



Second review of the Wheat Port Code

ACCC submission in response to
Discussion Paper

14 December 2023

Acknowledgement of country

The ACCC acknowledges the traditional owners and custodians of Country throughout Australia and recognises their continuing connection to the land, sea and community. We pay our respects to them and their cultures; and to their Elders past, present and future.

Australian Competition and Consumer Commission

Land of the Ngunnawal people

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Executive summary

The purpose of the Port Terminal Access (Bulk Wheat) Code of Conduct (Code) is to ensure that exporters of bulk wheat have fair and transparent access to port terminal services. The ACCC has administered the Code since it commenced on 30 September 2014. Since that time the ACCC has observed considerable change, including:

- greater numbers of port terminal service providers (PTSPs) and port terminal facilities
- the increased use of novel types of infrastructure and/or business models by new entrant PTSPs (including the use of mobile ship loaders).

In considering these changes and the future of the Code, the ACCC has formed the view that it is not clear that the Code strikes the right balance between regulatory burden and the benefits it delivers. Based on the ACCC's experience in administering the Code it is not fit for purpose. In particular:

- the Code's regulatory burden continues to increase as new PTSPs enter the market, particularly given new entrants are typically smaller-scale operators competing with large-scale operators
- all of the Code's obligations apply to new entrant PTSPs by default, despite new entrants often entering grain catchment areas where significant and well-established port terminal facilities are already operating.
- there are significant limitations to the enforceability of the Code's access obligations (largely due to them applying only when an exporter is seeking access to services for the purpose of exporting bulk wheat).

In addition, the ACCC notes that PTSPs have been granted exemption from Parts 3 to 6 of the Code in relation to 25 of the 32 currently operational port terminal facilities (this includes the exemption granted to CBH by the Minister administering section 1 of the *Farm Household Support Act 2014*).¹ This means that most of the obligations that seek to ensure PTSPs provide access to services fairly and transparently do not apply at these facilities. Only GrainCorp (in relation to 3 facilities) and Viterra (in relation to 4) must comply with all the Code obligations.

As a result only a small proportion of bulk grain exported from Australia is loaded at a facility where the PTSP must comply with the access provisions of the Code. In the 2021–22 season, this was around 11% of all bulk grain exported. Therefore, any amendments to the obligations in Parts 3 to 6 of the Code would likely have limited practical impact.

The ACCC considers that, on balance and in the current market context, the Code should be allowed to sunset. The ACCC's views on the ongoing merit of the Code are however a specific and targeted assessment of its limited effectiveness, against the backdrop of a changing industry.

The ACCC will continue to consider activity within the bulk grain export industry in other contexts (for example, in relation to a merger assessment or an enforcement matter) and will do so against the appropriate framework as required. The ACCC is also engaged in

¹ Currently the Minister for Agriculture, Fisheries and Forestry.

various reviews and inquiries that consider reform across supply chains more broadly (for example, the Productivity Commission's recent inquiry into Australia's maritime logistics system).

The ACCC is mindful that despite increasing numbers of PTSPs and port terminal facilities, market concentration and vertical integration continue to feature in certain grain catchment areas and may give rise to competition concerns.

The ACCC also does not wish to pre-empt the outcome of this review and observes that industry participants are best placed to comment on the impact of the Code (both positive and negative) and whether it remains necessary. Without the benefit of understanding industry's current views on the need for regulation of exporter access to port terminal services (for the purpose of exporting bulk wheat or bulk grains generally), it would be premature for the ACCC to attempt to identify possible alternate forms of regulatory (or non-regulatory) intervention at this time.

The ACCC observes that in Code-related consultation processes industry participants have also expressed a range of concerns regarding bulk grain export supply chains that relate to matters beyond the Code's specific scope (that is, exporter access to port terminal services). These concerns are summarised at Appendix B.

In the interests of supporting the review's consideration, the ACCC has identified the types of information that different stakeholders are likely well-placed to provide, as well as additional information that may be relevant to the review. This information is available at Appendix A.

Introduction

The ACCC appreciates the opportunity to respond to the Department of Agriculture, Fisheries and Forestry's (Department) Second Review of the Wheat Port Code: Discussion Paper.

As the agency that regulates codes of conduct that are prescribed as regulations under the *Competition and Consumer Act 2010* (Cth) (CCA), the ACCC is keen to ensure effective, fit-for-purpose regulation that supports competitive markets.

About the Code and the ACCC

The ACCC has administered the Code since its commencement on 30 September 2014. 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 CCA.

The Code applies to the providers of port terminal services supplied via port terminal facilities and the exporters that wish to use those services for the purpose of exporting bulk wheat. It regulates the behaviour between PTSPs and exporters to ensure that 'exporters of bulk wheat have fair and transparent access to port terminal services'.² In the context of the Code exporters can be considered the access seeker while PTSPs can be considered the access provider.

The Code assigns the ACCC several specific roles, including the ability to determine a PTSP to be an 'exempt service provider'.³ A decision by the ACCC to 'exempt' a PTSP means that the PTSP does not have to comply with Parts 3 to 6 of the Code when providing services at a specified facility.

Parts 3 to 6 of the Code contain most of the obligations that seek to ensure PTSPs provide access to services fairly and transparently. For example, a non-exempt PTSP is required to:

- not discriminate in favour of itself or a related export business and not hinder an exporter's access in the course of providing services
- provide access in accordance with an ACCC-approved capacity allocation system if allocating capacity more than 6 months in advance
- resolve disputes in accordance with Code-prescribed dispute resolution processes.

The ACCC wishes to provide to this review the benefit of its experience administering the Code and interacting with industry participants. The ACCC also has a general awareness of how the Code may be impacting markets for bulk grain export port terminal services through its interactions with industry stakeholders. However, the ACCC considers that industry stakeholders are best placed to comment on the practical impact of the Code on their operations, as well as its overall value and merit. Specifically, the ACCC considers that:

- PTSPs are best placed to comment on the regulatory burden that the Code imposes and the impact it has on their businesses (including the extent to which it imposes a barrier to entry).
- Exporters are best placed to comment on the effects the Code has on their ability to access port terminal services.

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

³ Port Terminal Access (Bulk Wheat) Code of Conduct, r.5(2).

- All industry participants will be well placed to comment on whether the regulation of access to port bulk grain export port terminal services is required, and the extent to which alternative approaches to facilitating fair and transparent access to services (or dealing with other industry issues) could deliver better outcomes.

The ACCC notes that industry engaged in the first Code review process in goodwill. The ACCC also expresses its appreciation for industry's engagement with the ACCC's Code-related consultation processes (for example, in relation to exemption assessments and the ACCC Bulk grain ports monitoring report). However, the ACCC notes that stakeholders' capacity and interest to engage in Code-related consultation processes has declined over time. The review will provide a timely opportunity for further engagement, especially noting the changes across the industry.

The ACCC considers it important that industry is given as much certainty as possible, as soon as possible, over whether the Code will be remade, amended or allowed to sunset. Any possible interaction between this review and sunseting processes should be as transparent as possible, including around the timing and sequencing of any interactions.

History of bulk wheat export regulation

The history of the regulation of bulk wheat exports stems from the removal of Australia's 'single desk' approach to wheat marketing. The *Wheat Export Marketing Act 2008* (Cth) (WEMA) was introduced to promote the development of a competitive bulk wheat export marketing industry and provide a regulatory framework for exporters participating in the bulk wheat export trade. The WEMA required bulk wheat exporters to be accredited and accredited exporters that operated a bulk wheat export port terminal facility to comply with an 'access test'. One of the requirements of the access test was to have in operation, under Part IIIA of the *Trade Practices Act 1974* (Cth),⁴ an access undertaking accepted by the ACCC.

At the time the WEMA was introduced there were 3 dominant PTSPs operating across Australia (GrainCorp, CBH and Viterra). Emerald (now Louis Dreyfus Company) also operated the Melbourne Port Terminal at this time. The ACCC accepted undertakings from all 4 of these operators. The first undertakings were accepted in 2009, with further undertakings accepted in 2011 and 2013.

Under this regime the ACCC also monitored PTSP compliance with the undertakings, assessed proposed variations to undertakings and carried out other specific roles.

The Code replaced the WEMA on 30 September 2014. Whereas the WEMA applied to PTSPs that were also exporters (which were also large-scale, monopoly or near-monopoly service providers), the Code applies to all PTSPs, including smaller-scale, non-vertically integrated PTSPs.

The Code was included in a list of instruments due to sunset on 1 October 2024 that was tabled in the Houses of Parliament on 9 and 10 May 2023.

⁴ The *Trade Practices Act 1974* (Cth) was later renamed the *Competition and Consumer Act 2010* (Cth).

Industry change since implementation of the Wheat Port Code

The ACCC observes that the Australian bulk grain export industry has developed significantly since the Code commenced on 30 September 2014. Among the changes are a significant increase in the number of PTSPs and a shift in business models being adopted by new entrant PTSPs.

This means that the regulation of bulk wheat exports applies more broadly, and to different kinds of PTSPs, compared to when the Code commenced. For example, the ACCC notes that:

- the WEMA (which applied before the Code commenced) applied to 4 large-scale, vertically integrated PTSPs with a monopoly or near-monopoly market positions,
- the Code currently applies to 16 PTSPs, and increasingly to smaller-scale, non-vertically integrated PTSPs entering markets already serviced by one or more existing providers (including one of the large-scale, vertically integrated incumbents).⁵

The ACCC considers that the Code may be applying more broadly and imposing more regulatory burden than what was originally intended. The ACCC considers that this review should consider how the Code applies to these changed circumstances.

Increased number of port terminal service providers subject to regulation

The Code's predecessor, the WEMA, applied to 4 large-scale PTSPs operating high-speed fixed ship loaders (CBH, GrainCorp, Viterra and Emerald (now Louis Dreyfus Company)).

At that time the Code commenced there were 7 PTSPs and 21 operational facilities. There are now 16 PTSPs and 32 operational facilities.⁶

This significant new entry has led to many Australian ports having multiple providers of bulk grain export port terminal services. The presence of multiple providers of services in specific grain catchment areas has been a key reason why the ACCC has granted PTSPs exemptions from Parts 3 to 6 of the Code in relation to 21 of the 32 currently operational facilities.⁷ However, notwithstanding the above, the ACCC notes that 3 vertically integrated PTSPs (CBH, GrainCorp and Viterra) continue to provide the majority of bulk grain export port terminal services nationally, and in their respective regions of operation.

⁵ In May 2023 Commodity Ag was granted exempt service provider status in relation to a new port terminal facility at the Port of Albany in Western Australia. Once services from this facility commences there will be 17 PTSPs and 33 operational port terminal facilities.

⁶ Once Commodity Ag begins providing services from its port terminal facility at the Port of Albany, there will be 17 PTSPs and 33 operational port terminal facilities.

⁷ Overall PTSPs have been granted exemption from Parts 3 to 6 of the Code in relation to 25 of the 32 currently operational port terminal facilities (this includes the exemption granted to CBH by the Minister administering section 1 of the Farm Household Support Act 2014).

New entrants increasingly adopting novel, smaller-scale operational models

The ACCC notes that many recent new entrant PTSPs have adopted novel and smaller-scale operational business models that do not appear to have been envisaged by the Code. This includes, for example, the use of hired mobile ship loaders and, in the case of T-Ports, a transshipment vessel.

In relation to PTSPs that have recently adopted novel and/or smaller-scale operational models:

- 4 new mobile loaders commenced operation during the record 2020–21 and 2021–22 seasons,⁸ bringing the total number of mobile loaders in operation in the 2021–22 season to 7.⁹
- T-Ports commenced bulk grain loading services using a transshipment vessel at 2 South Australian ports (Lucky Bay in 2020 and Wallaroo in 2023). Lucky Bay was responsible for 5% of South Australia’s grain throughput in 2020–21, increasing to 8% in 2021–22.¹⁰ Bulk grain loading services at T-Ports’ Wallaroo facility commenced in July 2023.¹¹

The introduction of mobile loaders, transshipment vessels and other novel operation models to the market has offered exporters more options for exporting grain (for example, smaller-scale PTSPs may have greater flexibility around grain accumulation and receipt processes). In turn this may allow some exporters the opportunity to accumulate grain outside of an established storage or transport network and deliver directly to port, or negotiate bespoke arrangements not possible in the large vertically-integrated supply chain operations. Overall, these new entrants have facilitated more bulk grain exports across peak shipping periods than would otherwise have been possible.

New entrant PTSPs have typically entered markets in competition with one or more exempt service providers, including at times one of the large-scale incumbents (CBH, GrainCorp or Viterro). Consistent with this all new PTSPs that have applied for exemption since the Code commenced in 2014 have been considered subject to sufficient competitive constraint, and subsequently granted exemptions.

However, the ACCC is not aware of whether the presence of mobile loaders has improved service levels or pricing within relevant grain catchment areas. Further, as noted in ACCC Bulk grain ports monitoring reports it is unclear whether mobile loader operations or other ad-hoc terminal arrangements will provide meaningful competition long term.¹²

To date mobile loader operations have only loaded significant volumes in well-above average (or record) shipping years, where capacity at large-scale facilities has been constrained. In the drought-affected 2018–19 and 2019–20 seasons, only 2 of the 4 mobile loaders in operation during those seasons loaded any grain.^{13 14} Further, the lower capital

⁸ Bulk grain ports monitoring report – data update – 2021–22, p 2.

