.
The Code	The <i>Port Terminal Access (Bulk Wheat) Code of Conduct</i> . Schedule 1 to the <i>Competition and Consumer (Industry Code—Port Terminal Access (Bulk Wheat)) Regulation 2014</i> (Cth).
Vertically integrated	A company that operates at more than one stage of a supply chain.

# Executive summary

The ACCC prepares the *ACCC Bulk grain ports monitoring report* to support stakeholders by providing a consolidated and timely information source about bulk grain shipments and related supply chains across Australia. This is the first time the ACCC has released the report in 2 stages:

- the *ACCC Bulk grain ports monitoring report – data update 2020–21* (data update report), which summarised and analysed bulk grain exports in 2020–21, was published on 15 December 2021
- this report (*the ACCC Bulk grain ports monitoring report – industry update 2020–21* (industry update report)) summarises the views expressed by stakeholders during consultation and provides the ACCC's views on certain matters.

The ACCC's consultation on the record 2020–21 shipping year confirmed that stakeholders continue to hold mixed views about a range of complex and ongoing issues impacting the industry. In particular stakeholders have differing views on whether the *Port Terminal Access (Bulk Wheat) Code of Conduct* (the Code) (or regulation more broadly) remains necessary, and whether further transparency at port or in supply chains is needed. Stakeholders also have differing views on whether preferential treatment is provided to vertically integrated exporters at their own facilities (or whether each PTSP is sufficiently incentivised to maximise throughput at each facility and offer a competitive service to all exporters).

In keeping with the record volume of exports in 2020–21, the main concerns expressed by stakeholders during the ACCC's consultation related to the shortfall in port terminal capacity and the lack of transparency around capacity allocation. This is despite there being a greater level of competition for port terminal services in most grain growing regions across Australia than at any other time. These concerns also appear to have strengthened general perceptions within the industry of unfair treatment at port and, in some cases, heightened long-held exporter concerns regarding access.

Stakeholders have also routinely raised concerns regarding broader supply chains during previous ACCC consultations. Consistent with this, most stakeholders considered 'getting grain to port' to be the industry's biggest issue in 2020–21.

Concerns around inefficient rail infrastructure were also raised by some stakeholders. While matters relating to upcountry storage and handling are outside the scope of the Code, during consultations several stakeholders indicated that they consider port access to be inextricably linked to upcountry supply chains.

In addition to the differing views and concerns held by stakeholders, the ACCC notes that the industry continues to evolve. The ACCC has granted 19 exemptions since the Code commenced and has generally been of the view that new entry and resulting competition has been positive for many exporters and growers. This includes exemptions relating to all 11 new PTSPs (12 facilities) that have entered the market since 2014. There has been significant change across the industry over the 5 years since the Code was last reviewed, particularly at the port level. The ACCC therefore considers that any changes to the Code should have regard to the more recent developments in the market.

The second Code review will provide an opportunity to consider issues that have emerged in recent years, as well as issues that have persisted since the 2017 review. Furthermore, issues identified in 2017 as a concern, may no longer exist or warrant regulatory consideration.

Significant changes that have occurred over the last 5 years include:

- an increase in the number of Port Terminal Service Providers (PTSPs) in the market (the Code applies to new entrants)
- increased coastal shipping (during drought years), which could in practice impact an exporter's ability to secure port terminal services for the purpose of exporting bulk grain
- a trending increase in the proportion of non-wheat grain bulk exports<sup>1</sup>
- the increased use of mobile loaders, and their ongoing role in servicing those exporters unable to access larger-scale facilities
- increased access and transparency concerns at some exempt facilities and uncertainty surrounding the effectiveness of the remaining requirements of the Code
- in some cases, increased market share of vertically integrated exporters at their own facilities
- upcountry supply chain challenges and increased costs particularly in relation to transport.

Given these changes in the industry since the last review in 2017, the ACCC considers the second review of the Code (which is required to commence by 30 September 2022) will ensure the Australian Government and industry are best placed to understand the changes needed to the Code.

While the ACCC continues to hold the view that implementing the recommendations from the 2017 review would improve the Code to some extent, deferring any amendments to the Code until after the second review will likely deliver a better targeted and more effective response by accounting for the changes in the industry. The regulatory burden associated with industry implementing the 2017 review recommendations at this time should also be carefully considered, particularly given the potential for the second Code review to recommend further changes. The ACCC notes that the burden of further obligations and ongoing regulatory change across the industry is most likely to be felt by smaller market participants and new entrant PTSPs.

The ACCC therefore considers that the second Code review should commence as soon as practicable within the next 12 months, and that any changes to the Code should be informed by this review. Implementing the recommendations of the 2017 review risks leaving the industry with an ineffective regulatory regime that does not appropriately balance regulatory burden with benefits.

Separately, some stakeholders have called for the ACCC to undertake a broader grains inquiry. It is a matter for the Australian Government to determine whether it wishes to direct the ACCC to conduct such an inquiry.

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<sup>1</sup> However, this trend was not reflected in 2020–21. Consistent with the record wheat crop, the proportion of non-wheat bulk grain shipments dipped to a 5-year low of 38%. See pages 19-20 of the ACCC's data update report.

# 1. Key findings

## 1.1 Views on the Code remain mixed

Stakeholders expressed differing views on the value and effect of the Code. Consistent with previous consultations the Code's reporting obligations were generally well supported, particularly among grower groups. However, as outlined in chapter 5 there was some concern amongst stakeholders that the current reporting obligations do not provide an adequate level of transparency regarding available port terminal capacity and shipping activity.

Stakeholders that expressed support for the Code offered mixed views on its effectiveness. Some noted that despite the Code's limitations, the Code (or some form of regulatory oversight over PTSPs involving the ACCC) is better than no regulation at all.

## 1.2 Access and transparency concerns raised this year indicate the need to review key Code obligations to ensure their effectiveness

The data update report found that between 2011-12 and 2020-21 the average number of exporters using each port terminal facility in Australia declined from 8 to 5.<sup>2</sup> Given this finding, the ACCC was interested in hearing exporters' experiences seeking access to port terminal capacity at bulk grain export port terminal facilities in 2020-21.

PTSPs noted that they experienced unprecedented demand for capacity in 2020-21.<sup>3</sup> Excluding facilities in Queensland, 17 of 23 facilities across Australia had peak shipping period capacity utilisation of at least 78%. Most PTSPs (particularly those with larger-scale port terminal facilities) indicated that capacity at their facilities was booked out well ahead of the commencement of shipping slots.<sup>4</sup> The ACCC notes that in typical years there is generally spare capacity available across a range of facilities.

A range of exporters raised concerns during consultation about their ability to secure access in 2020-21. Smaller-scale exporters noted that they had sought access at new entrant facilities due to capacity constraints at the larger-scale facilities. Some grower groups expressed concerns that fewer exporters were using the larger-scale facilities.

The ACCC notes that the benefit of mobile loaders to the industry was particularly evident in the 2020-21 shipping year. Mobile loader operations played a highly beneficial role in providing the market with additional capacity and export avenues at a time of high exporter demand.<sup>5</sup> Mobile loaders were typically operated by existing grain exporters with access to their own nearby storage facilities, or port operators who were able to offer exporters storage at their port to assist with accumulation. Some purchased mobile loaders outright, while others leased loaders on an ad hoc basis during the shipping season.

Some exporters indicated that they did not consider mobile loader operations to be perfect substitutes for fixed loader operations and queried whether mobile loaders represented attractive alternatives for exporters outside of high-demand years (that is, when the capacity of larger-scale facilities is constrained). Overall, stakeholder views on the year-to-year long term viability of mobile loaders in the bulk grain export market were mixed.

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2 The decline in average number of exporters per facility has occurred as the number of new port terminal facilities has increased. See page 2 of the data update report.

3 WA, NSW and Victoria achieved record bulk grain export shipping years in 2020-21. SA and Queensland exceeded average export levels. See page 1 of the data update report.

4 See pages 4, 25, 39, 57 and 70 of the data update report.

5 Excluding WA, mobile loaders accounted for 8% of throughput in 2020-21, their highest proportion yet. See page 2 of the data update report.

The ACCC considers that the specific nature of access and transparency issues (and the Code obligations that seek to provide transparency) should be considered as part of the second Code review.

### 1.3 Challenges getting grain to port

The ACCC heard that the record 2020–21 shipping year was achieved despite many difficulties across supply chains.<sup>6</sup> Some of these issues have been reported to the ACCC over several years (for example, uncertainty regarding the timing, location and quality of grain outturned from a bulk handler’s storage network). Some however were new issues or issues that impacted 2020–21 more than previous shipping years (for example, COVID-19 restrictions and labour shortages).

While outside the remit of the Code, the ACCC notes that stakeholders continue to express concern around broader supply chains. The ACCC has reflected these concerns in its *Bulk grain ports monitoring reports* for several years.

The ACCC considers that long-held stakeholder concerns, such as those in relation to broader supply chain issues, as well as emerging concerns should be considered as part of the second Code review.

### 1.4 The second Code review is required to assess industry changes and issues

Stakeholders expressed mixed views on the Code and its usefulness. The ACCC previously welcomed the Australian Government’s support for several of the recommendations from the 2017 Code review. While the ACCC continues to hold the view that implementing the recommendations would deliver some improvement to the effectiveness of the Code, the ACCC considers that progressing the second Code review is more likely to deliver a better targeted and more effective response for industry, while limiting the potential for unnecessary regulatory burden. In particular, the second Code review will provide the opportunity to consider how new entrant PTSPs have entered the market and operated under the Code.

Under the current regulatory framework, the second Code review must commence by no later than 30 September 2022. The ACCC supports the commencement of the second Code review as soon as practicable within the next 12 months. The second review will see the Australian Government and industry better placed to consider:

- whether the Code should be retained and if yes, whether the specific regulation of exporter access to port terminal services for the purpose of exporting bulk wheat remains the most appropriate regulatory focus
- if the Code should be retained, the changes that are needed to ensure it is able to better respond to current (and expected future) market conditions.

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<sup>6</sup> A record 33.3 million tonnes of grain were exported in 2020–21, surpassing the previous high of 31.5 million tonnes in 2016–17. The ACCC has access to bulk grain export data dating back to 2011–12. All references to record bulk exports refer to records since the 2011–12 shipping year (inclusive).

## 2. Introduction

The ACCC prepares the *Bulk grain ports monitoring report* to support stakeholders by providing a consolidated and timely information source about bulk grain shipments and related supply chains across Australia. This is the first time the ACCC has released the report in 2 stages:

- the data update report, which summarises and analyses bulk grain exports in 2020–21, was published on 15 December 2021
- this report summarises the views expressed by stakeholders in the ACCC’s consultation process and provides the ACCC’s views on certain matters.

The preparation and publication of the ACCC’s *Bulk grain ports monitoring reports* provide stakeholders with:

- analysis of the shipping information that PTSPs publish pursuant to Code obligations
- a regular opportunity to raise issues with the ACCC in a structured forum
- a summary of stakeholder views on the key issues in bulk grain export supply chains.

In early 2022 the ACCC engaged in extensive consultation with stakeholders, meeting virtually with exporters, PTSPs and grower groups which operate across Australia to seek their views on the key issues in the 2020–21 shipping year. The ACCC held a total of 20 meetings. The views summarised in this report reflect the views of stakeholders that participated in this consultation process.