⁹ The combined market share of mobile loader operations that entered the market since 2019–20 in the 2021–22 season was 8%. (Bulk grain ports monitoring report – data update – 2021–22, p 2).

¹⁰ Bulk grain ports monitoring report 2021–22, p 28.

¹¹ T-Ports port loading statements.

¹² The ACCC has observed a range of different approaches to exporting grain. In addition to the development of a transshipment vessel and mobile loaders, other new approaches have included exporting using hoppers and fixed mobile loaders.

¹³ Portland Riordan, Geelong Riordan, Port Adelaide Semaphore and Port Adelaide LINX.

¹⁴ Geelong Riordan and Semaphore Port Adelaide – Bulk grain ports monitoring report 2018–19 pages 73 and 58 respectively, Bulk grain ports monitoring report 2019–20, pages 71 and 55 respectively.

investment nature of mobile loader operations (particularly those involving the use of hired infrastructure) means that the relevant PTSPs may choose to provide services on an ad-hoc or seasonal basis.

The ACCC considers that PTSPs and exporters are best placed to comment on the level and nature of port terminal services that are likely to be available across Australia over the longer term.

Other industry changes

There has been an increase in the production and export of non-wheat grain since the Code commenced. This trend further highlights why the Code's limited focus solely on bulk wheat exports is of limited value. Furthermore, this trend will likely continue as growers respond to changing market demands and diversify production.

During the drought-affected 2018–19 and 2019–20 seasons, domestic demand for grain on the east coast led to an increase in demand for coastal shipments (shipments of bulk grain made between Australian ports). The Code does not apply to requests for access to port terminal services for the purpose of executing a coastal shipment.

Overall, the industry has experienced significant change since the end of the 'single desk' and more recently the introduction of the Code. While not an exhaustive list, the changes and challenges industry has faced in recent years include:

- record-breaking grain production and bulk grain export seasons
- changes in domestic growing conditions across seasons (and across different growing regions)
- increased application of technology in how grain is traded, grown, stored and transported
- instability in the global trading market due to the war in Ukraine
- domestic and international supply chain challenges (particularly during the pandemic).

The ACCC considers these changes and challenges mean the market and its participants are now noticeably different to those which existed at the time the Code commenced.

Unintended consequences and limitations of the Code

The ACCC considers that an increase in the Code's overall regulatory burden, automatic coverage of all PTSPs, significant limitations and limited enforceability and effectiveness mean that the regulatory burden it imposes now outweighs its benefits.

While the Code's limitations could be addressed through a series of significant amendments (the ACCC recommended a series of amendments in the first Code review), the ACCC considers that the regulatory burden of an amended Code is likely to still outweigh its benefits. The ACCC has reached this view based on its experience administering the Code, but as set out across the submission industry stakeholders are best placed to comment on the usefulness of the Code.

Regulatory burden on new entrants

Despite the intention that the Code would form part of a deregulatory pathway for the industry, the number of PTSPs regulated under the Code has increased significantly and the types of PTSPs covered by regulation has changed. Whereas the WEMA applied to PTSPs that were also exporters (which were also large-scale, monopoly or near-monopoly providers of services), the Code applies to all PTSPs, including smaller-scale, non-vertically integrated PTSPs.

The overall regulatory burden of the Code continues to grow. Increasingly it applies to smaller-scale and non-vertically integrated new entrants that are already subject to high levels of competition. Given the nature of new entrant PTSPs has changed since the Code commenced, the Code may be imposing unintended regulatory burden.

The ACCC also considers that the Code may be a barrier to entry. Even if a potential new entrant PTSP is confident that the ACCC will grant it exempt service provider status, that PTSP will be aware that at a minimum it will be required to engage in the ACCC's exemption assessment process and comply with the obligations in Part 2 of the Code.

The ACCC's exemption assessment process typically involves a new entrant:

- providing an application containing certain information about the applicant's operations, and reasons why it considers it should be exempt
- responding to additional information requests and attending meetings with ACCC staff.

The obligations in Part 2 of the Code require all PTSPs to:

- at all times deal with exporters in good faith
- publish and provide to the ACCC a port loading statement (a document providing certain details about all shipments scheduled to be loaded using the PTSPs port terminal services)
- publish policies and procedures for managing demand for the PTSP's port terminal services
- publish standard terms and reference prices.

PTSPs must manage the application process alongside numerous other government regulatory processes. The ACCC has also observed it is particularly difficult for new entrant PTSPs to control the timing of when they will commence providing port terminal services and ensuring all regulatory processes are satisfied within the requisite timeframes.

The ACCC is concerned that the prospect of seeking exempt service provider status from the ACCC and complying with the Code's Part 2 obligations may be disincentivising new PTSPs from entering markets (that is, raising barriers to entry).

The ACCC also considers that the requirement that new entrants publicly report on upcoming uses of its services through a port loading statement may be detrimental to the overall competitiveness of the market. In the initial period of their operation new entrants have typically provided services to one or a small number of exporters and this information must be published. Other documents setting out their standard terms and references prices must also be published. The level of transparency required of new entrants, especially as they commence operations, is disproportionate to that of the large-scale PTSPs.

Limitations of the Code

The ACCC considers that for a Code to be effective the:

- consequences of contravening a Code obligation must be sufficiently credible and serious to drive compliance
- obligations on parties covered by the Code should be clear and certain so that parties understand what they need to do to comply with the Code (and to ensure that contraventions of the Code are clear and can be the subject of enforcement).

In the 2017 Code review and several ACCC Bulk grain ports monitoring reports the ACCC highlighted its concerns that the drafting of several of the Code's key obligations and the Code's lack of penalty provisions have significantly limited the Code's effectiveness and enforceability.

The ACCC considers that the Code's lack of enforceability may have reduced the likelihood that exporters would have considered relying on the Code's obligations in dealings with PTSPs (particularly non-exempt PTSPs), including the Code's dispute resolution processes. The lack of enforceability may have also made exporters less inclined to complain to the ACCC regarding potential contraventions of the Code by PTSPs.

The ACCC notes that although the Code could be amended to address its enforcement, scope and drafting limitations, its overall regulatory burden is still likely to outweigh its benefits.

Lack of enforceability

The Code's lack of civil penalty provisions (and therefore the ACCC's inability to seek civil pecuniary penalties or issue infringement notices for contraventions) means the Code does not have a credible enforcement framework.

For a Code to be effective, the consequences of contravention must be sufficiently serious to incentivise compliance. The lack of consequences for contravening the Code has meant PTSPs have not had strong incentives to comply with the Code's obligations. The ACCC observes that in these circumstances it would have been difficult for exporters to rely on the Code in their dealings with PTSPs. Absent robust and enforceable provisions (particularly

those relating to access) the value of the Code to industry has been highly limited in practice.

The lack of enforceable access provisions applies to infrastructure that is used to export both wheat and other grains. The effect of the Code being unenforceable is most problematic in relation to the non-discrimination and no hindering obligations (Part 3, clause 10).

The ACCC has publicly noted the limitations to enforcing the Code's access obligations on non-exempt PTSPs, as well the broader transparency and reporting obligations on all PTSPs. The ACCC has highlighted its concerns around the regime's enforceability in submissions to the 2017 review of the Code and in multiple Bulk grain ports monitoring reports.

Several of the Code's definitions lack clarity

As identified in the ACCC's submissions to the first review of the Code there is considerable uncertainty over when many of the Code's provisions apply.

The uncertain application of the Code has given rise to possible loopholes that would allow PTSPs to limit their Code obligations and exporters to extend their Code rights.

The definition of exporter creates uncertainty as to when the Code's key 'access obligations' apply

The Code's definition of 'exporter' creates uncertainty as to whether the Code's key access obligations apply when an exporter is seeking access to a PTSP's port terminal services (including when an exporter eventually uses these services to export bulk wheat).

The Code defines 'exporter' as an 'entity seeking access to, or using, port terminal services for the purpose of exporting bulk wheat'. The definition's focus on an exporter seeking access for the purpose of exporting bulk wheat does not reflect how exporters typically seek access to port terminal services.

The ACCC understands that when an exporter seeks access to port terminal services from a PTSP it will not necessarily do so for the purpose of exporting a particular type of grain. Rather, they will typically seek access to port terminal services for the purpose of exporting bulk grain, with the type of grain to be loaded confirmed at a later date. This is particularly the case when the exporter is participating in an annual capacity allocation process (which involves the allocation of capacity up to 12 months into the future) or a long-term capacity allocation process (which can involve the allocation of capacity multiple years into the future).

Further, the ACCC understands that between the time that an exporter secures access to port terminal services (that is, makes a shipping capacity booking or secures an entitlement to shipping capacity) and the time those services are delivered, exporters will often advise the PTSP of a change to the type of grain that will be loaded. This means that a single access request could arguably fall in and out of Code coverage depending on the type of grain nominated by the exporter at any point between the point of capacity booking and service delivery. The ACCC understands that exporters are typically required to confirm the grain type to be loaded using their booked shipping capacity as part of the PTSP's final 'vessel nomination' process (which typically takes place only weeks prior to loading).

Accordingly, exporter practice of booking shipping capacity means that it may be unclear whether a grain exporter meets the definition of 'exporter' for the purposes of the Code at

the point of seeking access to port terminal services, or at any point between the point of capacity allocation and service delivery. This creates uncertainty over whether and when the obligations that PTSPs have in relation to 'exporters' (as defined by the Code) apply.

The Code's scope definitions create uncertainty over who the Code should apply to and when

The definitions which define the Code's scope create uncertainty over who the Code applies to and when. For example, these definitions do not:

- make it clear how the Code should apply when there are multiple owners and/or operators of a port terminal facility
- provide the necessary guidance over when a port terminal facility (and therefore a PTSP) is and is not covered by the Code.

The ACCC identified these limitations in the first review of the Code. Since that time this issue has been exacerbated as PTSPs have adopted new forms of entry and entered into different types of business arrangements to provide port terminal services not envisioned when the Code was developed.

The Code's key reporting obligations create uncertainty over what information must be reported and when

The Code's key reporting obligations are not clear. For example, the 'expected capacity', 'performance indicators' and port loading statement obligations lack clarity regarding what information must be reported and when.

Level and frequency of reporting requirements unwarranted and potentially misapplied

There are clear limitations around the port loading statement obligations:

- The port loading statements published by PTSPs (and provided to the ACCC) are forward looking documents that PTSPs may not update to reflect final details of completed shipments (including tonnages loaded). The information reported by PTSPs both on their website and to the ACCC may therefore be incomplete or inaccurate.
- Some of the information that PTSPs are required to report in port loading statements may also no longer be of value to exporters or relevant for many PTSPs. For example, the obligation to provide the time a nomination was received from an exporter and then accepted was originally intended to provide transparency over the allocation of capacity by large-scale PTSPs at a time when there was less capacity available across the industry.
- The information set out in port loading statements is intended to support the Code's enforcement regime and related transparency measures. As outlined above the enforceability of the Code is severely limited.
- Absent an effective enforcement regime, the ACCC has limited means to enforce the port loading statement obligations. This has led to inconsistent reporting practices by PTSPs and at times the publication of out-of-date shipping information.
- The port loading statement obligations (which often involve daily reporting) are a regulatory burden on many PTSPs and the weight of this burden may be greater than was envisioned when the Code was developed.

The Code applies in full to a small number of facilities

PTSPs have been granted exemption from Parts 3 to 6 of the Code in relation to 25 of the 32 currently operational port terminal facilities. This includes exemptions granted by the ACCC and exemptions granted in relation to CBH's facilities by the Minister administering section 1 of the *Farm Household Support Act 2014*.¹⁵ This means that Parts 3 to 6 of the Code currently only apply to 7 facilities (limiting the effect of retaining and/or amending these requirements). Furthermore, 2 of these non-exempt facilities (GrainCorp's facilities at the Port of Mackay and the Port of Gladstone, Queensland) export limited quantities of wheat, as compared to other grains and legumes.

Accordingly, the obligations which require PTSPs to deal with exporters in certain ways in providing access now only apply to a limited number of facilities and in relation to a small percentage of annual bulk grain exports. For example, in the 2021–22 season only around 11% of bulk grain exported from Australia was loaded via a facility where the PTSP was required to provide services in accordance with all the Code's obligations.

The practical effect of the existing access requirements in place at non-exempt facilities are further limited by the Code's enforcement limitations, particularly in relation to the non-discrimination and no hindering obligations (Part 3, clause 10).

Exemptions by Minister to cooperatives

The Minister for Agriculture, Fisheries and Forestry can decide that a PTSP is an exempt service provider. The Minister must be satisfied that the PTSP is a cooperative that has:

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

On 17 November 2014, the Minister found that CBH's port terminal facilities at Albany, Esperance, Geraldton and Kwinana satisfactorily met the criteria for exemption.

The ACCC was of the view (and remains of the view) that exempting a PTSP based on its cooperative status, without having regard to its ability and incentive to exert market power, was not an appropriate basis for deciding the level of regulation that should apply to a PTSP. Noting that CBH was the dominant, vertically-integrated provider of bulk grain export services in WA at the time it was granted exemption, the ACCC considered (and remains of the view) that CBH should not have been granted exemption based on its cooperative status.

Capacity already allocated at many ports

Long-term capacity arrangements mean Parts 3 to 6 of the Code have limited application even at the remaining non-exempt facilities. In addition to the obligations in Parts 3 to 6 of the Code only applying to 7 of the 32 currently operational port terminal facilities, the application of these obligations at those 7 facilities will be limited where PTSPs have entered into long-term agreements with exporters. The ACCC understands a significant

¹⁵ Currently the Minister for Agriculture, Fisheries and Forestry.

proportion of future shipping capacity has already been allocated to a range of exporters across various facilities.

If the review contemplates amendments to the Code, particularly relating to capacity allocation and terms and conditions of access, it is likely these would have limited practical impact.

The Code should be allowed to sunset

While the ACCC does not seek to pre-empt the outcome of this review, the ACCC considers that on balance (and absent a clear case for the Code's retention being established via this review), the Code should be allowed to sunset. The ACCC's views on the ongoing merit of the Code are a specific and targeted assessment of its limited effectiveness, against the backdrop of a changing industry.

The ACCC considers that given industry changes and the Code's significant limitations the Code may be having unintended consequences and that its regulatory burden may exceed its benefits. The ACCC has formed this view in the interests of reducing regulatory burden on industry and removing the potentially negative impacts the Code has on new PTSP entry and the competitiveness of (particularly smaller-scale) new entrants. The ACCC is mindful that maintaining the Code may falsely perpetuate the appearance of robust regulatory arrangements. Such an outcome is unhelpful for all stakeholders.

While the ACCC considers that the Code should sunset, the ACCC observes that:

- 3 large vertically-integrated PTSPs (CBH, GrainCorp and Viterra) remain the major providers and acquirers of bulk grain export port terminal services. In 2021–22 these 3 PTSPs combined to:
 - load (as providers of port terminal services) 31.9 of the 40.6 million tonnes of bulk grain exported from Australia (78.6%)¹⁶
 - export (as acquirers of port terminal services) 23.4 of the 40.6 million tonnes of bulk grain exported from Australia (57.6%).¹⁷

Although the ACCC has not received information regarding upcountry storage and handling services under the Code, the ACCC understands that these 3 PTSPs also remain the major providers of these services.

The ACCC considers that the level of market concentration and vertical integration in Australian bulk grain export supply chains (and the grains industry generally) may give rise to competition concerns, and that these concerns may be currently held by some stakeholders. Possible concerns may relate to information asymmetries, fees, service levels, service bundling or rebates. Such concerns may arise in relation to specific markets, grain catchment areas or particular points in time (for example, during specific harvest conditions).

Stakeholders may also have broader concerns regarding the operation of the industry, for example concerns regarding infrastructure investment, labour and logistics. These concerns are less likely to be competition concerns (see Appendix B).

Under the Code PTSPs are only required to provide the ACCC with information regarding scheduled uses of their port terminal services (in port loading statements). The ACCC does not receive information that can meaningfully inform a position on the competitiveness of

¹⁶ ACCC, Bulk grain ports monitoring report – data update – 2021–22, Appendix 1 – Supplementary spreadsheet – tables and charts.

¹⁷ ACCC, Bulk grain ports monitoring report – data update – 2021–22, Appendix 1 – Supplementary spreadsheet – tables and charts.

the bulk grain export port terminal services market or the bulk grain export industry more broadly.

Accordingly, the ACCC considers that this review provides a timely opportunity for the Department to engage with industry stakeholders. Should areas of concern be identified these can be considered appropriately. Possible remedies should be developed based on a sound evidentiary basis, appropriately targeted, effectively implemented and reviewed as appropriate.

Appendix A: Sources of market information on effectiveness of the Code

The information that the ACCC receives under the Code is limited to the port loading statements that all PTSPs are required to provide. The ACCC does not receive information regarding the terms and conditions on which exporters secure access to a PTSP's port terminal services (or related supply chain services such as upcountry storage and handling and grain transportation services).

Although the ACCC has consulted extensively with industry participants since the Code commenced, this interaction has declined over time. In recent years only a small number of submissions regarding applications by PTSPs for exempt service provider status under the Code have been received, and the ACCC's annual consultation process for the Bulk grain ports monitoring report ended in early 2022.

Industry participants are clearly best placed to provide views on the impact of and need for the Code. This Appendix provides a summary of the kind of views they may be able to contribute to this review.

PTSPs

PTSPs will be best placed to explain the operational challenges they manage in allocating shipping capacity and facilitating the export of bulk grain through their port terminal facilities and storage and handling networks. PTSPs may also be able to provide insight into:

- the level of investments across their port operations (and broader supply chains)
- examples of how the Code specifically impacted a decision to invest in new or existing port terminal facilities
- the level of long-term shipping capacity and short-term capacity available over the next 5 to 10 years (for example, the level of capacity that will be available to the market)
- the costs involved in providing port terminal services, including in relation to investments at port terminal facilities and across bulk grain export storage and handling networks
- the types of negotiations, processes and subsequent agreements they have entered into with exporters, including the extent to which standard terms and reference prices are used.

New entrant PTSPs can likely provide information on:

- the costs (including the opportunity costs) of the ACCC's exemption application process, as well as complying with the obligations of the Code over the short and longer-term
- the hire arrangements available for mobile ship loaders.

Exporters

Grain exporters are best placed to comment on whether the Code has positively impacted exporter access to bulk grain export port terminal services, and exporter participation in the market generally. For example, exporters may provide insight into:

- the costs of port terminal services at different times of the year, the level of service (including flexibility) offered around shipping slot bookings, and other related supply chain costs
- whether they consider that the Code has positively impacted negotiations with PTSPs regarding access agreements for port terminal services (or the final terms of such agreements), including whether dealings are undertaken in good faith
- whether the Code's reporting obligations have had a positive, negative or no impact on their willingness or ability to seek access to port terminal services from a PTSP
- the extent to which access to a range of services across a supply chain influence their shipping decisions (for example, how they preference one port terminal facility or PTSP over another).

Because the Code only covers requests for access to services for the purpose of exporting bulk wheat, exporters of non-wheat grains may be well placed to comment on the sufficiency of the general competition provisions in the CCA. Equally, noting the enforcement limitations of the Code, exporters of bulk wheat may also have considered the application of the CCA's general competition provisions to their operations.

Shipping agreements

The review may also benefit from examining shipping agreements between PTSPs and exporters. Such agreements may provide information on whether the Code has had an effect on access arrangements and competition at particular port terminal facilities or within different grain catchment areas.

In considering these matters, the use of long-term agreements by some PTSPs may also be relevant. Long-term agreements can provide both exporters and PTSPs greater certainty and confidence to participate in the market. They may also support greater investment by exporters, PTSPs and other industry stakeholders at port or in related markets. They may also have influenced how and when certain exporters could export grain. The ACCC understands that a range of PTSPs continue to offer long-term agreements for shipping capacity.

Appendix B: Bulk grain export supply chains

Concerns raised by stakeholders about bulk grain exports (and related supply chains) in consultation processes for the ACCC Bulk grain ports monitoring report were varied and largely related to matters not specifically covered by the Code. That is, most of the concerns raised by stakeholders did not specifically relate to an exporter seeking access to port terminal services for the purposes of exporting bulk wheat.

As observed in past Bulk grain ports monitoring reports and in other ACCC decisions (made under different decision-making frameworks) bulk grain export markets are significantly concentrated in many catchment areas across Australia. Vertical integration continues to feature both upstream and downstream of port operations, with many stakeholders offering bundled or linked services across a supply chain.

Common areas of concern related to:

- terms and conditions of access to upcountry storage and handling facilities
- quality of grain delivered to upcountry storage facilities compared to the quality of grain outturned (that is, grain blending)
- a lack of transparency over volumes of grain stored upcountry
- information asymmetry in the market between the large-scale PTSPs (in relation to entire supply chains) and other stakeholders
- inefficiencies in grain transport (road and particularly rail)
- costs of using containers and other container trade/freight logistic concerns.

More broadly, the ACCC has considered bulk grain export related upstream and downstream supply chain matters during merger assessments and enforcement investigations. Past matters include Qube's acquisition of the Newcastle Agri Terminal on 30 September 2021, and GrainCorp Operations Ltd's agreement to amend 19 terms in its Grain Warehousing Agreement with small business grain growers.¹⁸

¹⁸ For further information on the GrainCorp Warehousing Agreement matter see: <https://www.accc.gov.au/media-release/graincorp-amends-terms-in-its-warehousing-agreement>. For further information on the Qube acquisition of the Newcastle Agri Terminal see: <https://www.accc.gov.au/media-release/accc-to-monitor-effect-of-qubes-acquisition-of-newcastle-agri-terminal>.

Appendix C: ACCC submissions to the Department of Agriculture and Water Resources' first review of the Code (2017, 2018)



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12 December 2017

Daryl Quinlivan
Secretary
C/O Wheat Port Code Review Taskforce
Department of Agriculture and Water Resources
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CANBERRA ACT 2601

Dear Mr Quinlivan

Re: Wheat port code review – issues paper

The ACCC appreciates the opportunity to comment on the review of the *Competition and Consumer (Industry Code – Port Terminal Access (Bulk Wheat)) Regulation 2014* (the Code).

The Code plays an important role in ensuring port access for the exporters that buy grain from Australian growers. Despite emerging competition at some ports over the last four years the ACCC does not consider that fair and transparent access to bulk export grain export services across Australia would be assured in the absence of the Code. Without fair and transparent port access, exporters may reduce their participation in export markets, reducing the marketing options for growers and ultimately the price that they can secure for grain.

Australian bulk grain export supply chains have historically been characterised by varying degrees of regional monopolisation and vertical integration, resulting in a lack of competitive constraint for port terminal services. This continues to be the case across many port zones in Australia.

The Code's Explanatory Statement noted the 'concern within industry over behaviours in the supply chain related to potential abuse of market power and monopolistic behaviour, particularly by port terminal operators with associated wheat export businesses. The Explanatory Statement also noted stakeholders' concern that the industry was not yet ready to rely on general competition law and argued for a level of industry-specific regulation to remain.' As detailed in the ACCC's recently released bulk wheat ports monitoring report for 2016-17 there remains ongoing concern from exporters and growers about the state of the bulk grain export market and the effectiveness of the Code. The ACCC shares these concerns.

Accordingly the ACCC strongly supports the retention of the Code and in this submission provides the following observations on how the Code might be refined to better meet its objectives:

1. coverage and scope
2. whole of supply chain issues
3. penalty provisions
4. reporting arrangements
5. capacity allocation system approvals.

Competition is emerging but issues remain

While competition is emerging at some ports, other regions remain characterised by vertically integrated regional monopolies. This is particularly the case in SA and WA where Viterra and CBH dominate the bulk grain export market supply chains of each state both as service provider and via their related trading arms. Exporters using these facilities have limited countervailing power by which to negotiate access (including the price and terms of that access) at port or related parts of the bulk grain export supply chain.

The ACCC has received numerous complaints over several years in relation to the difficulty exporters experience accessing bulk handling services both at port and along related supply chains. Most exporters believe CBH's and Viterra's related trading arms receive preferential treatment at port and along related supply chains. Going forward the effect of CBH's rebate program may further inhibit competition emerging across the WA bulk grain export supply chain and reduce competition in the WA grain trading market.

The ACCC has monitored and enforced compliance with the Code since its establishment in 2014 and before that administered the port terminal service undertakings required under the *Wheat Export Marketing Act 2008*. In order to fulfil these duties, the ACCC has been required to consider the level and nature of competition along grain export supply chains. In addition to general monitoring activities, the ACCC has conducted a number of exemption assessments for specific port terminal facilities, and has assessed an application by Viterra for approval of a new capacity allocation system to facilitate long term agreements. The ACCC has maintained an ongoing dialogue with industry and has had the opportunity to consider industry's view of the Code in both seasons of average and high production.

The ACCC supports retaining the Code

As outlined above, in light of the current state of the Australian bulk grain export market the ACCC considers that industry-specific regulation for bulk wheat port terminal services remains necessary and does not support revoking the Code at this time.

The ACCC considers that obligations on both non-exempt and exempt service providers continue to play a key role in supporting fair and transparent access to bulk export services. Regarding non-exempt service providers that are not facing sufficient competitive constraint at port, the Code continues to place necessary obligations on those providers (e.g. not discriminating or hindering in providing access, providing access in accordance with an ACCC approved capacity allocation system) and provides important safeguards to exporters (e.g. recourse to arbitration). For both non-exempt and exempt service providers, the ACCC considers that the information publication obligations continue to provide necessary transparency about bulk export shipping stems. Publication of this information provides exporters with a picture of how a shipping stem has been allocated (and subsequently changed) and supports a broader analysis of the bulk export market by both public and private bodies.

In the absence of industry-specific regulation access seekers could consider pursuing declaration of certain ports under Part IIIA of the *Competition and Consumer Act 2010* (Cth) (CCA). However this can be a costly, time-consuming and uncertain path to access. Furthermore the process of seeking declaration is unlikely to be a viable option for most access seekers, particularly potential or new entrants to the Australian market. Where there is a clear bottleneck to competition in upstream and downstream markets, as remains the case at some bulk grain port terminals and along certain bulk grain supply chains, the ACCC considers it provides more certainty and is more cost-effective to continue industry-specific regulation.