The ACCC discussed a broad range of topics with stakeholders including:

- access to port terminal capacity
- transparency of shipping data
- the tangible impact and the value of the Code
- experiences accessing and outturning from upcountry storage facilities
- getting grain from upcountry to port, including challenges posed by COVID-19 restrictions and disruptions (logistics/coordination).

The ACCC notes that views expressed by stakeholders in the consultation process for this report were generally consistent with those expressed by stakeholders in previous years. However, stakeholders did identify several new issues which have emerged and are impacting on their operations. These include changes in market dynamics and grain flows because of new ports in some markets, pandemic related factors and broader supply chain challenges (both at port and in related markets).

The ACCC appreciates the time and commitment demonstrated by stakeholders through their continued participation in consultation processes for this report and assessments of whether a PTSP should be an ‘exempt service provider’ under the Code.

### 2.1 Why we prepare this report

The ACCC prepares the *Bulk grain ports monitoring report* as part of its commitment to the ongoing monitoring of access to bulk grain export port terminal facilities following its first decision to determine a PTSP to be an exempt service provider under the Code in 2015. The consultation processes for this report have allowed the ACCC to specifically ask exporters for their views annually on whether exporters are securing fair and transparent access to port terminal services, including at exempt port terminal facilities.

### 2.1.1 Provide the ACCC with an opportunity to consider the need to review exemptions it has granted

The ACCC produces these reports to inform the ongoing appropriateness of exemptions it has granted under the Code.

The ACCC notes that under subclause 5(6) of the Code the ACCC may revoke an exemption if, having regard to the matters in subclause 5(3) of the Code, it is satisfied that the reasons for granting the exemption no longer apply. This could, for example, include unforeseen changes in the market, the emergence of information that was not considered as part of the decision-making process, or where expected market outcomes did not occur following a decision to exempt (such as exporters subsequently not being able to gain fair and transparent access to port terminal services). Considering shipping data and engaging with stakeholders for the purposes of this report informs the ACCC's awareness of these matters. No exemption has been revoked to date.

More generally, through ongoing public monitoring of access to bulk grain export port terminal facilities the ACCC aims to ensure that the level of regulation applying to these facilities remains appropriate and furthers the ACCC's broader objective of 'making markets work' for Australian consumers, including the users of these facilities.

The ACCC has made some observations regarding exempt facilities in chapter 8.

### 2.1.2 Provide industry with stakeholder and ACCC views on current issues

The data update report presented shipping data and other relevant supply chain developments for the 2020-21 shipping year. The ACCC released the report to share timely information with stakeholders, as well as to address information asymmetries across the sector.

The ACCC also considered that by releasing the data update report ahead of consultations that stakeholders would be better placed to consider, and express views on, issues from the 2020-21 shipping year.<sup>7</sup>

This report builds on the data update report and presents a consolidated and high-level view of stakeholder concerns and observations regarding port access and related supply chains.

The ACCC considers that setting out a summary of views provides a useful reference point for stakeholders. Stakeholders have indicated to the ACCC that they use this report to assist with planning and their engagement with other stakeholders including customers and investors. Stakeholders may also find the report helpful to inform future discussions regarding the regulation of access to bulk grain export port terminal services, including whether the current regulatory arrangements remain fit for purpose.

## 2.2 About the Code and the ACCC

The Code is set out in Schedule 1 of the *Competition and Consumer (Industry Code – Port Terminal Access (Bulk Wheat) Regulation 2014* (Cth) and is a prescribed mandatory code of conduct for the purposes of section 51AE of the *Competition and Consumer Act 2010* (Cth) (CCA).

The Code commenced on 30 September 2014. Before the Code, access to bulk wheat export port terminal services was regulated under the *Wheat Export Marketing Act 2008* (Cth).

Wheat exporters who also owned or operated wheat port terminal facilities needed to pass an 'access test' before they could be accredited to export bulk wheat. One part of the access test that wheat exporters had to pass was having an access undertaking accepted by the ACCC under Part IIIA of the *Trade Practices Act 1974* (Cth), renamed the *Competition and Consumer Act 2010* (Cth) on 1 January 2011. The ACCC accepted undertakings from 4 operators – CBH, Emerald, GrainCorp and

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<sup>7</sup> The data update report posed a series of questions to help facilitate stakeholder discussions. See pages 12-13, 38, 56, 69, 83 and 95.

Viterra. Undertakings were first accepted in 2009, with further undertakings being accepted in 2011 and 2013.

The Code applies to the providers of port terminal services supplied via port facilities capable of handling bulk wheat and exporters that wish to use those services. It regulates the commercial behaviour between PTSPs and exporters to ensure that 'exporters of bulk wheat have fair and transparent access to port terminal services'.<sup>8</sup> The Code also assigns the ACCC a number of specific roles, including the ability to determine a PTSP to be an 'exempt service provider'.

The ACCC is an independent Commonwealth statutory authority whose role is to enforce the CCA and industry codes such as the Code, promoting competition, fair trading and regulating national infrastructure for the benefit of all Australians. The ACCC also regulates some national infrastructure services and monitors other markets where there is limited competition.

## 2.3 Port terminal facilities and exemptions

One of the ACCC's specific roles under the Code is to assess applications made by PTSPs for 'exempt service provider' status. Exempt service providers are not required to comply with Parts 3 to 6 of the Code in providing port terminal services via a specified facility.

Since 2014, the ACCC has granted exempt service provider status in relation to 19 facilities and decided against granting exempt status in relation to 5 (GrainCorp Portland, Viterra Wallaroo, Viterra Port Giles, Viterra Port Lincoln, and Viterra Thevenard). The ACCC is currently considering an application by Bulk Cargo Services regarding its port terminal facility at Pinkenba (Brisbane).

On 17 November 2014 the Minister for Agriculture granted CBH exempt service provider status at each of its 4 port terminal facilities in WA based on CBH's co-operative status.

**Table 2.1: Port terminal facilities in Australia (by state)**

State	Facilities and PTSPs	Exemption status
WA	Albany CBH	Exempt (17 November 2014)*
	Esperance CBH	Exempt (17 November 2014)*
	Geraldton CBH	Exempt (17 November 2014)*
	Kwinana CBH	Exempt (17 November 2014)*
	Bunbury WA Plantation Resources (WAPRES)	Exempt (24 September 2015)
SA	Inner Harbour Viterra	Exempt (27 April 2021)
	Outer Harbor Viterra	Exempt (27 April 2021)
	Port Giles Viterra	Exemption not granted (27 April 2021)
	Port Lincoln Viterra	Exemption not granted (20 July 2021)
	Thevenard Viterra	Exemption not granted (20 July 2021)
	Wallaroo Viterra	Exemption not granted (27 April 2021)
	Lucky Bay T-Ports	Exempt (1 April 2020)
	Port Adelaide Cargill	Exempt (2 July 2020)
	Port Adelaide LINX (previously BAPS and Patrick)	Exempt (11 October 2017)
	Port Adelaide Semaphore	Exempt (27 July 2017)
Port Pirie ADM	Exempt (24 September 2021)	

<sup>8</sup> Port Terminal Access (Bulk Wheat) Code of Conduct, clause 2.

State	Facilities and PTSPs	Exemption status
Victoria	Portland GrainCorp	Exemption not granted (25 June 2015), second exemption application submitted on 7 February 2019 and withdrawn on 20 December 2019
	Geelong GrainCorp	Exempt (25 June 2015)
	Geelong Riordan Grains (Riordan)	Exempt (29 May 2017)
	Portland Riordan	Exempt (31 March 2020)
	Melbourne Emerald Grain (Emerald)	Exempt (25 June 2015)
	Port of Portland Port of Portland Limited	Exempt (3 May 2022)
NSW	Carrington** GrainCorp	Exempt (1 October 2014)
	Port Kembla Quattro Ports (Quattro)	Exempt (1 April 2016)
	Newcastle Agri Terminal (NAT)	Exempt (30 July 2015)
	Port Kembla GrainCorp	Exempt (1 April 2016)
Queensland	Fisherman Islands GrainCorp	Exempt (24 September 2015)
	Gladstone GrainCorp	Not exempt, no exemption application submitted
	Mackay GrainCorp	Not exempt, no exemption application submitted
	Brisbane Qld Bulk Terminals (QBT)	Exempt (24 September 2015)
	Pinkenba Bulk Cargo Services	Currently under assessment

Notes: \* The Minister for Agriculture granted CBH an exemption at all 4 of its port terminal facilities, due to its co-operative status, on 14 November 2014.

\*\* Located at the Port of Newcastle.

## 2.4 Background and evolution of bulk grain port regulation

Following the end of the single desk in 2008,<sup>9</sup> the bulk grain export market was dominated by 3 regional PTSPs which operated a total of 16 port terminal facilities. An access undertaking regime covering these facilities administered by the ACCC was implemented and included comprehensive access terms and reporting obligations.<sup>10</sup> In 2014 the access undertaking regime was replaced by a mandatory industry code of conduct (the Code) prescribed under the CCA.

Considering the developing market, the Code implemented a two-tiered approach to regulation that allowed the ACCC to exempt a PTSP to substantially reduce the level of regulation applying to PTSPs operating in a competitive market. The ACCC maintained some of its key roles under the Code that it had under the access regime, including monitoring compliance with obligations and approving non-exempt PTSPs' capacity allocation systems.

The ACCC has continued to engage closely with stakeholders since the commencement of the 2017 Code review, consulting on monitoring reports and exemption assessments. The ACCC has continued to hear a range of concerns from stakeholders regarding the Code during this period, which have highlighted gaps in coverage and the limited effectiveness of certain obligations. Overall, stakeholder views on whether bulk grain export port terminal services need to be regulated continue to be mixed. Some stakeholders question the need for this kind of regulation (including the Code), while others support additional regulation of bulk grain export supply chains (or at least a comprehensive review of the bulk grain export industry to inform whether and how further regulation should be considered).<sup>11</sup>

<sup>9</sup> The single desk meant AWB had exclusive rights to be the monopoly provider for all Australian bulk wheat exports.

<sup>10</sup> The *Wheat Export Marketing Act 2008* (Cth) is available here: [http://classic.austlii.edu.au/au/legis/cth/num\\_act/wema2008254/](http://classic.austlii.edu.au/au/legis/cth/num_act/wema2008254/). For further details regarding the ACCC's role see: <https://www.accc.gov.au/regulated-infrastructure/wheat-export/accc-role-in-wheat-export#wheat-export-access-undertakings>.

<sup>11</sup> Exemption applications and stakeholder submissions to these assessments can be found here: [https://www.accc.gov.au/regulated-infrastructure/regulatory-projects?field\\_accc\\_industry\\_sector\\_tid\\_selective=339](https://www.accc.gov.au/regulated-infrastructure/regulatory-projects?field_accc_industry_sector_tid_selective=339).

## 2.4.1 The ACCC has granted 19 exemptions and continues to monitor the industry

The ACCC has granted 19 exemptions since the Code commenced in 2014, including exemptions relating to all 11 new PTSPs (12 facilities) that have entered the market in that time.