Following the successful passage of the *Competition and Consumer Amendment (Misuse of Market Power) Bill 2017* (Cth) on 23 August 2017 the ACCC will also now have recourse to strengthened misuse of market power prohibition provisions. The ACCC appreciates that exporters and growers may have been reluctant to pursue a complaint given its limitations. However, the amended misuse of market power is not a substitute for industry specific regulations ensuring port access for the exporters that buy grain from Australian growers.

The ACCC supports tiered regulation

In accordance with the Code the ACCC has granted numerous exemptions to operators, mostly located on the east coast of Australia where competition at the port and along bulk grain export supply chains has begun to emerge. In markets where competition has emerged exporters have responded positively to the increased choice, new services and scope to negotiate on access. Despite these positive developments, exporters have told the ACCC that the Code continues to play an important role in these markets. Specifically, the obligation on exempt service providers to continue to publish certain shipping information provides for necessary transparency and the obligation on both service providers and exporters to act in good faith when discussing terms of access supports productive commercial negotiations.

In addition to supporting tiered arrangements to facilitate reduced regulation where competition is emerging, the ACCC also supports retaining the general non-discrimination obligation and recourse to independent arbitration where a dispute cannot be resolved commercially.

The importance of the Code review process

Importantly this review provides a timely opportunity to consider certain refinements to the Code to improve its effectiveness and give exporters greater confidence in their dealings with both exempt and non-exempt port terminal operators. As outlined below there are some areas where the Code could be improved in order to better ensure effective, fit-for-purpose, and appropriately targeted regulation. Certain amendments will also ensure the ACCC can best fulfil its enforcement role under the Code.

The ACCC has recently finalised its second bulk wheat exports monitoring report, which provides further detail regarding the state of competition in relevant markets. This report is informed by export data provided by all port terminal service providers under the Code as well as consultation with industry representatives. Given the large harvest in 2016, this report covering the 2016-17 shipping year provides valuable insights regarding the current state of the bulk wheat export port terminal services market.

Opportunities to improve the effectiveness of the Code

1. Coverage and scope

Since the Code's commencement, competition in the grain export industry has continued to develop. In the last three years, several new port terminal service providers have entered the market and alternative supply chain models have emerged in some regions. The review of the Code provides an opportunity to ensure that the Code has sufficient flexibility to deal with these new arrangements and ensure that regulation remains appropriately flexible, targeted and fit-for-purpose.

The scope of the Code's coverage is currently determined according to three defined terms: 'port terminal facility', 'port terminal service', and 'port terminal service provider'. The ACCC is concerned that under the current definitions of these terms, the Code's scope may not be sufficiently flexible to accommodate newer innovative port structures and is not providing for the appropriate party to be regulated where more than one party jointly provides port terminal and associated services.

The purpose of the Code relates to ensuring that exporters of bulk wheat have fair and transparent access to port terminal services. Accordingly, a number of the requirements relate specifically to grain export (e.g. capacity allocation, including consideration of peak periods for grain export, and publication of shipping schedules, including specifying the exporter and the type of grain).

For this reason, the ACCC considers it most appropriate that grain industry infrastructure operators at port should be covered by the Code where possible, in preference to general logistics companies which may operate standalone ship loaders and no associated grain-specific infrastructure. As currently drafted, the Code applies where a party owns or operates a ship loader meeting certain criteria. Where there are infrastructure operators providing an integrated service, the ACCC considers that the focus on ship loader does not always lead to the most appropriate party being covered by the regulation.

The ACCC is also concerned that some ambiguity in the definitions could result in the Code applying more broadly than was intended, and that the Code does not explicitly provide for a party to be removed from coverage should it cease using its facility to provide port terminal services.

2. Whole of supply chain issues

The ACCC acknowledges there is a degree of information asymmetry between industry participants regarding stock levels at upcountry storage and handling facilities, and that arrangements for voluntary stocks reporting to address this issue are currently being considered by industry and government. The ACCC will continue to follow stakeholder debate on the various proposals.

In addition to information asymmetry, the ACCC has observed that vertically integrated port terminal services providers also have varying degrees of market power across upcountry storage and handling networks (and freight transportation services) and this can create problems for third parties seeking access to upcountry services as well as port terminal services.

The ACCC recommends that the Department consider extending the application of certain provisions in the Code to upcountry service providers of bulk storage for export grain. This approach could address concerns about upcountry market power without imposing upfront regulatory burden. For example, the Code could require that upcountry service providers:

- negotiate in good faith

- not discriminate or hinder access, and
- refer disputes to an independent arbitrator where they cannot be resolved via commercial negotiations.

These types of provisions could complement the existing protections available under general competition law, without imposing significant additional *ex ante* regulatory costs. Such amendments would also go some way toward providing exporters greater countervailing power in their negotiations with PTSPs. Further, parties may currently be reluctant to raise a dispute regarding port access if they also require services in other parts of the supply chain where the PTSP has market power. Extending dispute resolution to facilitate arbitration for upcountry services could therefore also improve the effectiveness of the Code in relation to downstream port terminal services.

3. Penalty provisions

At the time that the Code was developed, pecuniary penalties were not available in relation to mandatory codes under the CCA. On 4 September 2014 legislation was passed introducing pecuniary penalties for mandatory codes. In order for a breach of a clause in a Code to attract a pecuniary penalty, to the Code must specify that the relevant clause is a civil penalty provision.

In line with the intention behind introducing penalties for mandatory codes, the ACCC considers that amending the Code to make certain clauses penalty provisions will encourage compliance with those clauses. The ACCC has identified the following provisions where penalties should be available:

- the publication obligations in Part 2, including the continuous disclosure rules
- the non-discrimination, no hindering and dispute resolution provisions in Part 3, including the process for proceeding to mediation and arbitration
- the publication obligations in Part 5, including regarding capacity and performance indicators
- the record keeping obligations in Part 6.

Penalties may also be appropriate in relation to certain aspects of the capacity allocation and protocol obligations in Part 4.

4. Reporting arrangements

There is currently some ambiguity in the Code regarding how far in advance a capacity booking should be published on the loading statement. This has led to confusion among industry participants, inconsistent reporting practices and calls by stakeholders for greater consistency in reporting. Currently some service providers are listing bookings from the point that they receive a booking for port capacity (typically months in advance of the shipment) while others are publishing from the point that the specific vessel that will be used to complete the shipment is nominated (typically weeks in advance of the shipment).

Earlier publication would make the documents more useful for industry and be more consistent with the original intent of the continuous disclosure rules. However, regardless which interpretation is preferred, the ACCC's main priority on this issue is to ensure clarity of obligations.

The ACCC has also reviewed the usefulness of the obligation on service providers to provide a loading statement to the ACCC on a daily basis. These documents are primarily used by the ACCC to conduct industry monitoring and to enable review of exemptions. The ACCC considers that a less frequent (monthly, rather than daily) retrospective report to the

ACCC showing executed bookings would be more useful and could reduce regulatory burden. A retrospective report would better align with the performance indicators, particularly where tonnages shipped differ from those nominated. Port terminal service providers are also required to maintain a current version of their loading statement on their website. The ACCC considers that this obligation should be retained in order to maintain day to day transparency for industry.

The ACCC also considers that the reporting requirements in Part 5 of the Code should be reviewed to ensure clarity of obligation and consistency of compliance. These obligations, which apply to non-exempt service providers are intended to provide transparency regarding expected available capacity at non-exempt facilities, and certain performance indicator information such as variances between capacity allocated and loaded, and reasons for ship movements. PTSPs are currently interpreting these provisions differently; accordingly the intent of these obligations should be clarified to facilitate enforcement. Appropriate penalty provisions should also be introduced to incentivise compliance.

Non-exempt port terminal service providers are also currently required by clause 29(1)(e) to report information on demurrage. In practice, this information is shared via contractual arrangement between exporters and shipping companies, and is generally not held by port terminal service providers. The ACCC considers the requirement to publish this information should be removed.

5. Capacity allocation system approvals

Parties subject to the full level of regulation in the Code must have a capacity allocation system approved by the ACCC. Currently, once the ACCC has approved a capacity allocation system there is no opportunity for the ACCC to review that approval and no expiry date for that approval. This is in contrast to the ACCC's exemption determinations, which can be revoked if the reasons for granting the exemption no longer apply.

While the ACCC did not have the opportunity to revoke approval of a capacity allocation system under the previous undertaking regime, the regime provided a de facto opportunity to revisit each system at the expiry of the relevant undertaking.

The ACCC considers that the effectiveness and appropriateness of a capacity allocation system should be reviewable under the Code. The Code currently provides port terminal service providers with the ability to make changes to a capacity allocation system with the ACCC's approval. The ACCC considers that the ACCC should also have the ability to initiate changes to a system in certain limited circumstances. The ACCC considers that following a review the ACCC should be able to require amendments to address concerns with the system or revoke its approval of the system (consistent with the approach to exemption determinations). This would provide some discipline on a PTSP's conduct in relation to its capacity allocation system and would provide the ACCC with an opportunity to respond to changing market conditions.

The ACCC would welcome the opportunity to work with the Department of Agriculture and Water Resources, in consultation with industry stakeholders, to develop drafting amendments to address the issues outlined above.

Yours sincerely



Rod Sims

Chairman

Happy to discuss
at any time Darryl
Cheers

Red



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10 May 2018

Daryl Quinlivan
Secretary
Department of Agriculture and Water Resources
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Sent electronically: Daryl.Quinlivan@dbcde.gov.au

Dear Mr ~~Quinlivan~~ *Daryl*

Re: Wheat port code review - interim report

The ACCC appreciates the opportunity to comment on the April 2018 interim report regarding the review of the *Competition and Consumer (Industry Code – Port Terminal Access (Bulk Wheat)) Regulation 2014* (the Code). The ACCC supports the Department's finding that 'The intent of the code, the two-tiered regulatory framework and its operating arrangements remain valid, although there are opportunities for some amendments to improve its effectiveness.'¹

The ACCC would particularly like to highlight two key issues in this submission:

- the Code should ensure that exporters of all bulk grains (including pulses and oilseeds) have fair and transparent access to port terminal services²
- the Code would be considerably more effective if it were extended to apply baseline regulatory access arrangements to vertically integrated upcountry storage and handling networks.

These changes would greatly improve the effectiveness of the Code, promote competition in grain supply chains, and ultimately improve the prices that growers are offered for their grain.

The ACCC supports a number of the findings in the interim report, including the amendments proposed at interim finding 9.³ Attachment A sets out how the ACCC considers these proposals could be implemented in practice. The ACCC is keen to engage with the Department further to develop the detail of these amendments.

¹ Department of Agriculture and Water Resources, Wheat Port Code review: Interim report of the Competition and Consumer (Industry Code—Port Terminal Access (Bulk Wheat)) Regulation 2014, April 2018, p. vii.

² In this submission, references to grain include cereal grains, pulses and oilseeds.

³ Interim report, p. 39.

Expand the coverage of the Code from wheat to all grains

The ACCC considers that extending the Code's protections to exporters of all grains is appropriate and will better promote competition for grower grain.

The current focus of parts of the Code on wheat has no economic justification. The key purpose of the Code is to regulate access to port terminal infrastructure with monopoly characteristics. The likelihood of monopoly port terminal service providers (PTSPs) taking advantage of market power and inhibiting competition in upstream or downstream markets exists no matter which commodity an access seeker intends to (or does) export. Where there is market failure it therefore applies to all users of the relevant port facilities, regardless of whether the commodity for a given shipment is bulk wheat or other grains.

The Code's current focus on bulk wheat exporters is a legacy issue. The scope of the *Wheat Export Marketing Act 2008* (Cth) (WEMA) was a result of the establishment and dismantling of the Australian Wheat Board's monopoly on bulk wheat exports (the 'single desk'), a concept originally devised to ensure efficient management of a vital commodity during World War I. During the Code's development limited consideration was given to reviewing the scope of the port access regulation in favour of maintaining consistency with the WEMA and facilitating its repeal. However, the ACCC's experience monitoring bulk grain exports since 2008 is that issues of access to port terminal services for bulk export impact on exporters of bulk grain equally and are not specific to wheat.

All bulk exporters of grain face the same issues when seeking access and should be equally protected under the Code. All exporters, not just the trading arms of the vertically integrated operators, should have confidence that their shipments will be subject to consistent treatment in accordance with the Code. Confining the Code's protections to bulk wheat is also problematic from a practical perspective, as discussed below. For these reasons, the Code should be amended to clearly apply protections to exporters of bulk grain, rather than only exporters of bulk wheat.

It is also likely that some affected parties are currently unaware their operations may not be covered by the Code, given that the distinction between where the Code covers all grains and where it only covers wheat is unclear. The submission by ADM in response to the issues paper specifically proposes that 'not only access to [w]heat elevation ... it is all export commodities, which need equivalent regulation to ensure fair and equitable access to shipping capacity and destination markets'.⁴ Further, a number of other submissions simply referred to 'grain' rather than 'wheat' when discussing the Code, or used the two terms interchangeably.⁵ Industry's apparent lack of clarity regarding the Code's current application is a further reason in support of amending the Code to address this issue.