In considering whether to exempt a PTSP from having to comply with Parts 3 to 6 of the Code in the course of providing port terminal services via a specified facility, the ACCC is required to consider a list of matters set out at subclause 5(3) of the Code.<sup>12</sup> When considering whether to grant a PTSP an exemption from Parts 3 to 6 of the Code, the ACCC has generally considered that the presence of alternative PTSPs and reasonable levels of spare capacity in relevant grain catchment zones are strong indicators that a PTSP has incentives to provide fair and transparent access to exporters which will continue if granted an exemption.

In addition to the 19 exemptions granted by the ACCC, on 17 November 2014 the Minister for Agriculture granted CBH an exemption in relation to all 4 of its port terminal facilities due to its co-operative status.<sup>13</sup> PTSPs have therefore been determined to be exempt service providers in relation to 23 bulk grain export port terminals.<sup>14</sup>

## 2.5 Approach to key consultation themes

In following chapters, the ACCC presents the key themes that emerged from its consultation process in early 2022. A number of key themes emerged:

- Stakeholders continue to have mixed views on the value and role of the Code.
- Exporters had concerns about securing port terminal capacity.
- Exporters had concerns about transparency, particularly in relation to port terminal service capacity allocation processes.
- Mobile loaders provided an alternative pathway to port in a busy year, but their place in the market in the long term is unclear.
- Stakeholders had a range of concerns around supply chain issues, including the need for greater transparency at port, difficulty accessing transport and challenges around using upcountry storage and handling services.

The views presented in this report are de-identified and summarised at a high level.

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12 Available here: <https://www.legislation.gov.au/Details/F2014L01250>.

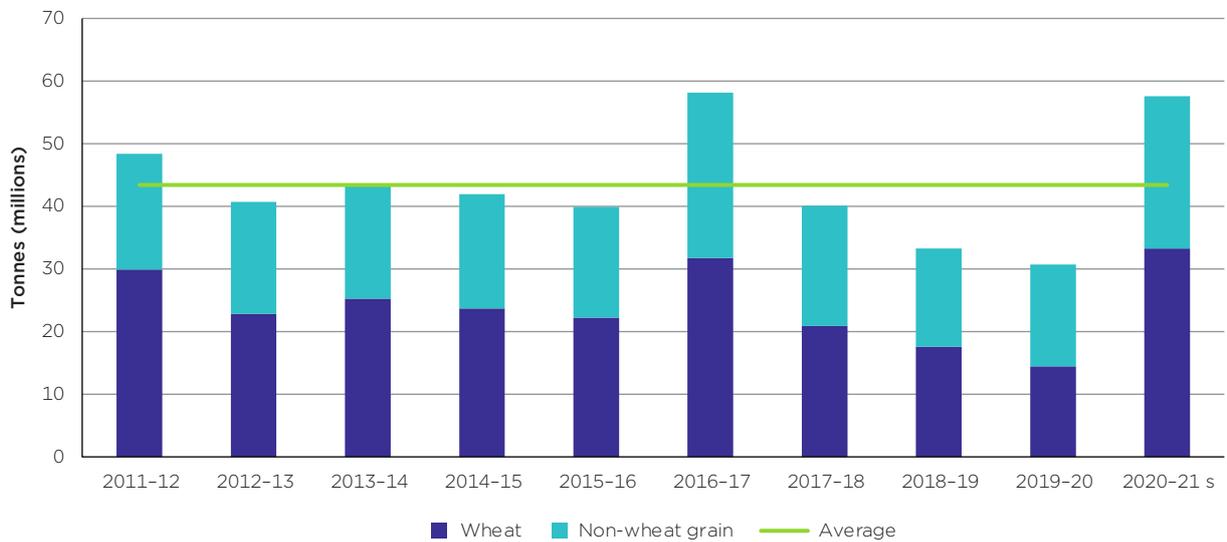
13 The ACCC notes that, excluding CBH's facilities, it has received exemption applications regarding all bulk grain export facilities except GrainCorp's Mackay and Gladstone facilities.

14 The 7 non-exempt port terminal facilities are: Port Giles (Viterra), Port Lincoln (Viterra), Thevenard (Viterra), Wallaroo (Viterra), Portland (GrainCorp), Gladstone (GrainCorp), Mackay (GrainCorp). Additionally, the ACCC is currently assessing an application for exemption by Bulk Cargo Services in relation to its Pinkenba facility.

### 3. Key findings of the ACCC Bulk grain ports monitoring report - data update 2020-21

As set out in the ACCC’s December 2021 data update report, Australia’s total grain production in 2020-21 reached a near record of 57.6 million tonnes (Figure 3.1). Reflecting the bumper production year of 2020-21, the data update report found bulk grain exports reached the highest level on record and were above average in all states.<sup>15</sup> Nationwide, 33.3 million tonnes of grain were exported via bulk shipments (Figure 3.2). The previous record was 31.5 million tonnes in 2016-17.<sup>16</sup> The report also showed that export volumes were well above average for most months of 2020-21 shipping year (Figure 3.3). The report showed that there is spare capacity across years at many ports, but capacity is constrained during peak periods in years such as 2020-21.

**Figure 3.1: National grain production compared to average, 2011-12 to 2020-21**



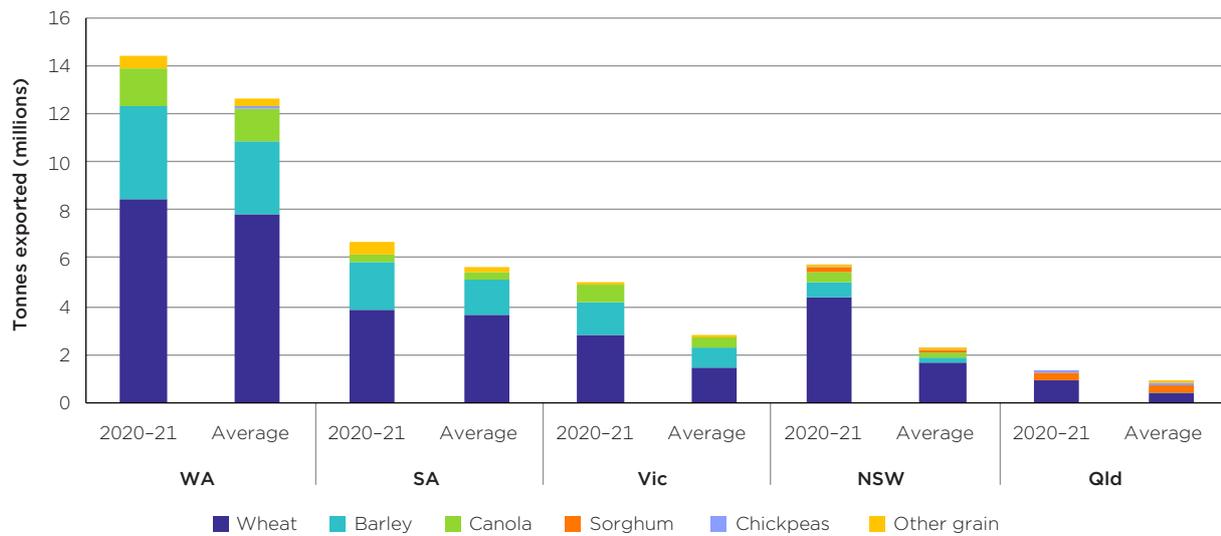
Source: ABARES, State data underpinning: Australia crop report: September 2021 No. 199.

Notes: s 2020-21 figures are ABARES estimates, which are subject to revision.

<sup>15</sup> The ACCC has access to bulk grain export data dating back to 2011-12. All references to record bulk exports refer to records since the 2011-12 shipping year (inclusive).

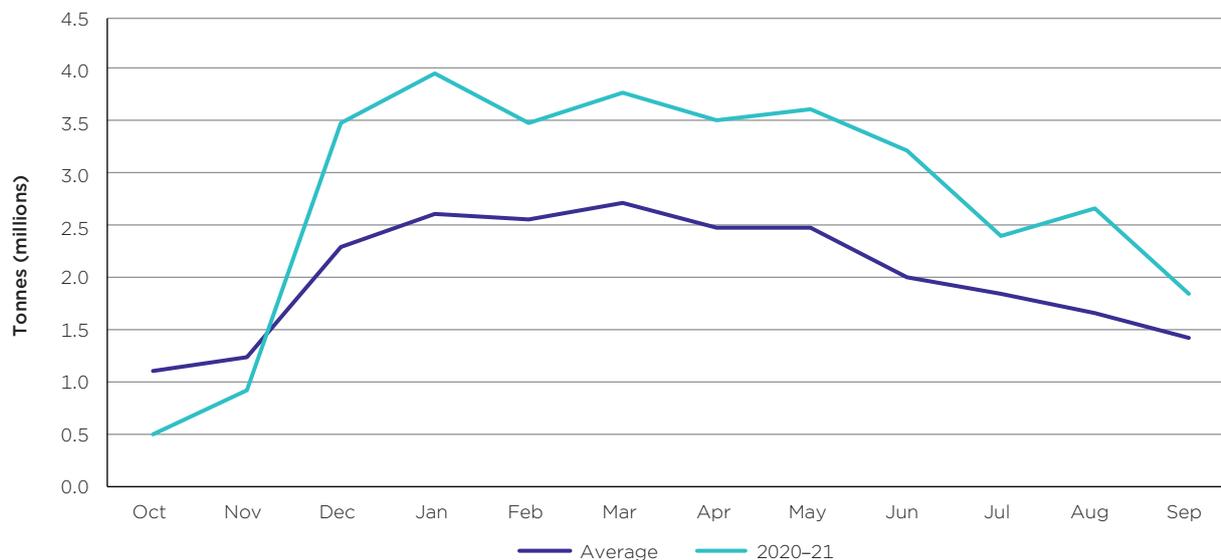
<sup>16</sup> *Bulk grain ports monitoring report - data update - 2020-21*, p.17.

**Figure 3.2: Bulk grain shipments by state and commodity, 2020-21 compared to average**



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

**Figure 3.3: National bulk grain shipments by month, 2020-21 compared to average**



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

The data update report made the following 5 key findings about the 2020-21 shipping year:

1. It was the highest bulk grain export shipping year on record, driven by near-record production, with exporters accessing an increasing number of port terminal facilities across Australia.
2. On average each PTSP facility was used by fewer exporters compared to previous years, with new entrant PTSPs providing more alternative facilities.
3. Exporter market shares continue to be volatile in some states, while WA's exporter market shares remain stable.
4. Capacity was constrained during the peak shipping period at numerous facilities.
5. Shipment levels in several states remained high after the typical peak shipping period.

These key findings from the data update report informed the questions that were put to stakeholders during the ACCC's consultation process for this report. The ACCC was interested in further exploring the data findings and hearing stakeholder perspectives on the 2020-21 shipping year.

## 4. Stakeholder views on the Code

As part of its consultation on the 2020–21 shipping year, the ACCC asked stakeholders whether they considered the Code to be effective, as well as what they considered the practical impact of the Code to be on their operations (and the industry more broadly). Overall, stakeholder views on the Code continue to be mixed and remain generally in line with those expressed in previous years. The ACCC notes that many PTSPs are also exporters or associated entities of an exporter. The views of ‘exporters’ summarised in this report therefore include exporters that are also PTSPs or the associated entity of a PTSP. Similarly, the views of PTSPs include the views of PTSPs that are also exporters or the associated entity of an exporter. As a result, there is a level of overlap between the views expressed in sections 4.1.1 (Exporter views on the Code) and 4.1.3 (PTSP views on the Code). The ACCC also notes that in some circumstances exporter views on the Code reflected in section 4.1.1 may have been influenced by their role as PTSPs.