Non-wheat grain exports are becoming increasingly important

While the export of bulk wheat remains a significant contributor to Australia's economy, non-wheat grain exports have been trending upwards over the last six seasons, across both periods of high and low production. Non-wheat grain exports as a proportion of total grain exports have increased from around 30 per cent of total grain exports in 2011-12 to around 40 per cent in 2016-17. In some regions the market failure has potential to *more* severely impact non-wheat grain exports, such as in North Queensland where chickpeas are the main

⁴ ADM Trading Australia Pty Ltd, Submission in response to the review of the Wheat Port Code, January 2018, p. 1.

⁵ For example, see NSW Farmers' Association, Review of the Port Terminal Access (Bulk Wheat) Code, January 2018, pp. 7-8; Grain Producers Australia, Submission to the 2017/18 Review of the Port Terminal Access (Bulk Wheat) Code of Conduct, January 2018, pp. 3-6; Victorian Farmers Federation, Wheat Port Code Review, 19 January 2018; AgForce, Submission: Review of the Port Terminal Access (Bulk wheat) Code, 19 January 2018, pp. 2, 4; GrainGrowers, Submission to the Review of the Industry Code – Port Terminal Access (Bulk wheat), January 2018, pp. 1-2.

commodity shipped from GrainCorp's two monopoly ports. The increasing significance of non-wheat exports is discussed further at Attachment B. Given that a significant amount of the grain exported via port terminal infrastructure is non-wheat, it is important that the Code promote fair and transparent access for all exports of bulk grain.

In some areas there also appears to be less competition to purchase non-wheat grains. The top three vertically integrated exporters are more dominant in the 'other grains' market than in wheat. This is demonstrated by their market shares across the last six seasons, which has included both high and low production years (see Attachment B). Amending the Code to cover all grains will help to ensure port access is not a barrier to competition increasing in these markets. Ensuring the Code consistently applies to all grains would provide confidence to exporters regarding access to port terminal services, and thereby facilitate competition for all grains in the upstream grain acquisition market. The ACCC understands that growers generally produce multiple commodities both within and across seasons, and production of non-wheat grains is increasing.⁶ This will therefore benefit growers as well as exporters.

Confining the Code's application to bulk wheat is problematic

The Code's obligations regarding stocks reporting, shipping stem reporting, and capacity allocation already apply to all grains. The Code thereby implicitly acknowledges the need to apply regulation to the allocation of all port terminal capacity. Further, it would be impracticable to confine regulation of capacity allocation solely to wheat, given that a facility's aggregate capacity is able to be used for both wheat and other grains.

The ACCC is concerned that some users of these port terminal facilities may be denied the protection afforded by, for example, the non-discrimination and dispute resolution provisions, if a specific shipment is for grains other than wheat.

On a more practical level, drawing a distinction between exporters seeking access to port terminal services for bulk wheat and exporters seeking access for other grains is somewhat artificial. Bulk grain exporters typically seek and secure capacity before deciding which grain to ship. The grain that the exporter eventually loads will depend on the demands of the market, and an exporter's plans may change between initial booking and final execution (discussed further in Attachment B). In this scenario a single shipment could arguably come in and out of coverage depending on the grain nominated at the time. Attempting to confine non-discrimination and other relevant protections only to bulk wheat is therefore problematic. The application of these parts of the Code to both wheat and non-wheat commodities in such scenarios is unclear.

Apply baseline access obligations at vertically integrated upcountry networks

In some areas the market failure at port extends up the supply chain to include vertically integrated storage and handling networks. This can create problems for third parties seeking access to upcountry and port terminal services. To address this, certain aspects of the Code should be extended to cover access to upcountry services to support the competitiveness of all sectors through the supply chain.⁷

Issues in upcountry access

Concerns have been expressed to the ACCC regarding the ability of the vertically integrated bulk handlers to exert market power upcountry. For example, notional entitlement systems mean that traders can have their entitlement outturned at the minimum protein content of the

⁶ See Grains Industry National Research, Development and Extension Strategy 2017, accessed at Grains Industry National Research, Development and Extension Strategy 2017, accessed at <https://www.npirdef.org/strategy/11/Grains>.

⁷ Subsection 12(2)(c) of the *Wheat Marketing Amendment Act 2007* (Cth).

grade they purchased, allowing for the bulk handlers to blend grades to achieve greater stock of the higher grade for their own benefit. Site swaps also discourage traders from purchasing grain above minimum specifications from growers in particular areas, as they may get swapped to another site where the quality of the same grade is lower. More general concerns have also been expressed about arbitrage of stocks between more and less favourable locations.⁸

Extending aspects of the Code upcountry

To address concerns regarding access to vertically integrated upcountry networks, the ACCC remains of the view that the following baseline access obligations are appropriate and should be applied:

- the good faith obligation
- the obligations not to discriminate on the terms of access or to hinder access to port terminal services, and
- the obligation to refer disputes to an independent arbitrator where they cannot be resolved via commercial negotiations.

The ACCC recommends these provisions apply to access to storage and handling facilities owned and operated by a PTSP and located in the grain catchment area for that PTSP's port terminal facility. Applying these obligations to facilities that are not part of a vertically integrated supply chain is unlikely to be beneficial. Further, given the latter two obligations are in Parts 3 to 6 of the Code, they would only apply in networks where the associated port terminal facility had not been granted an exemption or in the future if an existing operator's exemption was revoked.

As previously noted, the ACCC considers these protections will not impose significant additional upfront regulatory cost.

The ACCC notes the view in the interim report that applying a non-discrimination obligation at upcountry facilities would prevent differentiated product or service offerings. The ACCC does not agree that this is the purpose or effect of a non-discrimination clause. Rather the purpose of a non-discrimination clause is to prevent vertically integrated monopoly providers giving *preferential* treatment to their own related business. A non-discrimination clause does not prevent parties offering differentiated services and terms. The purpose of the negotiation and arbitration provisions which sit alongside the non-discrimination provision is to facilitate negotiation of alternative terms to those set out in the standard agreement and ensure that such negotiations can be resolved by an independent party if commercial agreement cannot be reached.

Under the Code the non-discrimination clause already applies to access to port terminal services and the ACCC is aware of parties negotiating tailored agreements for port terminal services.⁹

Vertically integrated upcountry networks remain dominant

The Code's focus on port terminal facilities reflects the Productivity Commission's (PC) 2010 report on wheat export marketing arrangements which found that 'up-country storage facilities do not exhibit natural monopoly characteristics...[and] specific access regulation is

⁸ In addition to concerns raised directly with the ACCC, these concerns are also outlined in ADM's submission, p. 8.

⁹ The ACCC has received feedback from stakeholders indicating that parties are negotiating port access agreements with prices that vary from the published reference prices, although in some markets there is reportedly a lack of interest from PTSPs in negotiating despite provision in the Code to do so. See ACCC, Bulk wheat ports monitoring report 2016-17, December 2017, p. 66.

likely to hinder the development of efficient supply chains'.¹⁰ A key factor in the PC's finding was the emergence of on-farm storage and development of large scale upcountry facilities by non-bulk handlers.

The ACCC acknowledges that that individual storage facilities are possible to duplicate, that on-farm storage has increased, and alternative supply chains have emerged in some areas. However, the ACCC has observed over the eight years since the PC's report that the upcountry networks of the three largest incumbent bulk handling companies remain dominant. One likely reason for this is that while the cost of building a single storage facility may not be prohibitive, the cost of building a network of facilities sufficient in scale to draw grain for bulk shipments is far more significant. In addition, the ACCC understands the costs of constructing sites that can access rail is generally prohibitive. The cost advantage of rail over road transport in some regions also limits the viability of on-farm storage, as grain will ultimately still need to be delivered into a bulk handling site with rail access for transport to port.

New investment in upcountry storage by non-incumbent bulk handling companies has only occurred in a small number of areas. Cargill owns and operates the legacy AWB network in SA and the eastern states, Emerald operates a network in Victoria, while Bunge operates two sites in the catchment area for its operations at Bunbury in WA.¹¹ In the majority of these cases, the owners of these facilities still utilise the incumbent's upcountry network. For example, despite investing in its own facilities Bunge has found accumulation of grain for bulk export challenging alongside CBH's upcountry network. Similarly, Cargill continues to utilise Viterra's upcountry network in SA in addition to its own sites.

The ACCC understands that third party exporters continue to experience difficulties accumulating grain for a shipment without using CBH's network in WA, Viterra's network in SA, or GrainCorp's network on the east coast. These experiences are consistent with the interim report's finding at port level that 'the structure of the bulk wheat industry and concerns that existed in 2014 about potential monopolistic behaviour by PTSPs in some regions continue to be observed today'.¹²

Further investment in alternative upcountry facilities may not be the optimal solution. Growers have expressed the view that duplication of grain infrastructure represents inefficient over-investment and increases supply chain costs.¹³ In recent years existing bulk handlers have been consolidating their upcountry storage networks, indicating they do not consider additional upcountry storage capacity would be economical. This suggests parties may have invested in their own networks due to dissatisfaction with the terms of access to the existing networks rather than because such investments were economically efficient from a broader industry perspective.

Various factors may also affect the likelihood of further competition emerging in particular upcountry storage and handling markets. For example, the upcountry storage and handling market is more competitive on the east coast where there are strong domestic and container trade markets to complement the bulk export market, increasing the prospect for new entrants to offer a range of services and spread their risk. Entry has been less common in WA and SA. In WA CBH's rebate structure remains a significant disincentive for possible new entrants, given the perceived risk of forgoing rebates for parties choosing to operate outside the CBH system. The introduction of long term agreements across many ports, but

¹⁰ Productivity Commission 2010, Wheat Export Marketing Arrangements, Report no. 51, Canberra, Finding 6.2, p. 31.

¹¹ For further information on the state of competition upcountry across Australia see ACCC, Bulk wheat ports monitoring report 2016-17.

¹² Finding 3, Interim report p 18.

¹³ GPA submission on Code Review January 2018, pp. 5-6. Also NSW Farmers submission on port Kembla exemptions in June 2015, p. 9. <https://www.accc.gov.au/system/files/Kembla%20Exemption%20Submission.pdf>.

particularly in WA and SA, will also reduce the likelihood of existing exporters seeking to compete at other parts of the bulk grain export supply chain. These factors suggest that competition in upcountry markets depends on certain conditions, and the prospect of achieving meaningful competition across upcountry markets is unlikely.

Vertically integrated supply chains can have efficiency benefits, and therefore a vertically integrated incumbent storage and handling network may be the most efficient model in some cases. In these cases, effective regulatory constraints are required to prevent the vertically integrated provider exerting market power to the detriment of upstream and downstream competition.

Amendments to definitions to ensure the regulation is appropriately targeted

The ACCC has previously expressed concern regarding the coverage and scope of the Code under the current set of definitions, particularly in the context of entry of new PTSPs and emerging alternative supply chain models. The interim report acknowledges that amendments are needed to redraft 'defined terms related to the provision of port terminal services'.¹⁴ In addition to the broader issues outlined above, the current definitions have two particular problems:

- the Code's application may not be appropriately targeted where more than one party jointly provide port terminal and associated services
- the Code's application may be broader than intended and does not allow for a facility to be removed from coverage if the owner ceases using it to provide port terminal services for bulk grain.

The first issue arises chiefly because the current drafting focuses on a party who owns or operates a ship loader. The ACCC considers that instead it should focus on the party primarily responsible for managing demand by exporters and setting the terms of access. The ACCC's proposed approach regarding both issues is outlined at Attachment A. These amendments will ensure the regulation is flexible, targeted and fit-for-purpose.

Appropriate basis for exemptions

The ACCC does not agree with the interim report's proposal to grant exemptions where there is 'a history of providing access on fair and reasonable terms'.¹⁵ A party's behaviour while complying with regulatory obligations is not a reasonable predictor of that party's behaviour once it is no longer subject to those obligations.

Exemptions should be based on a competition assessment that considers the market conditions which can effectively constrain a PTSP's ability and incentive to utilise market power in the absence of regulation under Parts 3 to 6. Exemptions on grounds other than competition (such as the cooperatives exemption for CBH) would not be appropriately conducted by the competition regulator.

While the interim report notes such exemptions could be subject to review, reviewing and revoking exemptions is likely to be a costly and time-consuming process and should not be viewed as a quasi-enforcement avenue for exempt parties. Implementing this proposal may result in considerable uncertainty for PTSPs exempted on this basis. Providing access on 'fair and reasonable terms' is a broad objective which is ambiguous in the absence of specific behavioural requirements. A decision to revoke an exemption that was granted on grounds other than competition on the basis that the PTSP was no longer providing access

¹⁴ Interim report, p. 39.

¹⁵ Ibid

on 'fair and reasonable terms' would therefore be subject to significant debate and uncertainty.

Other matters raised in the interim report

The ACCC welcomes the interim report's finding that a number of the ACCC's proposed amendments are reasonable, including to amend the loading statement requirements, include penalty provisions, redraft part 5 obligations regarding capacity reporting, and provide the ability to review capacity allocation systems under clause 25. The ACCC considers these amendments will improve the operation of the Code. Attachment A sets out how the ACCC considers these amendments could function in practice.

The ACCC also welcomes the finding that 'the two-tiered structure of the Code appears to be operating as intended'.¹⁶ It is important to retain flexibility to apply appropriate regulatory constraints where a PTSP has market power, and to reduce regulatory obligations where they are no longer necessary due to competition emerging. Compliance costs for the reporting obligations in the Code are generally likely to be low, as this type of information would already be collected and held by PTSPs.

The ACCC does not consider that the application of the obligations in Parts 3 to 6 of the Code to PTSPs with market power results in market distortions. To the contrary, the regulatory obligations are designed to correct market distortions arising from the presence of market power at monopoly facilities.

The interim report notes that exports have declined at GrainCorp's Portland facility. There are a range of reasons why this may have occurred including decreased production over several years, declining transport standards and increasing container trade from Victoria. More recently, exports from Portland have increased.¹⁷ The ACCC does not consider that exports are likely to decline as a result of an ACCC decision not to grant an exemption.

The ACCC remains of the view expressed in the ACCC's response to the issues paper that the Code plays an important role in ensuring port access for exporters that buy grain from Australian growers. Fair and transparent access to bulk grain export services across Australia would not be assured in the absence of the Code. The ACCC therefore supports retention of a mandatory Code and does not support a transition to industry self-regulation or a voluntary code, particularly in the context of current market structures.

The ACCC welcomes the opportunity to continue to work with the Department of Agriculture and Water Resources on this review. In this regard, the ACCC considers a working group with industry representatives would be beneficial and would be happy to participate.

Yours sincerely



Rod Sims
Chairman

Daryl
Very happy to
discuss all this when
convenient.

¹⁶ Interim report, p. 45.

¹⁷ Exports from Portland in 2016-17 were over 500 000 tonnes, as reported in the ACCC *Bulk wheat ports monitoring report 2016-17*, December 2017, p. 55.

Thanks
Rod.

A. Proposed amendments to the Code of Conduct

This attachment sets out the ACCC's proposed amendments to the Code of Conduct.

A.1. Amendments to the definitions regarding port terminal services

As noted in the covering letter, the ACCC considers there are two key issues with the definitions that currently define the coverage of the Code. This section proposes amendments to address these concerns.

A.1.1. Expand the coverage of the Code from wheat to all grains

The Code should be amended to clearly apply to all bulk grains exported via a bulk grain export facility. This could be achieved by amending references in the Code from wheat to 'grain', with grain defined to include cereal grains, pulses and oilseeds. This matter is further addressed in Attachment B to this submission.

A.1.2. The Code's application may not be appropriately targeted where more than one party jointly provides services for export at a port terminal

The ACCC considers that regulated access obligations should apply to owners of port terminal facilities with primary responsibility for managing demand by exporters and setting the terms of access.

The Code currently applies to the owner or operator of the ship loader. At the time the definitions used in the Code were originally drafted (i.e. when the WEMA was drafted), making the ship loader the trigger for port terminal regulation did not practically impact upon its coverage, as at that time the owners of ship loaders also owned all relevant infrastructure supporting the ship loader at port. When the Code was developed, these same definitions were carried over from the previous regulation.

However, since the definitions were developed there has been a general shift in approach by new entrants. This shift in focus has meant that the owner of the ship loader is no longer *necessarily* a party that should be covered by the Code.

While some new entrants adopted the more traditional approach of owning/operating a fixed ship loader and all supporting infrastructure, others have involved a grain export business contracting with the owner/operator of a mobile or fixed stand-alone ship loader or trans shipping operations for connection with its own infrastructure at the port.

The ACCC considers that the Code should be amended so that it is not confined to parties who own or operate ship loaders. This is addressed below at section A.1.3.

The ACCC further considers that where there are infrastructure operators providing an integrated or joint service there should be flexibility to apply obligations to the most appropriate party. Failing to regulate the appropriate party is unlikely to ensure the publication and provision of timely and accurate data and is unlikely to achieve the purpose of the Code.

Generally, it will be most appropriate for the Code to apply to the party best placed to manage demand for third party access. This party would typically also hold most of the information required to be published under the Code (e.g. details about the commodity and tonnage to be shipped and the relevant timeframes).

The ACCC considers one way this objective could be achieved is as follows:

- The Code should cover all parties involved in providing a port terminal service – including services provided via the ship loader, intake/receival, storage and handling, and testing infrastructure located at the port.
- To avoid duplication of reporting activities and access negotiations, the Code should then provide for parties who jointly provide port terminal services to nominate which party is responsible for fulfilling relevant Code obligations.
- The service provider which is nominated would be responsible for fulfilling the requirements in Part 2 of the Code (and Parts 3 to 6 of the Code if the ACCC has not granted an exemption) for that facility.
- The service provider which is not nominated would be taken to have complied with the requirements in Parts 2 to 6 the Code, subject to a requirement that it must provide to its nominated party any information within its control and necessary for the nominated party to fulfil existing Code obligations.
- A nomination should be subject to an objection period, during which the ACCC may conduct an assessment and object to the nomination if it is not appropriate having regard to specified relevant matters.

A.1.3. The Code's application may be broader than intended and does not allow for a facility to be removed from coverage

The Code does not allow for a facility to be removed from coverage if the owner / operator decides to cease using it for bulk grain but it technically remains 'capable' of doing so. This unnecessarily increases the overall regulatory burden and creates problems for consistently ensuring compliance. Further, as discussed above the ACCC considers that the Code should be amended so that it is not confined to parties who own or operate ship loaders.

To address these issues, the ACCC proposes the following changes:

- the definition of 'port terminal facility' should be amended to describe, without limitation, the range of facilities located at a port that are covered, without confining the definition to a ship loader and without any reference to capability, and
- for the avoidance of doubt, further amendments should be made clarifying when a facility would be considered 'used or to be used' to provide a port terminal service; for example, if an exporter can book capacity at that facility for bulk grain exports, or if bulk grain is exported using that facility during a season.

Together, these changes should provide greater clarity as to which facilities fall within the scope of the Code at a particular time.

A.2. Upcountry storage and handling

The ACCC's previous submission recommended the Department consider extending the application of certain provisions in the Code to certain upcountry service providers. The reasons for this are outlined in the main submission, and further details regarding this proposal are outlined below.

The following 'base level' regulatory obligations already set out in the Code are proposed to apply to vertically integrated PTSPs at their upcountry storage facilities located in the grain catchment area for the relevant port:

- to deal with exporters in good faith (all PTSPs) – clause 6
- to not discriminate or hinder access (non-exempt PTSPs only) – clause 10

- to refer disputes to binding arbitration as a backstop to commercial negotiation (non-exempt PTSPs only) – clause 15.

Other Code requirements relating to publishing protocols, having capacity allocation systems, and publishing capacity and other KPIs, would not apply to the upcountry facilities; only those at port.

The regulation of the upcountry facilities would be effectively ‘tied’ to the regulation of the relevant port. No regulatory obligations would apply to upcountry storage facilities which are not owned by a PTSP (i.e. facilities that are not part of a vertically integrated supply chain). Further, no regulatory obligations would apply to upcountry facilities which are owned by a PTSP but are not in the grain catchment area for one of the PTSP’s ports.

BOX 1: Hypothetical application of the Code at upcountry facilities

A party owns and operates a port terminal facility that is covered by the Code. This party also owns upcountry storage facilities which are located in the grain catchment area for that port (i.e. the geographic area where grain is grown, stored and then delivered to that port for export).

Code provisions would apply to the PTSP’s interactions with access seekers in relation to those upcountry facilities as follows:

- If the port was an exempt port, then the good faith obligation (which is in Part 2 and applies to exempt PTSPs) would apply.
- If the port was not exempt, then the good faith obligation, the requirement not to discriminate or hinder access, and the requirements to negotiate and refer disputes to binding arbitration, would apply.

The arrangements would not apply to any of the PTSP’s upcountry facilities located elsewhere.

This approach appropriately targets regulation to the market failure, as parties are less likely to experience access issues at standalone storage facilities compared with facilities that are part of a wider network in which a PTSP may leverage its market power. The application of dispute resolution upcountry is particularly important, as currently parties may be reluctant to raise a dispute regarding port access if they also require services in other parts of the supply chain where the PTSP has market power. Dispute resolution provisions at port may therefore currently be underutilised, and extending dispute resolution upcountry will therefore also improve the effectiveness of the Code downstream at port. While only the good faith obligation will apply at facilities in the zone of exempt ports, this proposed approach will also encourage fair and transparent access upcountry across the exempt networks given the potential for these facilities to be subject to non-discrimination and dispute resolution obligations if the exemption were revoked.

A.3. The loading statement

The interim report supports specifying a minimum forward reporting period for daily port loading statements. The issue of ambiguity in the current drafting was raised in the ACCC’s submission, and as stated at that time the ACCC’s main priority on this issue is to ensure clarity and facilitate a consistent approach to compliance and enforcement of the provisions. The ACCC acknowledges that there are costs and benefits for both earlier and later publication, accordingly the ACCC considers that industry views should inform the decision regarding an appropriate timeframe.

The interim report also supports the ACCC’s proposal that PTSPs provide the ACCC with a less frequent (monthly, rather than daily) retrospective port loading statement report showing executed bookings. Box 2 sets out proposed drafting specifying the information required for that report and the timeframe for it to be provided. This would replace the current

requirement at subclauses 7(4) and (5) of the Code to provide the ACCC with the most current port loading statement for each business day in the form and manner it requires. The ACCC notes that transparency to industry regarding shipping stems would be maintained through the Code's obligation on PTSPs to have an up-to-date version of their loading statement available on their website.

BOX 2: Example drafting to implement the monthly retrospective report

Port terminal service providers to provide monthly port terminal service report to the ACCC

- (1) A port terminal service provider must provide the ACCC with a retrospective port loading statement setting out the bookings for each month, including for each booking:
 - (a) the port loading statement information (as set out at subclause (2) of clause 7) on the most recent port loading statement that included the booking
 - (b) if a port terminal service was provided, the quantity and type of grain that was loaded onto the ship using the port terminal facility
 - (c) if a port terminal service was provided, the time when the ship left the port terminal facility through which the port terminal service was provided
 - (d) if a port terminal service was not provided, the reason why it was not provided.
- (2) The port loading statement for each month must be provided to the ACCC within one month of the conclusion of that month in the form and manner required by the ACCC.

The ACCC would likely require the monthly retrospective report be provided in .csv files similar to current practice. However, the ACCC would be open to industry feedback regarding an appropriate format.

A.4. Capacity reporting arrangements under Part 5

Clause 28: regarding expected capacity

Non-exempt port terminal service providers are required under clause 28 to publish their estimated yearly total available capacity at each port, and must update the capacity which remains available to be acquired on a weekly basis. The ACCC is of the view that reporting of total and remaining available capacity is useful, but that the clarity of these obligations should be improved to increase transparency.

The purpose of reporting on port terminal capacity is to provide transparency to industry and enable them to plan their exporting and marketing activities. However, as currently drafted it is not clear whether clause 28(1) requires PTSPs to report on (for the relevant 12 month period):

- a) the total amount of capacity including any capacity that has already been allocated prior to publication what (that is, a statement of a port terminal's total capacity) or
- b) the total amount of capacity that remains available at each port at the time of publication (that is, the total amount of capacity at each port, minus any allocations).

For example, if capacity has been allocated via long term agreements prior to the August publication date, it is not clear whether that capacity should be included in the total published amount. If a PTSP adopts the approach outlined in option B industry is left with an incomplete picture of a terminal's capacity and therefore the likely level of shipping activity that will occur over the 12 month period.

In addition, the reporting of capacity as prescribed by the Code cannot be reconciled with the amounts being shipped. It is also unclear how releases of additional capacity and moved or

cancelled bookings should be reflected in the reporting. The ACCC considers that current practices are likely to be under-reporting port terminal facilities' actual capacity.

This lack of clarity about what is required leads to inconsistent practices between PTSPs, makes enforcement more difficult, and undermines the usefulness of the reported information to industry. Greater certainty of PTSP capacity may also go some way to alleviate current industry concerns on the lack of transparency surrounding the creation of additional capacity at certain ports by some PTSPs.

The ACCC considers that capacity should continue to be reported but in a manner that is clearer and more consistent, as outlined below.

For each port, by shipping window, PTSPs should report:

- (1) '*total capacity*', including capacity that may have been allocated via long term agreements, so that this amount reflects the total baseline capacity of the facility
- (2) cumulative total of aggregate '*allocated capacity*', updated weekly to reflect additional bookings and moved or cancelled bookings
- (3) any '*additional capacity*' releases, updated weekly to reflect additional capacity being created
- (4) '*available capacity*' (which should equal (1) minus (2) plus (3)), updated weekly consistent with other items to reflect total capacity which remains available for new bookings.

It would then be clearer how changes in capacity should be reflected and reporting practices would be more consistent across PTSPs. The current drafting appears to contemplate publication of items (1) and (4), however, the drafting in relation to item (1) is open to interpretation, and in the absence of items (2) and (3) it is not clear exactly what is currently being reflected under item (4). Although clause 28(1) does not specify that the yearly expected capacity should be provided by shipping windows, PTSPs are currently providing the information in this form, but for clarity of obligation the clause should be amended.

These changes will ensure more consistent reporting practices, assist industry in understanding a PTSP's ability to facilitate transfers of bookings and releases of additional capacity, and maintain a summary of available capacity in each slot.

Clause 29: regarding performance indicators

Non-exempt port terminal service providers are currently required by clause 29 to report on performance indicators. Clauses 29(1)(a) to (c) require a PTSP to report on the port terminal's monthly *allocated amount* of capacity and *loaded amount* by shipping window, and to provide reasons where these vary by more than 20 per cent.