### 4.1 Key consultation theme: The ACCC continues to hear mixed views on the Code

Stakeholders expressed differing views on the value and impact of the Code.

Stakeholders that expressed support for the Code held mixed views on its effectiveness. Some noted the limitations of the Code, though overall still considered that the Code (or some form of regulatory oversight involving the ACCC) was preferable to no regulation at all. Some stakeholders also noted that the ACCC’s Agriculture Unit and Agriculture Commissioner were able to assist in grain-related matters.<sup>17</sup>

#### 4.1.1 Exporter views on the value of the Code were mixed

Exporters expressed a wide range of views on the Code, and on the value of specific Code obligations to their businesses. Views ranged from strong support for the Code and its positive impact on the quality of exporter access, to strong opposition and calls for it to cease.

The most common view expressed by exporters that supported the Code was the value of port loading statements, as well as the documents published by non-exempt PTSPs (for example, reports on expected capacity and grain stocks held at port under Part 5 of the Code). Some exporters acknowledged that they have only a limited awareness or understanding of the Code’s obligations, particularly in relation to their access rights under the Code. The ACCC is not surprised by these views, given the limitations of the Code (for example, the lack of penalty provisions) and the number of exemptions that have been granted (that is, access rights under the Code do not apply at exempt facilities and therefore may not be a relevant consideration for all exporters). The ACCC has previously noted that it has limited scope to take enforcement action under the Code. The ACCC has also flagged that drafting issues limit the extent to which access seekers can or should rely on the Code in their dealings with PTSPs. In addition, the Code’s exemption framework means that exempt operators are subject to few obligations, including limited obligations regarding third party access.

Some exporters expressed concern that the Code does not cover upcountry storage networks. These exporters considered that issues with access and service conditions were typically experienced in relation to upcountry in storage and handling facilities, rather than at the port level. For example, some exporters referred to issues outturning grain upcountry.

Exporters that did not support the Code considered that it had achieved its purpose (that is, to provide third party access and facilitate the development of competition in the industry). Several exporters stated the exemption status of a port terminal facility does not influence their access decisions. These exporters indicated that they consider the ‘forces of supply and demand’ sufficient to facilitate the efficient use of, and access to, facilities in future.

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<sup>17</sup> The ACCC’s Agriculture Unit was established to examine competition and unfair trading issues in agricultural supply chains with a view to improving enforcement and compliance with the CCA across the agriculture sector.

Overall, while some exporters considered the Code positively impacted the quality of their access to facilities, no exporters expressed specific support for the Code's key 'access obligations' that apply to non-exempt PTSPs.

#### **4.1.2 Grower groups support the Code's reporting obligations more than exporters**

Most grower groups supported the Code and considered there to be a need for regulatory oversight of PTSPs. Some grower groups reiterated their support for the Code's reporting obligations, which they consider improve transparency in the industry. Consistent with the views expressed in previous years, grower groups that expressed support for the Code cited the value of the port loading statements (commonly referred to as 'shipping stems') that all PTSPs are required to publish. Most also supported greater transparency over how PTSPs allocate capacity (including the value of publishing expected capacity).

Some grower groups also suggested that the publication of port loading statements, and the ability to consider future shipment activity, assisted growers' marketing decisions. Grower groups also considered that port loading statements and other forms of transparency provide the industry (including growers) with an indication of where the market will be in the coming months. They consider that this assists growers that have on-farm storage by helping to inform their choices around when to market grain.

Aside from comments on the value of the Code's reporting obligations, grower groups expressed ongoing concern regarding the fairness and transparency of exporter access to facilities, particularly larger-scale facilities owned by large vertically integrated PTSPs. Grower groups indicated that these concerns reflected their discussions with exporters (and also acknowledged that they are somewhat removed from the port access interactions between exporters and PTSPs). Grower groups' views on whether the Code does (or could) address these concerns were mixed.

A common view among grower groups was that there should be a grains industry market inquiry to consider the overall effectiveness of the industry. Grower groups suggested that concerns had persisted in the industry for many years and that other markets (but not the grains market) had been subject to broader review.

#### **4.1.3 PTSPs had mixed views on the Code, regardless of exemption status**

Many PTSPs (regardless of the exemption status of their facilities) consider the Code requires amendments to improve its effectiveness. Some PTSPs considered the Code was no longer necessary for industry and made meeting exporters' shipping needs more difficult. Other PTSPs noted that they did not strongly support the Code.

In relation to the Code's reporting obligations, several PTSPs stated that they do not consider the port loading statement obligation to be burdensome. Some PTSPs questioned the merit of publishing stock at port information and in particular, capacity information. Overall, some PTSPs considered that documents which provide further information on forward shipping plans (for example, port loading statements and available capacity documents) may disadvantage exporters, growers and PTSPs in certain circumstances (both in local and international contexts). For example, if industry was aware of exporters' plans to ship significantly ahead of time, it may increase prices at the time of accumulation. Equally, the ACCC understands that PTSPs may also frustrate outturn upcountry or engage in stock swaps to the detriment of a party planning to export from a competing port terminal.

In relation to the Code's good faith obligation, most PTSPs indicated it wasn't something that changed the way they did business or imposed any particular burden. Most PTSPs stated that their own internal business cultures required them to deal with exporters in good faith and therefore this obligation was not something that impacted how they offered services or treated exporters.

## 5. Stakeholder views on fair and transparent access at port terminal facilities

This chapter explores the key consultation themes on the question of whether exporters were able to secure to fair and transparent access in the 2020–21 shipping year. A range of exporters noted that capacity was constrained at most facilities in 2020–21 and expressed concern about the level of transparency over how certain PTSPs allocated capacity, and how much available capacity they had to offer at any given time. The ACCC also heard from stakeholders on the new pathways to export offered by PTSPs using mobile loaders.<sup>18</sup>

The key themes identified in this year's consultation process build on the observations made in the data update report. In some instances, stakeholders raised long-held concerns, while there were also several new and emerging issues raised.

Through consultation the ACCC can consider the practical effect of the Code and better understand if key concerns are temporary or reflect long-held views. Matters discussed during consultation may warrant further consideration, and potential remedies may be available under the Code, or potentially the CCA.

Information collected by the ACCC regarding bulk grain exports is limited to the information that PTSPs are required to publish or provide the ACCC under the Code (for example the ACCC receives data on upcoming and past shipments and can access other publicly available information required under the Code). Furthermore, exempt PTSPs and non-exempt PTSPs have different reporting obligations.<sup>19</sup> Accordingly, the ACCC is mindful when considering stakeholder concerns that, in its role administering the Code, the ACCC does not always have access to specific evidentiary sources.

### 5.1 Key consultation theme: Access concerns for some exporters during a record shipping year

The key focus of the ACCC's consultation processes for the *ACCC Bulk grain ports monitoring report* is to hear views on whether exporters are securing fair and transparent access to port terminal services, including at exempt port terminal facilities.

It should be noted that since the Code commenced there have been few formal and specific allegations made by exporters regarding vertically integrated PTSPs engaging in discriminatory conduct. Further, some exporters acknowledged in consultation that certain PTSPs (who have been the subject of previous concerns) have improved their customer service in recent years. Despite this, the prevailing view among exporters and grower groups since the Code commenced has been that third party exporters are treated differently, particularly at facilities owned by larger-scale Bulk Handling Companies (BHCs). However, most of the exporters that have expressed this view have been unclear about how unequal treatment (or the perception of unequal treatment) should be addressed, and whether it is an issue that is able to be addressed (or is most effectively addressed) by regulation such as the Code. For the most part exporters advised that they have attempted to engage with the PTSPs to the best of their ability, and/or developed new export pathways using mobile loaders to reduce their reliance on these PTSPs for all of their capacity needs.

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<sup>18</sup> Excluding WA, mobile loaders accounted for 8% of throughput in 2020–21, the highest proportion yet for mobile loaders. See page 2 of the data update report.

<sup>19</sup> Part 2 of the Code requires all PTSPs to publish a port loading statement on their website, and to provide this statement to the ACCC (in a form and manner specified by the ACCC). Part 5 of the Code requires non-exempt PTSPs to publish stock at port information, expected capacity, and performance indicators on their website.

### 5.1.1 Stakeholders provided comments on a changing market with new PTSPs commencing operations

The data update report<sup>20</sup> found that in 2020–21 on average, 5 exporters used each bulk grain export port terminal facility in Australia. This number has steadily declined since 2011–12 when there was an average of 8 exporters using each facility. The data showed that the number of exporters per facility has significantly declined at GrainCorp facilities on the east coast. The decline in average number of exporters per facility has however occurred as the number of new port terminal facilities has increased (particularly on the east coast). The data also showed that some vertically integrated exporters increased their market share at their own facilities when compared to the 2019–20 shipping year.

These data observations were recorded against the backdrop of a record-breaking bulk grain export shipping year,<sup>21</sup> with exporters stating during consultation that margins for Australian grain were particularly high. Stakeholders reported these settings created high demand for port terminal services for both bulk and container exports, as industry sought to take advantage of the huge crop and high global demand for Australian grain. Under these conditions, the ACCC sought to understand further how exporters fared in securing access at the various bulk grain facilities across Australia.

When asked why fewer exporters were using each facility and the market share of vertically integrated exporters at their own facilities had increased in 2020–21, responses from exporters broadly fell into the following categories:

- Market shares and the number of exporters active in specific markets fluctuate each year and are dependent on several factors that are unrelated to access to port terminal capacity (that is, there were no direct issues with access to port terminal services or capacity allocation in 2020–21, these changes were due to other factors).
- Larger-scale facilities were more difficult to access this year for a number of reasons, which led to more exporters seeking and securing access at newer facilities (that is, exporters used a higher number of facilities).
- Securing capacity in the record 2020–21 shipping year was difficult across all facilities due to the high demand.

Some exporters stated that a variety of supply chain and drought issues meant that the larger-scale, more established facilities with long term capacity allocation arrangements were more difficult for smaller-scale exporters to access. For example, after years of larger-scale facilities on the east coast experiencing low levels of utilisation, some exporters noted that vertically integrated exporters had strong incentives to maximise their export volumes at their own facilities in the record 2020–21 shipping year by booking substantial amounts of capacity.

When vertically integrated exporters were asked about their increases in market share at their own facilities,<sup>22</sup> or why fewer exporters had used their facilities, most stated that (in many cases) PTSPs and their trading divisions (or associated entity exporters) had an incentive to keep their supply chain going. These vertically integrated exporters noted that they booked capacity well in advance of the relevant shipping slot, as they were incentivised to keep loading grain for export as efficiently as possible so that storage could be emptied for new receivals.

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20 See section 1.2 of the data update report.

21 A record 33.3 million tonnes of grain were exported in 2020–21, surpassing the previous high of 31.5 million tonnes in 2016–17.