There appears however to be a lack of clarity on what is meant by *allocated amount* of capacity and at what point in time capacity is said to have been allocated to a specific shipping slot. This has resulted in providers reporting differently.

The ACCC is of the view that the intention of this clause is to capture changes between the capacity that was originally allocated to the shipping slot and what was actually loaded. Unless a moved booking or capacity release happened well in advance of the shipping window, they would be captured as a change and not be considered *allocated capacity*.

The ACCC considers this issue could be addressed by specifying a timeframe after which the comparison under clauses 29(1)(a) to (c) would apply. Subject to industry feedback, an appropriate timeframe may be one month. Under this approach, the *allocated amount* reported under clause 29(1)(a) would be the allocated capacity as was published under

clause 28 one month prior to the relevant month (regardless of any changes post that date). The actual *loaded amount* reported under clause 29(1)(b) would then be compared to this *allocated amount*, with any significant variations explained under clause 29(1)(c).

BOX 3: Hypothetical booking changes under a revised clause 29

An exporter has a booking in April. In January, the exporter and PTSP agree to shift the booking to an alternative port. This is reflected on the shipping stem and as a change in the published allocated capacity at both ports, and the '*allocated amount*' KPI for April would reflect this change (with no further explanation required).

However, in late March 2019, the exporter and PTSP agree to delay the booking to May 2019. This change would be reflected in the KPIs for April and require an explanation under clause 29(c).

A.5. Penalty provisions

The interim report supports the introduction of pecuniary penalties to certain clauses to encourage compliance.

For a code to be effective, the consequences of breaching it must be sufficiently serious to incentivise compliance. Currently, the lack of consequences for breaching the Code undermines the ACCC's ability to ensure compliance. The ACCC's view is therefore that penalties should be applicable in relation to all obligations on PTSPs set out in the Code. This is consistent with the ACCC's position in relation to other mandatory codes.

Having the option of civil pecuniary penalties for all breaches of the Code would enhance its effectiveness and deter port terminal service providers from breaching the Code. The ability to seek civil pecuniary penalties and issue infringement notices is a fundamental part of the ACCC's enforcement toolkit. Providing for meaningful civil pecuniary penalties and infringement notices for all breaches of the Code would significantly improve the ACCC's ability to enforce it and improve conduct in the industry.

It will encourage improved compliance by all PTSPs with procedural obligations in the Code, such as the publishing and reporting requirements, as well as the behavioural obligations which facilitate fair and transparent access.

The availability of infringement notices will allow the ACCC to respond swiftly to likely breaches where there are reasonable grounds to believe that a breach has occurred; thereby achieving timely and cost efficient compliance outcomes.

Where the penalties for non-compliance are too low, PTSPs may factor the risk of a penalty in as a cost of doing business. Where penalties are unavailable there is limited incentive for a PTSP to comply.

Therefore, the ACCC recommends that:

- civil pecuniary penalties (and thereby infringement notices) be introduced for all breaches of the Code and
- the amount of civil pecuniary penalties available under the CCA for a breach of a prescribed industry code be increased to at least reflect the penalties currently available under the ACL.

A.6. Revocation of capacity allocation system approvals

The previous ACCC submission recommended that there should be an ability to revoke approval of a capacity allocation system in certain limited circumstances. The interim report supports this proposal.

The ACCC considers that this process could be modelled on the equivalent process for revoking an exemption determination. In particular, it could provide that the ACCC be able to revoke its approval if the reasons for making the decision to approve no longer apply, having regard to the relevant matters set out at subclause 25(3) of the Code. Similar timeframes for notifying the revocation and it taking effect would apply.

B. Exports of all grains

The purpose of this attachment is to provide further evidence in support of the ACCC's submission that the Code should ensure that exporters of all bulk grains (including pulses and oilseeds) have fair and transparent access to port terminal services.¹⁸

B.1. Why all grains?

As noted in the body of this submission, there are a number of reasons why the Code should apply to all exports of bulk grains, rather than specifically to exports of bulk wheat. Capacity allocation and access issues at port are not isolated to bulk wheat exports. Rather, they exist in relation to all bulk grain exports, a significant proportion of which are bulk grains other than wheat ('non-wheat').

As detailed further below, it will be important when considering the effectiveness of the Code both now and in the future to consider that:

- most access seekers seek capacity to export a range of grains, and the proportion of bulk non-wheat grain exports is increasing
- current trends show the largest bulk handlers are significant exporters of bulk non-wheat grains
- at some ports there are very few exporters competing for certain grain types, particularly at certain times, indicating there is less competition for bulk non-wheat grains
- bulk non-wheat grains are high value crops and provide growers a significant risk-reward scenario
- capacity is a generic entitlement and nomination of grain type can change over the life of a booking and is not required until close to shipping. Consequently, it can be unclear even over the course of a single booking whether an exporter is covered by the Code
- the ACCC's ability to consider potential Code breaches is more limited where exports or capacity allocation decisions involve multiple commodities
- reporting requirements where grain type is undefined are uncertain, leading to inconsistent shipping activity reporting.

The Code review provides the opportunity to remove these uncertainties, improve reporting and ensure exporters shipments are covered over the course of a booking. Expanding the Code to apply to all grains will help ensure that port access is not a barrier to increasing competition in markets where competition for bulk non-wheat grains is limited.

B.2. Australian bulk grain exports

As detailed in the ACCC's monitoring reports, a range of grains are exported from ports across Australia.¹⁹ The commodity export profile for each port can vary greatly; relevant factors include but are not limited to geographic attributes which determine planting decisions, harvest outcomes, domestic demand and distance to international markets. Most recently, in the 2016-17 shipping season, across all Australian ports, 60 per cent of total bulk grain exports were wheat and 40 per cent were non-wheat. Table 1 shows the breakdown.

¹⁸ In this attachment, references to grain include cereal grains, pulses and oilseeds.

¹⁹ ACCC *Bulk wheat ports monitoring report 2016-17*, December 2017.

Table 1: Total exports in 2016-17 season

Commodity	Tonnes	Proportion
Wheat	19,037,142	60 %
Barley	8,285,228	26 %
Canola	2,890,462	9 %
Chickpeas	657,935	2 %
Lupins	291,601	1 %
Sorghum	174,000	1 %
Oats	161,946	1 %
Faba Beans	143,911	<1 %
Lentils	74,692	<1 %
Maize	32,500	<1 %
Field Peas	21,315	<1 %
Grand Total	31,770,731	100 %

Bulk non-wheat exports as a proportion of all bulk exports has been generally trending upwards across the past six shipping seasons, in particular from the 2015-16 season to the 2016-17 season when the proportional increase was over 7.5 per cent.

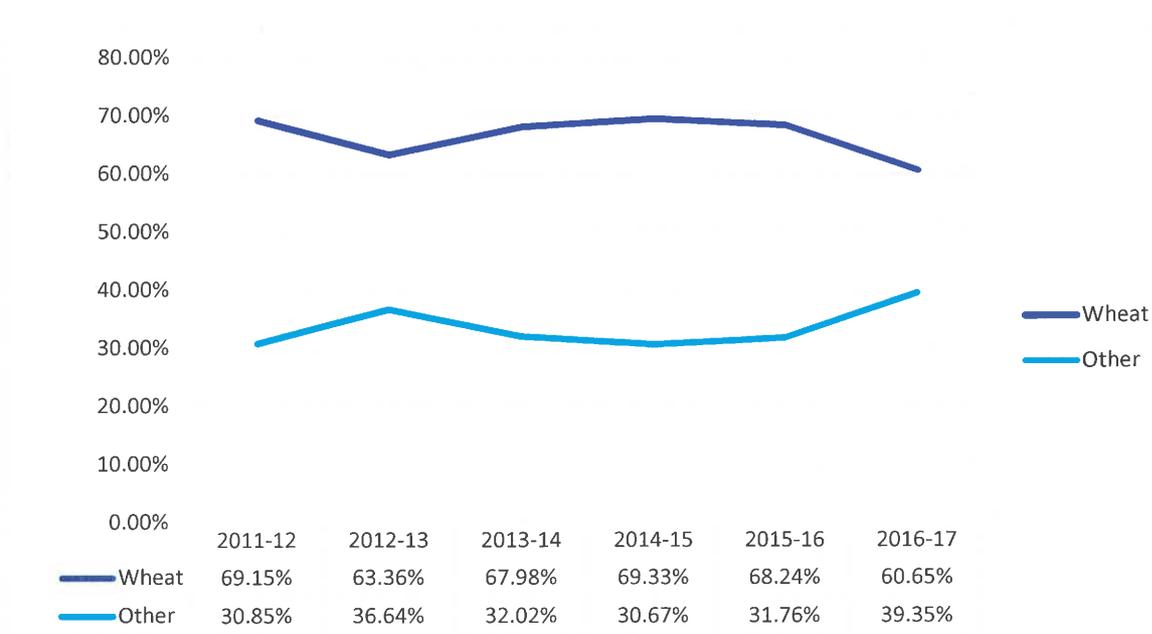


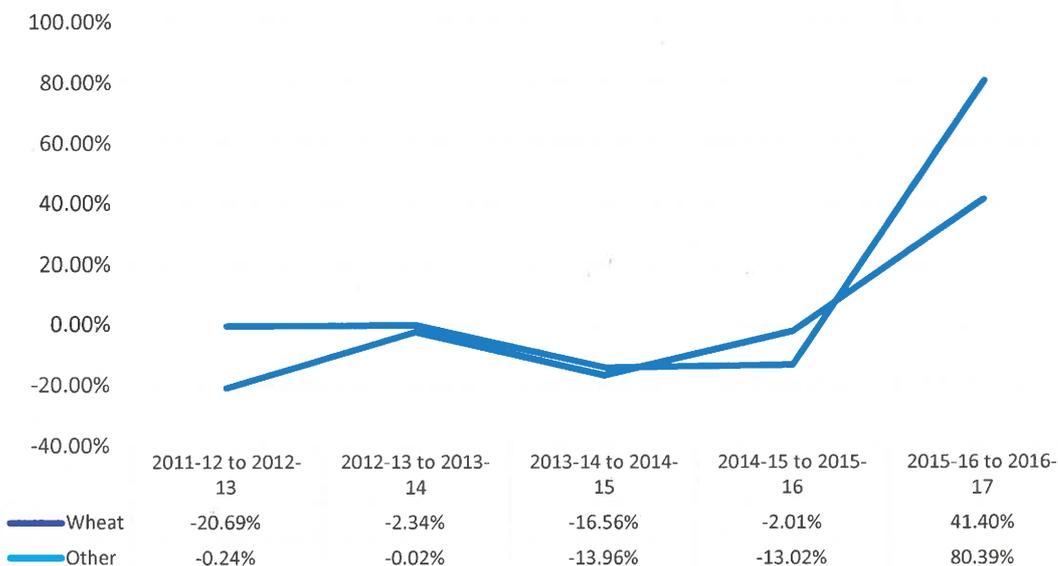
Figure 1: Wheat and non-wheat grains as a proportion of all exports

Proportional changes in bulk wheat exports and bulk non-wheat exports

In comparing bulk wheat exports across the seasons, from the 2011-12 season to the 2012-13 season, bulk wheat exports fell by 20.69 per cent. Bulk wheat exports continued to decrease, in particular falling by 16.56 per cent from the 2013-14 season to the 2014-15 season. Bulk wheat exports saw an increase of 41.4 per cent in the 2016-17 season, which was a season of particularly high wheat production.

In contrast, in the 2012-13 season the amount of bulk non-wheat exports only declined by 0.24 per cent compared to bulk non-wheat exports in the 2011-12 season. Bulk non-wheat exports also experienced a smaller proportional decline than bulk wheat across the 2013-14 and 2014-15 seasons. In the 2016-17 season bulk non-wheat exports had an extremely large increase of 80.39 per cent compared to the previous season. This proportional increase in bulk non-wheat exports is nearly double the proportional increase in bulk wheat exports. On average, from 2011-12 to 2016-17 bulk wheat had a proportional decrease of close to zero per cent and bulk non-wheat had a proportional increase of over 10 per cent.