22 CBH's, GrainCorp's and Viterra's total exporter market share at their respective facilities was 58%, 61% and 47% in 2020–21 (7, 18 and 5 percentage points above average respectively). However, this did not lead to an equivalent increase in state-wide market share. CBH in WA (55%) and GrainCorp on the east coast (37%) were 4 percentage points above average, while Viterra's exporter market share in SA (38%) was 2 percentage points below average (see section 1.2 of the data update report). The ACCC also notes that Emerald's exporter market share at its Melbourne facility was 100% (see section 7.3.6 of the data update report).

Vertically integrated exporters also noted that other factors had resulted in the market share increase. For example, some vertically integrated exporters noted that the increase in market share was also driven by the type of crops produced (some exporters tend to focus on certain commodities and not others). It was also noted that overall market shares and the number of exporters active in the market (or at specific facilities) fluctuates year-to-year for a number of reasons other than access to port terminal capacity (such as individual business strategies).

### **5.1.2 Stakeholders noted that Long Term Agreements are an option for some, but not all exporters**

Consistent with the views expressed in the consultation process for the 2019–20 *Bulk grain ports monitoring report*, those exporters not vertically integrated with a PTSP considered entering into Long Term Agreements (LTAs) to be high risk. During the consultation process for the 2019–20 report, many exporters expressed relief that their existing LTAs were coming to an end.

However, despite considering LTAs a high-risk option for their own business, these exporters noted that in the record 2020–21 shipping year a lot of capacity had already been booked by larger vertically-integrated exporters via LTAs (or early short-term bookings in annual capacity allocation processes). This meant it was more difficult for third-party exporters to secure short-term capacity.

While exporters didn't suggest PTSPs were breaching the Code in the way they were allocating capacity, some did suggest concerns around the transparency of certain capacity allocation systems and processes. Some exporters commented that it appears that LTAs were in some way causing the reduction in number of exporters using the larger-scale facilities, particularly given the capital needed to secure LTAs.

In addition, some stakeholders reiterated that LTAs only appear to benefit larger-scale exporters, especially those who are vertically integrated with the PTSP offering them capacity, and therefore face lower risk in signing up. These stakeholders suggested that in practice, smaller-scale third party exporters are less capable of taking on and managing the risks of LTAs. These stakeholders noted that vertically integrated exporters who have LTAs for capacity at their own facilities may benefit in several ways, including by having a higher level of flexibility or discretion in the way they can use and move long term capacity either across the shipping year or between ports. The ACCC notes that LTAs provide a means to allocate the risk of changes in market conditions over time between parties. Vertically and non-vertically-integrated exporters are likely to have different appetites for (and opportunities to manage) the risks associated with unanticipated changes in demand for port terminal capacity (whether due to growing conditions or other factors).

The ACCC acknowledges there are a range of views on the benefits and risks of LTAs in the bulk grain export market. The ACCC notes that the Code does not require PTSPs to publish or provide the ACCC with data that identifies the type of bookings it has received (for example, long-term or short-term capacity). Accordingly, the ACCC has not assessed the extent to which capacity in the 2020–21 shipping year was taken up by LTAs in this report.

### **5.1.3 PTSPs noted the unprecedented demand for services at port and across supply chains**

PTSPs noted the significant demand for port terminal services in 2020–21, but indicated they were not refusing capacity enquiries regularly.

Most PTSPs reported that, overall, exporters appreciated the enormous effort of industry to export such a high volume of grain. Many PTSPs noted that their ability to provide additional port terminal capacity was hampered by supply chain constraints and labour shortages.

Some PTSPs reported that the exporters who were able to successfully export significant volumes were able to arrange for grain to be transported to port (given upcountry transport was one of the most challenging parts of the supply chain).

### 5.1.4 Some grower groups raised concerns that there were fewer exporters using larger-scale facilities and questioned the long-term competitive threat of mobile loaders

Grower groups generally reiterated their view that if exporters are denied fair and transparent access to port terminal services, it is ultimately growers who will bear any additional costs incurred by exporters as a result. More specifically, these grower groups either reiterated, or referred to, their previously stated views that:

- vertically integrated PTSPs have an incentive to discriminate in favour of their own trading division or the exporter that is their associated entity in providing access to port terminal services
- vertically integrated PTSPs are not currently subject to a level of competition that constrains this incentive
- if exporters are not securing fair and transparent access growers will pay the price (either by exporters passing along the additional costs they incurred in securing access through reduced grain prices, or by exporters leaving or not entering the Australian market due to difficulties securing fair and transparent access (thereby reducing competition for growers' grain)).

Some grower groups considered there to be fewer exporters active in the market since the beginning of deregulation, and that this was negatively impacting growers.<sup>23</sup>

Grower groups also raised concerns in terms of the longevity of mobile loading operations and their ability to effectively compete in low demand years. Other stakeholders considered that mobile loaders provided a suitable model for long term use by smaller-scale exporters.

Some grower groups were also concerned that the increased market share of vertically integrated exporters at their own facilities was pushing some exporters either out of the market, or preventing them from using larger port terminal facilities. Some grower groups further indicated that fewer exporters using the larger-scale facilities would lead to reduced competition for grain at the relevant PTSP's upcountry sites, which for some growers are likely to remain their nearest and most practical storage location.

Grower groups generally reiterated previously expressed views that despite having much to gain or lose based on whether exporters are receiving fair and transparent access to port terminal services, they have no visibility over at-port arrangements between exporters and PTSPs.

## 5.2 Key consultation theme: Transparency concerns at ports

This year a number of stakeholders expressed concern about a lack of transparency over certain capacity allocation systems and levels of available capacity at certain port terminal facilities. These concerns related to both exempt and non-exempt facilities and both larger-scale and smaller-scale facilities (including mobile loader facilities). Stakeholder comments were not targeted at any specific region, with examples provided concerning various supply chains and operators across Australia.

### 5.2.1 Exporters expressed concerns about the transparency of some PTSP capacity allocation systems and processes

Several exporters expressed concern that some PTSP capacity allocation systems and specific capacity allocation processes conducted in the 2020-21 shipping year capacity lacked transparency. Some exporters also queried whether certain vertically integrated PTSPs only consider capacity requests by third party exporters only after the capacity needs of their own trading division or associated entity have already been met.

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<sup>23</sup> The ACCC notes that the number of total exporters in the Australian market appears to have marginally increased since the 2014-15 shipping year (the Code commenced on 30 September 2014). Over the 2011-12 to 2013-14 shipping years there were on average 19.3 exporters in the Australian market, whereas over the 2014-15 to 2020-21 shipping years there were 21.3 exporters on average. In 2020-21, 23 exporters were active in the Australian market.

Exporters noted that their experiences with capacity allocation systems differed across the various PTSPs. Exporters noted that some PTSPs were transparent in how requests for capacity were managed, while other PTSPs completely lacked transparency. Exporters questioned the fairness of processes run by PTSPs that they considered lacked transparency. Some of the concerns in relation to transparency related to exempt facilities, while others related to non-exempt facilities.

These transparency concerns related to a range of PTSPs, including larger-scale providers that have operated for several years and smaller-scale new entrants. Concerns also related to both 'First In First Served' (FIFS) capacity allocation processes and ad hoc capacity requests at various stages of the shipping year. All concerns related to PTSPs that have their own trading division or an associated entity that is an exporter.

No PTSP reported receiving any complaints regarding the transparency of their capacity allocation system or 2020–21 shipping year capacity allocation processes. PTSPs did however note that demand for capacity exceeded supply in the record 2020–21 shipping year, meaning they could not accept every capacity request.

### **5.2.2 Stakeholders support the Code's reporting obligations, some exporters and grower groups supported improved transparency measures regarding port terminal capacity**

The Code's reporting obligations (particularly the port loading statement and expected capacity obligations) have typically enjoyed strong support from grower groups and support from most exporters. The basis of this support has generally been that these obligations provide an important level of transparency, as they inform business decisions by providing information that is not available by other means.

PTSPs have typically acknowledged that a level of transparency regarding the availability and use of port terminal capacity is good for the industry, and that the Code's reporting obligations impose a low or fairly low level of regulatory burden.

The ACCC notes the 2017 Code review recommended a series of amendments to the Code's reporting obligations that were intended to improve the quality of the reported information. These proposed amendments were to be supported by the introduction of penalty provisions to promote PTSP compliance.

#### **Stakeholder views on port loading statements**

The port loading statement obligation continues to be the most widely known and valued Code obligation, with most stakeholders agreeing that some form of transparency over capacity bookings or upcoming shipments benefits industry.

Some exporters reiterated concerns about inconsistency in PTSP reporting practices, and explicitly or implicitly supported the Department's recommendation that PTSPs be required to provide a longer forecast of upcoming shipments than they currently do.

While the general level of support for port loading statements continues, many reiterated views expressed during the 2017 Code review that more comprehensive and consistent reporting by PTSPs would improve the value of the reports.

Grower groups reiterated their strong support for continued publication of port loading statements. Grower groups noted their broader concerns about a lack of transparency in bulk grain export supply chains when discussing the value of the port loading statements.

## Stakeholder views on expected port terminal capacity reporting

Perhaps due to the high level of demand for capacity in 2020–21 (and more exporters being advised by PTSPs that they were unable to supply requested capacity than in recent years), several stakeholders commented that the transparency over capacity bookings and available capacity could be improved.

One exporter noted that capacity reporting helps it analyse the market, but that it is not possible to assess the level of available capacity at most port terminal facilities under current reporting arrangements.

## 5.3 Key consultation theme: Mobile loaders provided additional capacity at some ports in a record shipping year

The data update report showed that 2020–21 was the highest bulk grain export shipping year on record.<sup>24</sup> The data showed that capacity was constrained at numerous facilities<sup>25</sup> and that export levels remained high after the typical peak Australian shipping period (February to May), especially in NSW and Victoria.<sup>26</sup> A wide range of exporters sought capacity across competing port terminal facilities.

### 5.3.1 Stakeholders reported that several factors contributed to capacity constraints in 2020–21

Stakeholders noted that several factors contributed to high levels of capacity constraint and exports after typical peak shipping months in the 2020–21 shipping year.

Many stakeholders noted that high levels of capacity constraint were largely due to the near record levels of grain production. Nationally, 57.6 million tonnes of grain were produced, just below the record of 58.1 million tonnes in 2016–17.<sup>27</sup> Many stakeholders noted that it was a whole of industry effort to export the record crop.

Further, many stakeholders noted that in 2020–21 the Northern Hemisphere, particularly in northern USA and Canada, experienced a severe drought. The decrease in production from the Northern Hemisphere resulted in an increase in demand for Australian grain (and for port terminal capacity). Many exporters mentioned that they wanted to capitalise off the strong Australian grain price, leading most to seek to export as much as possible. For some exporters this meant a return to the market after limited participation in recent years.<sup>28</sup>

This increased international demand for Australian grain, in conjunction with increased overall production, resulted in greater capacity constraints across Australian ports than have been recorded for several years.

Grower groups noted that the 2021–22 harvest was predicted to be significantly above average.<sup>29</sup> Consequently it was in the interests of industry to export as much of the 2020–21 harvest as possible, so that space would be available in upcountry storage networks (and in on-farm storage) for the 2021–22 harvest.

Both exporters and PTSPs stated that more capacity would have been welcomed by the industry in 2020–21.

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24 See section 1.1 of the data update report.

25 Excluding terminals in Queensland, 17 of 23 facilities across Australia had peak shipping period capacity utilisation of at least 78% in 2020–21. See pages 4, 25, 39, 57 and 70 of the data update report.

26 In NSW 3 of the 4 largest exporting months occurred after the end of the peak shipping period. Victoria recorded its highest export month after the end of the peak shipping period (in August). See section 1.5 of the data update report for further information.

27 ABARES, State data underpinning: Australia crop report: September 2021 No. 199.

28 ACCC, *Bulk grain ports monitoring report – data update – 2020–21*, p. 3.

29 The 2021–22 harvest is estimated to be the largest on record (65.2 million tonnes). This exceeds the previous high of 58.1 million tonnes in 2016–17 (the 2020–21 total was 57.7 million tonnes). Source: ABARES, State data underpinning: Australia crop report: June 2022 No. 202.

Many stakeholders noted that exports remained high after the typical peak shipping period because of the large production, and that most facilities operated at capacity during the typical peak shipping months.

### 5.3.2 PTSPs wanted to provide further shiploading capacity in 2020–21, but were constrained by supply chain issues

Many PTSPs noted that they would have provided additional port terminal capacity to the industry in the record 2020–21 shipping year. However, the many issues industry faced getting grain to port across the country made it difficult to commit to providing additional capacity to the market.

While many PTSPs noted that they could have offered the market more capacity, not offering this extra capacity meant that they were able to respond quickly to the many logistical challenges experienced in 2020–21 (therefore providing increased flexibility to exporters). For example, one PTSP noted that committing to further port terminal capacity may have overextended other parts of their supply chain and led to delays and disruptions.

While some PTSPs indicated an intention to increase capacity in the coming years, many acknowledged increasing capacity came with logistical challenges and costs.

Stakeholders noted that mobile loaders have entered the PTSP market in response to capacity constraints and to provide further choice in the market. Most exporters noted that mobile loaders had entered the market due to high demand for port terminal capacity or to provide exporters greater control over their shipping operations. Many exporters noted that a significant proportion of capacity was booked out at larger-scale facilities well in advance of when most shipping slot bookings typically occur. In some cases, it appears the reason a significant proportion of capacity was not available to the broader market on a short-term allocation basis was due to LTAs. Some stakeholders noted this development (of booking capacity well head of shipping slots or via LTAs) has in turn created new opportunities for mobile loader operations in some locations.

Some exporters noted the relatively low cost of entry and flexible supply chains offered by mobile loader operations meant these operations were able to respond more quickly and flexibly to high demand (and capitalise off strong harvests).

Some exporters stated mobile loaders play a highly beneficial role in providing exporters access to additional capacity in large shipping years (like 2020–21, where capacity was constrained across many fixed loader operations during the peak shipping period). Some exporters noted the additional benefit of mobile loaders being more accommodating to smaller volumes, and offering greater flexibility in supply chains (such as where grain is delivered from), which are better suited to some exporters.

However, some exporters acknowledged mobile loader operations were not a perfect substitute for fixed loader operations. The key reasons exporters did not view mobile loader operations as perfect substitutes were:

- **Mobile loaders are less efficient.** Compared to fixed loaders, mobile loaders are slower to load grain and more labour-intensive. Exporters stated that in the 2020–21 shipping year high grain margins would have allowed them to absorb the potential unexpected costs of extra labour, freight and demurrage when using a mobile loader, and still make a profit. Additionally, many mobile loader operations have limited storage in the surrounding catchment and must operate a 'just in time' style loading operation, which can be frustrated by poor weather, or delays if grain quality issues arise and alternate grain is unavailable.
- **Mobile loader operations are higher risk than fixed loader operations.** Exporters acknowledged that using a mobile loader operation was a high risk versus high reward proposition. Exporters noted that operational costs can increase rapidly and significantly if, for example, an issue occurs at port or upcountry at the time of loading.

Overall exporters had mixed views regarding the significance of mobile loader operations in future shipping years. Some exporters stated that they would only use a mobile loader operation when trading margins are high (like in 2020–21), and they can afford the increased risk associated with slower loading, delays and demurrage. Other exporters stated that in a shipping year such as 2020–21 they would want to own some supply chain assets (for example, trucks, upcountry storage) if they were to use a mobile loader operation to mitigate risk.

Some grower groups mentioned that in addition to providing extra capacity to the market, mobile loader operations offer more flexible pathways to port. For example, the growth of mobile loading alongside the growth of on-farm storage has allowed growers to move grain outside of commercial bulk handling systems and deliver grain with greater flexibility directly from farm to port. On-farm storage and alternative pathways to port have allowed growers to retain greater control of their grain and occasionally save on supply chain costs. In a bumper shipping year such as 2020–21, some grower groups stated the ability to get grain to the export market via mobile loader operations (and capitalise off strong prices) was beneficial to grower margins.

### **5.3.3 Mixed views on the long-term viability of mobile loader operations in the bulk grain export market**

Some stakeholders stated mobile loader operations will only provide surge capacity for certain exporters when harvests are above average and grain margins are high. These stakeholders consider that PTSPs operating mobile loaders will not provide port terminal services when harvests are below average or when margins are low, as exporters will be less willing to take on the higher risks associated with mobile loading arrangements. Additionally, when harvests are below average, exporters will likely have less difficulty securing access at larger-scale facilities. Many exporters acknowledged that the high trading margins<sup>30</sup> in 2020–21 made mobile loading operations more attractive compared to more typical shipping years. In years where PTSPs using mobile loaders choose to not operate, it was unclear to some exporters how this would impact the nature of access offered by larger-scale fixed loader operations.

Other stakeholders believe that mobile loader operations will be long term players in markets for bulk grain export port terminal services, though possibly not with the same market share as in 2020–21. These stakeholders thought mobile loader operations had become a competitive alternative pathway to market for exporters, particularly in high-demand shipping years where peak period capacity at larger-scale facilities is constrained. In many instances exporters who used mobile loading operations were able to use their own storage facilities and transport connections to facilitate their exports.

### **5.3.4 Container shortages and related logistical difficulties led some exporters to shift to bulk exports**

A few exporters reported that they had re-entered the bulk export market, or increased the proportion of bulk exports they performed, because they were unable to secure containers at an efficient price. These exporters stated they had operations that were somewhat flexible and were able to adapt to the changed market conditions.

The ACCC observed in its *Container Stevedoring Monitoring Report 2020–21* that the container shipping market has been substantially impacted by the COVID-19 pandemic. Consistent with the findings of that report, bulk grain exporters who participated in the consultation process for this report (who have previously exported via containers) indicated that the availability and cost of containers was a hinderance to containerised grain exports in 2020–21.

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<sup>30</sup> The ACCC does not collect grain price information. As such, this statement reflects the views expressed by stakeholders only.

## 6. Stakeholder views on broader grain supply chains

The ACCC has acknowledged the widespread and consistent concerns expressed by exporters and grower groups regarding the upcountry storage arrangements of vertically integrated PTSPs in previous years.<sup>31</sup>

The ACCC considers that the introduction of new port terminal facilities and export pathways has been a positive development for the industry. In addition, the ACCC understands on-farm storage and new third party or independent storage facilities continue to increase across many states. The increasing number of storage options and pathways to port have likely been driven by stakeholders identifying new opportunities to lower input costs and/or gain greater operational control, particularly regarding outturn activity and transport costs.

However, despite the greater number of storage options available to exporters and growers, large incumbent bulk handlers still own and operate most of the upcountry storage across Australia. As such, while there appears to be increasing competition in upcountry storage (both as a result of greater on-farm storage and as new PTSPs develop their operations), the ACCC understands that exporters remain largely reliant on the storage, handling, transport and port terminal services of incumbent vertically integrated PTSPs for at least some of their business.

The ACCC is also aware of ongoing grower concern regarding grain prices, particularly compared to global markets. This report does not consider these matters due to timing (that is, grain price concerns were reported after consultation) and the scope of the Code. Under the Code the ACCC does not receive information on grain prices or the contractual arrangements (including price) in place between growers and exporters.

The views presented in this chapter are also confined to those expressed during the consultation period of January to March 2022 and are based predominantly on experiences during the 2020-21 shipping year. Therefore, the views in this chapter were expressed before reports of large disparities between Australian local grain prices and international grain prices. As above, the ACCC does not collect price data and this matter is outside the remit of the Code.

### 6.1 Key consultation theme: The Code does not cover upcountry services

While beyond the Code's remit, the ACCC has found it useful to invite views on upcountry services, noting the need to consider these services during exempt service provider assessments and to understand the issues faced by industry more broadly. Issues covered in this chapter therefore reflect the views the ACCC received from stakeholders, though there is no supporting data or evidence collected under the Code available for consideration.

Overall stakeholders continue to raise concerns about upcountry supply chains, particularly the process of outturning grain from upcountry facilities. They have also shared with the ACCC that it is difficult to comment in isolation about access to one specific part of the bulk grain export supply chain. That is, to export bulk grain an exporter generally requires access to grain storage (or grain storage outturn) services, grain transport services to get grain to port, and bulk grain export port terminal services to get grain loaded onto vessels.

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<sup>31</sup> The ACCC acknowledged these concerns in its 2015-16, 2016-17, 2017-18, 2018-19 and 2019-20 *Bulk grain ports monitoring reports*.

## 6.2 Key consultation theme: Getting grain to port was costly and complicated for many growers and exporters

Most stakeholders noted that ‘getting grain to port’ was the industry’s biggest issue in 2020–21 (and has continued to be the case into 2021–22). Many of these concerns were in relation to supply chain constraints caused by the COVID-19 pandemic and other factors. For example, several stakeholders noted the difficulty of obtaining access to transport services in the 2020–21 shipping year given record production across several states.

However, like in previous years a small number of stakeholders continued to raise concerns about upcountry stock swaps at facilities operated by vertically integrated BHCs. Similar to previous years, there were also concerns in relation to the certainty, quality and timeliness of grain outturn, and the efficiency of rail transport.

### 6.2.1 Labour shortages impacted the supply chain

Labour shortages were a commonly raised issue that frustrated all stakeholders (growers, PTSPs and exporters) in getting grain to port. It appears this issue spanned whole supply chains across many growing regions.

Exporters stated it was often difficult to secure truck drivers and train drivers to transport grain to port. Many suggested the workforce was greatly reduced during the years of drought and it would take some time for the workforce to recover.

Stakeholders in WA suggested they were losing drivers to other industries, particularly the mining industry, which offers competitive trucking contracts. The shortages seemed to be exacerbated by the COVID-19 pandemic and associated border restrictions.

Stakeholders in SA and on the east coast reported similar issues with securing skilled on farm labour, as well as truck and train drivers. Some exporters suggested there are not enough new employees entering the industry.

Similarly, COVID-19 restrictions seemed to exacerbate labour shortages due to lockdowns and labourers contracting COVID-19 or being required to isolate. Despite this, many exporters emphasised that the labour shortage is a more widespread and longstanding issue rather than just a specific impact of the COVID-19 pandemic.

### 6.2.2 Weather events

Several stakeholders indicated that extreme weather events impacted their ability to get grain to port. Stakeholders in NSW experienced delays and increased costs because of bushfires, floods and landslides. Some PTSPs and exporters explained that heavy rain during harvest significantly impacted grain quality.

### 6.2.3 Inefficient rail infrastructure and increased demand for road freight

Stakeholders acknowledged that where suitable rail infrastructure is available it continues to represent the most efficient method of transporting grain over longer distances. However, many stakeholders emphasised a range of inefficiencies experienced using rail due to the physical state of rail infrastructure across many regions and high costs overall. Most exporters acknowledged significant investment is required to improve rail infrastructure, though some reported improvements in some areas of the WA network.

Many stakeholders also noted rail was not a viable option for smaller-scale PTSPs due to costs and risks, especially as many rail providers require multi-year agreements. In some locations rail was previously available but the lines were no longer in use. Some grower groups suggested that industry is losing money because of a lack of investment in rail and the resulting inefficiencies were in effect passed onto growers through lower grain prices. More broadly, some grower groups continued to raise long-held concerns that any costs or reduction in competition throughout the supply chain, are ultimately borne by growers.

Many stakeholders noted that road freight was also at capacity in the 2020–21 shipping year due to the large harvest causing high demand for drivers. Some exporters noted this resulted in the cost of road freight per kilometre increasing significantly.

#### **6.2.4 While there are now more export pathways, they are each used by fewer exporters**

Stakeholders expressed concern that some pathways to port are becoming more complicated to enter. For example, as bulk handlers rationalise their storage networks it can become more expensive and time consuming for a grower to deliver to a different site further away or to a hub site where they previously delivered to a local site closer to farm. Further, if the prospects of securing capacity at port are uncertain for third party exporters the merits of storing and trading grain in the incumbent's upcountry facilities decline.

Some exporters also observed that due to the considerable logistical challenges experienced during the 2020–21 harvest, PTSPs sought to have greater control over their whole supply chain from upcountry to port. Specifically, many PTSPs needed to keep grain moving through upcountry storage to facilitate throughput and have capacity to receive grain. Many exporters acknowledge the efficiencies that flow from this type of model where storage, transport, port facility and exporter are all highly coordinated and that they understood why it was occurring to varying degrees across industry. However, it was unclear from stakeholders if such efficiencies flowed through to growers or exporters in some way.

As exporters identified shipping opportunities at alternate ports, they also needed to identify new pathways, for example by arranging their own transport, using a mix of on farm storage, upcountry storage or delivering direct to port.

Stakeholders believed this trend was not tied to specific seasonal factors but represented a shift in approach by exporters and PTSPs.

#### **6.2.5 Ongoing uncertainty regarding regulatory settings upcountry**

Some stakeholders reported ongoing uncertainty regarding the outcome of the 2017 Code review, with grower groups and some exporters indicating ongoing concerns surrounding access to upcountry facilities. Some PTSPs expressed concern about the experiences of their customers when using the upcountry facilities of other PTSPs (that is, taking grain out of one pathway and putting it into another).

#### **6.2.6 The impacts of COVID-19 on stakeholders' operations**

The ACCC's 2019-20 *Bulk grain ports monitoring report* found that the industry had effectively managed the earlier effects of the COVID-19 pandemic on bulk grain operations. The 2019-20 report attributed this largely to a low production year. With 2020–21 being a record export shipping year, the impacts of COVID-19 were more largely felt throughout the industry.

Unsurprisingly, stakeholder responses when asked about the impacts COVID-19 had on their business varied significantly based on their geographical location:

- Some PTSPs and exporters noted the impacts of COVID-19 on business operations were not widespread or long lasting. For example, the impacts to these businesses were limited to some staff contracting COVID-19 and taking leave or working from home during lockdowns.

- Stakeholders operating across the eastern states reported more staffing disruptions due to the longer lockdowns faced in Victoria and NSW, including for example isolation requirements and border restrictions.
- Stakeholders indicated that the main COVID-19 impact experienced by the WA industry was labour shortages, mainly because of border restrictions and competition for labour from other markets.

While operational impacts were limited, many PTSPs and exporters stated COVID-19 resulted in increased costs across the supply chain.

### **6.2.7 Views on a lack of transparency over the impact of vertical integration in bulk grain export supply chains**

Some stakeholders also reiterated general concerns or perceptions regarding the incentives and ability of vertically integrated PTSPs to exercise market power along supply chains.

Some stakeholders also noted the ability of vertically integrated PTSPs to vary pricing and services at different parts of the supply chain which, at times, can be to the apparent disadvantage of network users. Costs in one part of the supply chain may also reverberate more broadly. For example, delayed outturn may cause demurrage at port or a late vessel may hamper outturn and increase associated costs.

Stakeholders often linked broader concerns across supply chains with the need to increase transparency measures.

### **6.2.8 Debate across industry regarding the merit of publishing upcountry stocks continues**

Debates regarding the merit of mandatory reporting on volumes of grain stored upcountry have persisted for most of the past decade.

In consultation stakeholders again raised differing views on the value that further transparency regarding grain stocks data can provide industry versus the detriment it may cause.

# 7. ACCC's response to key consultation themes

## 7.1 ACCC response to stakeholder views on the Code

The ACCC notes that stakeholders continue to have differing views on the value of and need for the Code (as outlined in chapter 4).

The ACCC has observed that exporters and grower groups generally appear to value the presence of the ACCC in the market and the obligations the Code imposes on PTSPs. However, it is not clear if this reflects their specific views on the merit of particular aspects of the Code, or rather the ACCC's general monitoring of the industry.

Notably, many exporters appear to have a limited awareness of the specific rights afforded to them under the Code. The ACCC notes that the Code's lack of a robust enforcement regime makes it a risky strategy for an exporter to rely on the Code in their dealings with a PTSP.<sup>32</sup> As noted by exporters during consultation, exporters rely on one or more of the following arrangements to secure the port terminal capacity they need: effective commercial relationships with incumbent PTSPs; developing their own export pathways; or switching between PTSPs.

## 7.2 ACCC response to stakeholder views on fair and transparent access

Chapter 5 outlined the key issues expressed to the ACCC during the 2020–21 consultation period in relation to fair and transparent access at port. Most concerns raised related to experiences in the 2020–21 shipping year (during which many facilities were fully booked) but some also reflected more general, longer-standing views.<sup>33</sup>

### High demand meant some exporters missed out on securing shipping slots

Access concerns in 2020–21 appear to have been isolated to a lack of available capacity and a lack of transparency regarding capacity allocation and availability. These concerns are similar to those expressed in previous years; however they were more widespread in relation to the 2020–21 shipping year and were mostly in relation to exempt facilities. The record bulk grain export shipping year meant there was high demand for capacity and some exporters indicated that securing access at certain facilities was difficult due to the lack of capacity and/or being unable to satisfy access terms at certain ports (for example the need to deliver grain by rail instead of road).

In high production years, it may not be possible for all capacity requests to be met. However, some exporters noted that many facilities were already booked out when they made their capacity enquiries.

The ACCC notes that there are no capacity allocation requirements or obligations under the Code for exempt facilities, while non-exempt facilities must have an ACCC approved capacity allocation system to allocate capacity more than 6 months in advance. Non-exempt PTSPs must also publish information on expected capacity. The Code also requires all PTSPs to publish port loading statements, which provides some (but not all) information on booked capacity. The Code as drafted is unable to provide stakeholders any further information regarding the allocation of capacity, particularly in relation to exempt facilities.

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<sup>32</sup> For example, see page 11 of the 2019–20 *Bulk grains monitoring report*.

<sup>33</sup> Concerns raised by exporters in relation to specific shipping years can be found in previous ACCC *Bulk grain ports monitoring reports*. See here: <https://www.accc.gov.au/regulated-infrastructure/wheat-export/bulk-grain-ports-monitoring-reports>.

## Continued perceptions of unfair treatment in capacity allocation processes

Despite a number of new PTSPs entering markets in recent years (and therefore high levels of competition between providers of bulk grain export port terminal services), stakeholders appear to continue to hold in-principle concerns regarding the incentives of vertically-integrated PTSPs. Further, stakeholder concerns around the incentives of certain vertically-integrated PTSPs do not appear to vary on the basis of a PTSP's exemption status (that is, whether the relevant PTSP is required to comply with Parts 3 to 6 of the Code or not). At the same time the ACCC notes that the number of specific and formal complaints received regarding the conduct of individual PTSPs remains relatively low.

In this year's consultation, some exporters expressed concerns regarding a lack of transparency around the allocation of capacity by several PTSPs. While similar concerns have been expressed in previous years, they appeared more widespread this year.

Consistent with previous years, stakeholders expressed fairly strong support for the Code's reporting obligations (including the obligations to publish a port loading statement, and to publish expected capacity for non-exempt facilities), particularly among grower groups. In relation to capacity allocation, more concerns were raised regarding the fairness and transparency than in previous years, though the ACCC notes that 2020–21 was a record export shipping year.

There were also some direct inferences from stakeholders that improved capacity reporting by PTSPs (such as via the extension of Part 5 capacity reporting obligations to all PTSPs) would improve transparency and understanding of how PTSPs allocate capacity. The ACCC considers that ongoing perceptions of unfair treatment may be reducing exporters' confidence in obtaining port terminal services.

## 7.3 ACCC response to stakeholder views on broader supply chain issues

Chapter 6 sets out a number of the concerns on supply chain issues expressed by stakeholders during the course of the ACCC's consultation on the 2020–21 shipping year. Some of these views expressed reflected more general, longer-standing views.

The ACCC's observations and views on broader supply chain issues are discussed below, drawing on the 2020–21 consultations as well as the ACCC's previous interactions with stakeholders. In considering these matters, the ACCC notes that the Code is focused on fair and transparent access for exporters at the port level, and that the ACCC does not have a pricing role under the Code. As such, the ACCC does not necessarily have the data to draw conclusions in relation to the issues related to broader supply chain concerns.

While the ACCC acknowledges the supply chain challenges industry faced in the 2020–21 shipping year, the ACCC notes that the Code's regulatory framework does not extend to most of the issues brought to its attention. In this regard the ACCC notes that stakeholder views regarding port access being inextricably linked to other stages of the supply chain and concerns about services beyond the port were a consistent theme of the 2020–21 consultation process. The ACCC appreciates that these issues have also been raised by stakeholders over several years.

Grower groups have long-held concerns that any costs, reduction in competition, or inefficiencies across the supply chain are passed onto them through lower grain prices. The ACCC acknowledges that, as price takers, any costs or inefficiencies throughout the supply chain are likely borne, at least in part, by growers. The ACCC notes that the Code does not directly interact with growers or upcountry markets, and as such does not offer a means in which to address these concerns (or other concerns not directly related to access to port terminal services). However, the ACCC notes that its Agriculture Unit can assist in some grain-related matters, should the conduct fall under the remit of the CCA.<sup>34</sup>

As such, the ACCC considers that the second Code review should seek to confirm the specific nature of exporters' and growers' concerns, and whether the Code does or could address them (or whether other mechanisms may be more effective or appropriate).

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<sup>34</sup> Further details about the ACCC's Agriculture Unit can be found here: <https://www.accc.gov.au/focus-areas/agriculture>.

## 8. Current exemptions do not warrant further consideration by the ACCC at this time

As outlined in section 8.2, the ACCC heard concerns about transparency of capacity allocation processes in the 2020–21 shipping year. Many of these concerns were in relation to exempt facilities which have fewer reporting obligations and are not required to have an ACCC approved capacity allocation system.

The ACCC has granted 19 exemptions since the Code commenced and has generally been of the view that new entry and resulting competition has been positive for many exporters and growers. For example, exporters have suggested increased competition in markets for bulk grain export port terminal services has led to some PTSPs increasing their responsiveness and flexibility when it comes to access negotiations and day to day operational matters. Where the ACCC has granted exemptions, the ACCC has noted in its decision documents that in the presence of sufficient competitive constraints both PTSPs and exporters are likely to benefit from increased operational flexibility.

The ACCC can revoke exemptions if, after having regard to the matters in subclause 5(3) of the Code, it is 'satisfied that the reasons for granting the exemption no longer apply'.<sup>35</sup> The ACCC notes that if it were to observe concerning market trends or receive complaints about access to port terminal services at an exempt facility it could give rise to further consideration of the appropriateness of the exemption.

The uncertainty around the Code means that the ACCC does not consider it is now the time to review existing exemptions. The ACCC will however continue to monitor port terminal services provided via exempt facilities, and acknowledges the concerns expressed by stakeholders in relation to some facilities where capacity was fully or mostly booked by the vertically integrated exporter.

Stakeholders may raise concerns with the ACCC at any time about issues relating to bulk grain export supply chains.<sup>36</sup>

The ACCC recognises that many stakeholders have also called for increased transparency measures at port (and across related markets) during the ACCC's consultation on various exemption applications. This has included the broader application of the 'expected capacity' obligation in Part 5 of the Code.

The ACCC notes it can only exempt a PTSP from all obligations in Parts 3 to 6 of the Code. That is, it cannot exempt a PTSP from specific obligations in Parts 3 to 6 (while retaining other obligations). The decision to grant an exemption involves the ACCC balancing a series of incentives and trade-offs, including any potential benefits associated with publication requirements under Part 5 of the Code.<sup>37</sup>

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35 See subclause 5(6) of the Code. Available here: <https://www.legislation.gov.au/Details/F2014L01250>.

36 See here for how to contact the ACCC regarding bulk grain export matters: <https://www.accc.gov.au/regulated-infrastructure/wheat-export/accc-role-in-wheat-export#contact-the-wheat-export-team>.

37 Under Part 5 of the Code a PTSP is required to publish expected capacity, performance indicators and stock at port information on its website.

## 9. ACCC's view on next steps on the Code reforms

In its previous monitoring reports, the ACCC emphasised the importance of implementing the 2017 Code review's recommendations as soon as practicable. However, significant time has elapsed since that review was undertaken and markets for bulk grain export port terminal services have continued to evolve in that time. The ACCC now considers that the recommendations of the 2017 review should be revisited to ensure that any changes to the Code take recent developments in the market into consideration.

The ACCC submitted a series of recommendations designed to improve the effectiveness of the Code as part of the 2017 Code review.<sup>38</sup> These recommendations included:

- introducing a more effective compliance and enforcement regime (including penalty provisions)
- resolving drafting ambiguity for several of the Code's obligations
- improving transparency measures
- expanding the Code to cover all grains, both as a means of addressing enforcement limitations within the Code and in recognition that the Code should target access to port terminal capacity, and not any one grain type.

The ACCC's ability to ensure exporters can access capacity on a fair and transparent basis has been impacted by the limitations of the Code. While implementation of the 2017 Code review recommendations will improve some aspects of the Code, the industry has evolved since this time and the ACCC has identified further regulatory limitations while administering the Code since 2017. The ACCC considers that a timely second review of the Code will provide a much-needed opportunity to consider the merit and effectiveness of the Code, and whether the current regulatory approach is fit for purpose.

### 9.1 Implementing 2017 Code review recommendations will not provide the best regulatory outcome

In the 2019–20 *Bulk grain ports monitoring report* the ACCC welcomed the then Australian Government's support for several of the 2017 Code review's recommendations. At that time the ACCC expected that implementing these recommendations would benefit the industry, including those recommendations intended to clarify several of the Code's reporting obligations. The recommended amendments were also expected to reduce regulatory burden on PTSPs by removing (and adjusting) several reporting obligations. More broadly, the inclusion of new compliance and enforcement measures (which were supported by the then Australian Government), were also expected to deter breaches and increase overall confidence in the regime. The ACCC's support also reflected the expectation that there would be sufficient time for the effects of the implementation of the recommendations (and any new issues that might arise) to be considered by the second review of the Code prior to its required commencement by 30 September 2022.

Many of the recommendations from the 2017 Code review reflected concerns held by the ACCC at that time and, if implemented in a timely manner, would have improved the operation of the Code. However, the market has changed considerably since that time and new issues with the Code have emerged.

The ACCC also notes that, in part, it appears that the market may have developed in certain ways because of the limitations of the Code. For example, due to the limitations of the non-discrimination provision and the absence of a penalty regime, access seekers had little reason to rely on the Code as a means to secure port access. Rather many exporters appear to have invested in mobile loading operations to guarantee some export activity.

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<sup>38</sup> The ACCC's submissions to this process can be found here: <https://www.accc.gov.au/about-us/consultations-submissions/accc-submissions#wheat-export>.

While the ACCC continues to hold the view that implementing the recommendations from the 2017 Code review would deliver some improvements to the effectiveness of the Code, the ACCC considers that progressing the second review of the Code is more likely to deliver a better targeted and more effective response for industry. In particular, the second review can consider both long standing as well as emerging concerns, the duration of the Code, and to what extent the port terminal services market has changed across Australia.

## 9.2 Importantly, the Code’s application to new entrants requires urgent consideration

The ACCC considers that the default application of the full suite of the Code’s obligations to new entrants may place an unnecessary regulatory burden on smaller-scale operators. All 11 new PTSPs that have applied for exemption since the Code commenced in 2014 have been granted an exemption.<sup>39</sup> The ACCC notes that, to date, new facilities have entered markets with significant and well-established port terminal facilities and have therefore been subject to significant competitive constraints.

The Code was intended to provide a deregulatory pathway for industry. However, the industry has evolved, with an increasing number of smaller-scale PTSPs being subject to regulation. While the original access undertakings appropriately captured 4 larger-scale, vertically-integrated PTSPs, the Code currently covers 16 PTSPs.<sup>40</sup> Given that new-entrant PTSPs are increasingly smaller operations, they are potentially subject to a relatively disproportionate level of regulatory burden (compared to larger incumbents).

This was not a matter considered in the 2017 Code review, therefore the implementation of 2017 Code review recommendations will not address this issue. The ACCC considers it should be a key consideration for the second Code review.

## 9.3 Second review and consultation on future of the Code is warranted

The then Australian Government responded to the 2017 Code review in October 2020. The regulatory arrangements which the Code is established under require a second review to commence by no later than 30 September 2022.

The then Australian Government’s response to the first review of the Code:

- supported that the Code be retained and reviewed again in 2022 (and that the next review of the Code was likely to commence in mid-2022)
- indicated the intention to consider the ACCC’s proposed ‘all-grains’ amendment as part of the 2022 review.

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39 New facilities since 2014 include: NAT Newcastle, WAPRES Bunbury, QBT Brisbane, Patrick Port Adelaide, Quattro Port Kembla, Semaphore Port Adelaide, Riordan Geelong, Riordan Portland, T-Ports Lucky Bay, Cargill Port Adelaide, ADM Port Pirie and Port of Portland Portland.

40 Prior to the Code, wheat port access was regulated under the Wheat Export Marketing Act 2008 (Cth) (WEMA). In order to export bulk wheat, wheat exporters who also owned and/or operated wheat port terminal facilities were required by the WEMA to pass an ‘access test’. Having an access undertaking accepted by the ACCC under Part IIIA of the CCA was one component of the access test. The ACCC accepted undertakings from 4 operators – CBH, Emerald, GrainCorp and Viterro – under the WEMA regime. <https://www.accc.gov.au/regulated-infrastructure/wheat-export/accc-role-in-wheat-export#wheat-export-access-undertakings>.

Overall, the ACCC considers that industry would be best served by ensuring the second review commences as soon as practicable within the next 12 months. The second review will allow for the consideration of issues and developments that have emerged since the 2017 Code review, as well as ongoing issues. These include:

- the increasing number of PTSPs in the market and the application of the Code on new entrants
- coastal shipping (during drought years), which could in practice impact an exporter's ability to secure port terminal services for the purpose of bulk grain exports
- the uncertainty in relation to the ongoing role of mobile loaders, particular in relation to the role they now play in servicing exporters who are unable to access larger facilities
- access and transparency concerns in relation to some exempt facilities and uncertainty surrounding the effectiveness of the Code
- in some cases, increased market share of vertically integrated exporters at their own facilities
- upcountry supply chain challenges and increased costs particularly in relation to transport.

The ACCC therefore considers that commencing the second review of the Code will see both the Australian Government and industry better-placed to determine what changes are needed to the Code. This will help to ensure that any changes to the Code reflect current (and expected future) market conditions and that the Code remains the most effective and fit-for-purpose regulatory approach. In the interim, the ACCC will continue to monitor exporter concerns regarding fair and transparent access.

Separately, some stakeholders have called for the ACCC to undertake a broader grains industry market inquiry. It is a matter for the Australian Government to determine whether it wishes to direct the ACCC to conduct such an inquiry.

# Appendix A: Background on the Code

The Port Terminal Access (Bulk Wheat) Code of Conduct began on 30 September 2014. The Code replaced the previous wheat port access rules under the *Wheat Export Marketing Act 2008* (Cth).

The Code is set out in Schedule 1 of the *Competition and Consumer (Industry Code – Port Terminal Access (Bulk Wheat) Regulation 2014* (Cth)<sup>41</sup> and is a prescribed mandatory code of conduct for the purposes of section 51AE of the *Competition and Consumer Act 2010* (Cth). It is often referred to as the Wheat Port Code of Conduct or wheat port code.

The Code applies to the providers of services supplied via port facilities capable of handling bulk wheat and exporters that wish to use those services. It regulates the commercial behaviour between PTSPs and exporters to ensure that ‘exporters of bulk wheat have fair and transparent access to port terminal services’.

The Code also assigns the ACCC a number of specific roles, including the ability to determine a PTSP to be an ‘exempt service provider’. In considering whether to exempt a PTSP from having to comply with Parts 3 to 6 of the Code in the course of providing services from a specified facility, the ACCC is required to consider a list of matters set out at subclause 5(3) of the Code. Parts 3 to 6 of the Code contain the obligations that seek to ensure PTSPs provide access to services fairly and transparently. For example, non-exempt PTSPs are required to:

- not discriminate in favour of a related export business or hinder access in the course of providing services
- have and publish a port loading protocol which contains a capacity allocation system
- if allocating capacity more than 6 months in advance, have an ACCC-approved capacity allocation system
- resolve disputes in accordance with a Code-prescribed dispute resolution process.

Since 2014, the ACCC has granted exempt service provider status in relation to 19 facilities and decided against granting exempt status at 5 (GrainCorp Portland, Viterra Wallaroo, Viterra Port Giles, Viterra Port Lincoln, and Viterra Thevenard).

On 17 November 2014 the Minister for Agriculture granted CBH exempt service provider status at each of its 4 port terminal facilities in WA based on CBH’s co-operative status.

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<sup>41</sup> Available at: <https://www.legislation.gov.au/Details/F2014L01250>.



AUSTRALIAN COMPETITION  
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