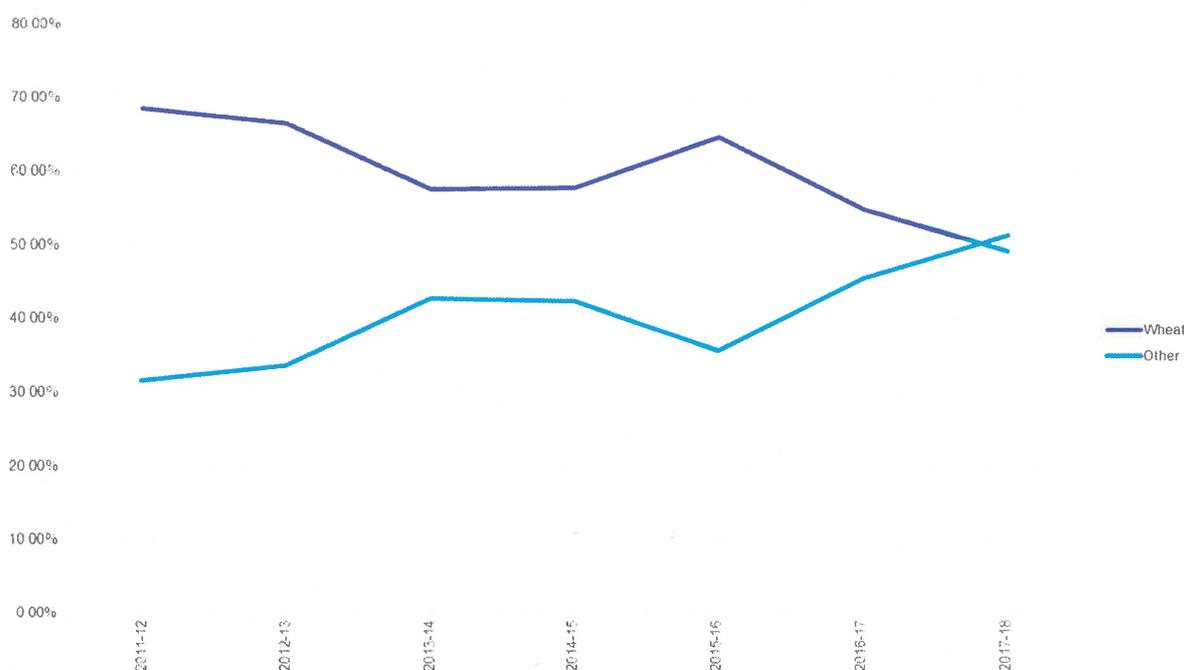
Figure 2: Proportional changes in wheat exports and non-wheat exports



Bulk wheat and bulk non-wheat as proportion of all exports October-February

In the first five months of the current 2017-18 season (October 2017 to February 2018), a higher proportion of bulk non-wheat commodities has been exported compared to the same time period in previous season. Although differing harvest times for various commodities across the years will impact these figures, there is a general upward trend in the proportion of bulk non-wheat exports during the October to February period. This should be considered in the context of a low wheat production season where other grains may be less affected.

Figure 3: Wheat and non-wheat as a proportion of all exports October-February



Value of export commodities

Both wheat and non-wheat commodities are worth significant amounts of money to the Australian economy. In the 2016-17 season, the value of Australia's total crop exports (bulk and container) was \$13.9 billion, representing an increase of \$3.7 billion from the previous season.²⁰ This includes a variety of non-wheat commodities, many of which saw significant increases in value for 2016-17.

The average annual value of Australian barley exports is \$1.58 billion, the value of canola exports \$1.45 billion, and the value of pulse exports \$1.63 billion (based on four calendar year averages up to 2016).^{21,22}

In the 2016-17 season, increased production in canola and legumes contributed significantly to total exports in these commodities which together increased by 85 per cent. Chickpeas were Australia's number one food and agriculture export to India in 2016-17, comprising \$1.14 billion out of a total \$3 billion exports to India. In the same period Canola was Australia's top food and agriculture export to the European Union, valued at \$1.88 billion out of a total \$3.78 billion in exports.

Increases the value of non-wheat grain exports in the 2016-17 season were also seen at the state level. The value of canola exports increased by \$295 million for Victoria, and by \$602 million for WA. In Queensland and NSW, chickpea exports increased by \$701 million and \$180 million respectively. In SA the value of lentil exports increased by \$222 million.²³

This evidence highlights that Australian growers and exporters are connecting with different international markets to trade various commodity types. Demand for these different

²⁰ Rural Bank, 'Australian Agriculture Trade Performance 2016/17', <https://www.ruralbank.com.au/for-farmers/ag-answers/trade-report>.

²¹ <http://aegic.org.au/publications/australian-grains/barley/>.

²² <http://aegic.org.au/publications/australian-grains/pulses/>.

²³ <https://www.ruralbank.com.au/for-farmers/ag-answers/trade-report>.

commodities, in addition to the demand for bulk wheat, fluctuates and is likely to continue to change over time.

B.3. Breakdown by state and port

The proportion of bulk non-wheat exports which makes up total grain exports varies significantly across individual states and ports. In the 2016-17 shipping season, Victoria and Queensland had the highest proportions of bulk non-wheat exports at 51.9 per cent and 50.7 per cent of the state's total bulk grain exports. NSW had the lowest proportion of bulk non-wheat exports at 18.1 per cent.

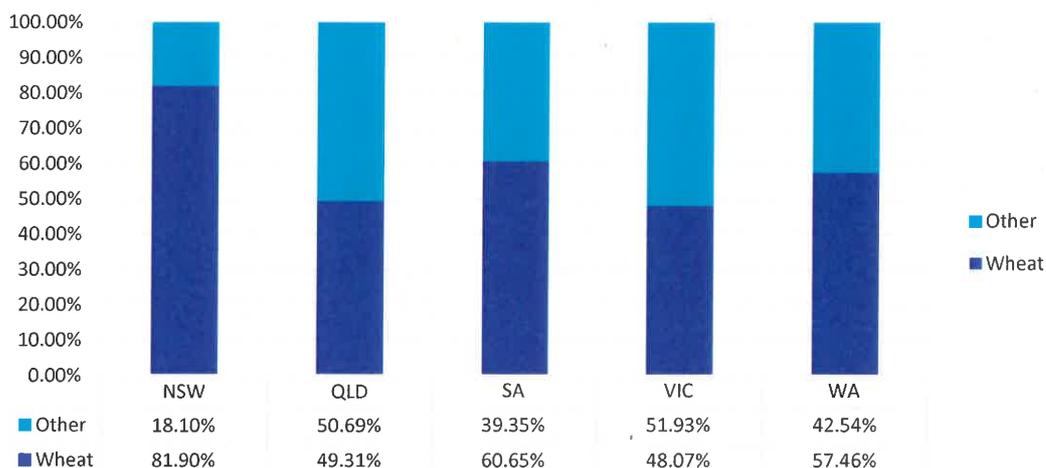


Figure 4: Proportion of bulk wheat and bulk non-wheat exports by state, 2016-17 season

Breakdown by type of commodity in each state

The three major bulk grain exports in Australia are wheat, barley and canola. In Queensland chickpeas are the second largest export behind wheat. In SA, Victoria and WA barley is the second largest export behind wheat, whereas in NSW canola is the second largest export. South Australia is the only state that also exports faba beans, lentils and field peas, while sorghum is only exported in NSW and Queensland, and oats are only exported from WA.

Table 2: non-wheat breakdown by commodity – 2016-17 shipping season

	NSW	Qld	SA	Vic	WA	All states total
Barley	35.39%	0.00%	81.46%	77.16%	62.48%	65.05%
Canola	39.17%	0.00%	9.98%	21.84%	30.15%	22.71%
Chickpeas	10.34%	89.26%	0.00%	0.00%	0.23%	5.17%
Lupins	0.00%	0.00%	0.98%	0.00%	4.41%	2.29%
Sorghum	15.09%	9.16%	0.00%	0.00%	0.00%	1.37%
Oats	0.00%	0.00%	0.00%	0.00%	2.74%	1.27%
Faba Beans	0.00%	0.00%	4.55%	0.00%	0.00%	1.13%
Lentils	0.00%	0.00%	2.36%	0.00%	0.00%	0.59%
Maize	0.00%	1.58%	0.00%	1.00%	0.00%	0.26%
Field Peas	0.00%	0.00%	0.67%	0.00%	0.00%	0.17%

Coverage implications for the Code

The volumes, values and location of non-wheat bulk exports highlights the need for consistent protection of all bulk grain exports under the Code.

As outlined above bulk non-wheat exports represent a significant proportion of Australia's overall grain export profile. Furthermore, production and demand for grain types varies greatly across each harvest. Currently the level of regulatory coverage therefore fluctuates depending on the level of wheat production compared to other grains.

On a state by state analysis the evidence also suggests that coverage of the Code is intermittent, with shipping covered at certain times and at certain ports. For example, the application of the Code in Queensland and Victoria is complex as 50 per cent of exports are non-wheat. Some ports, such as Mackay and Gladstone in Queensland, only export wheat in a two or three month period during the season, and the rest of the season is dedicated to non-wheat bulk commodities. Further, exporters with long term agreements in place may have Code coverage for some shipments but not others.

The Code should provide clear, consistent protections for all bulk grain exports.

B.4. Commodity market shares

As outlined in the ACCC's monitoring reports, at most ports there has been increased competition in bulk wheat exports. That increase does not carry across to non-wheat bulk grain exports, as illustrated below. The trading arms of the vertically integrated PTSPs have the largest shares of non-wheat bulk grain exports at their related facilities. CBH and Glencore export more bulk non-wheat grain, particularly canola and barley exports, compared to other exporters.

Based on current trends it appears the number of exporters participating in the export of non-wheat grains is declining at some ports. For example, the ACCC understands that in light of the complexities surrounding the trading and exporting of canola, particularly within some vertically integrated supply chains, vigorous competition between exporters is unlikely to emerge.

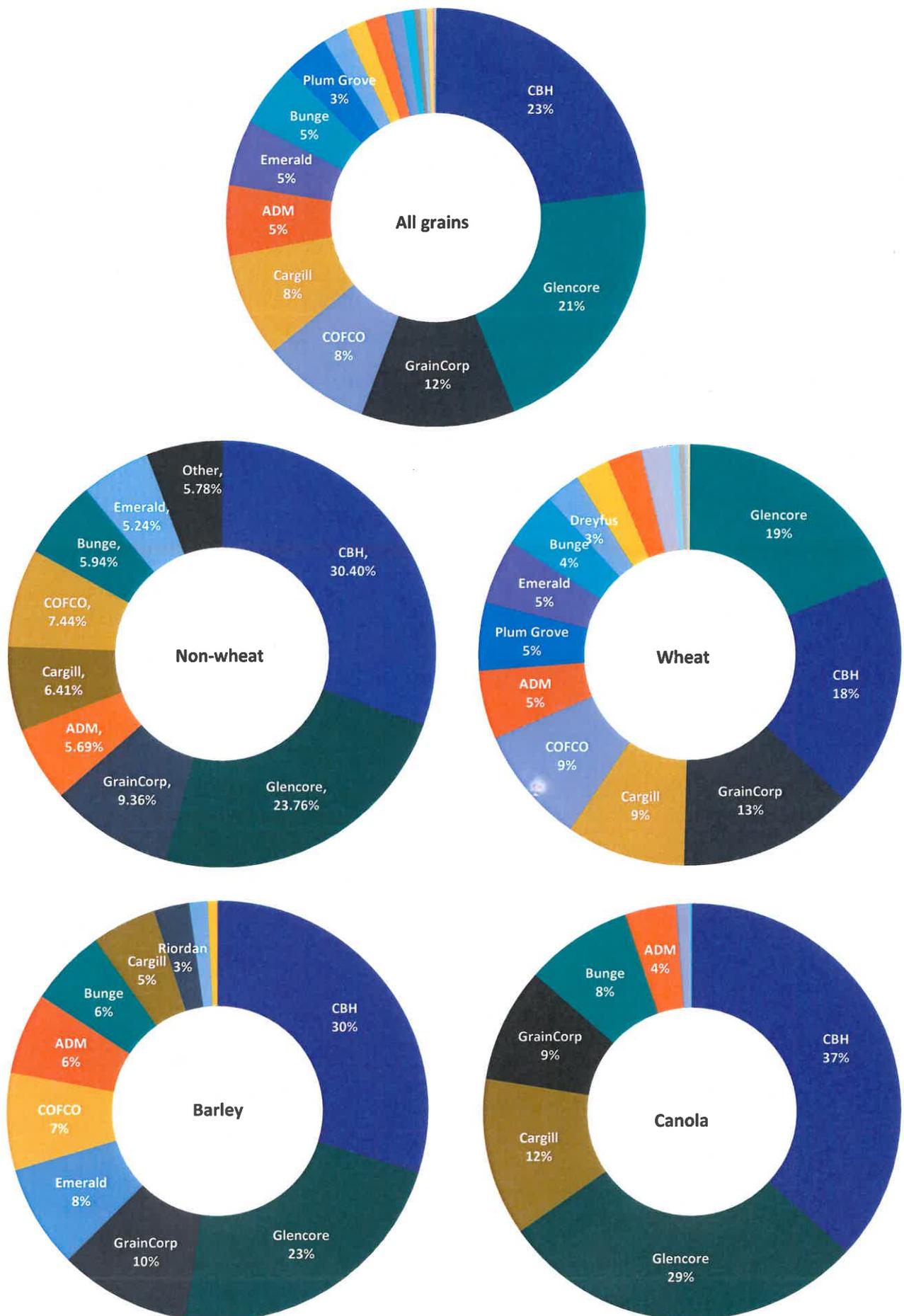
Market shares in the 2016-17 season

In the 2016-17 season, CBH had the largest market share in wheat and non-wheat bulk export markets at 23 per cent, followed by Glencore at 21 per cent and GrainCorp at 12 per cent.

In respect to bulk wheat, CBH, Glencore and GrainCorp collectively held a total of 50 per cent market share. The market dominance of these three exporters is greater in the bulk non-wheat market, with the collective market share of CBH, Glencore and GrainCorp at 64 per cent. As discussed above, the non-wheat market is not that much smaller than the wheat market, at around 40 percent of all exports, therefore this greater dominance and lack of participation by other exporters cannot be fully explained by lower export volumes.

These market shares are depicted in figure 5 below.

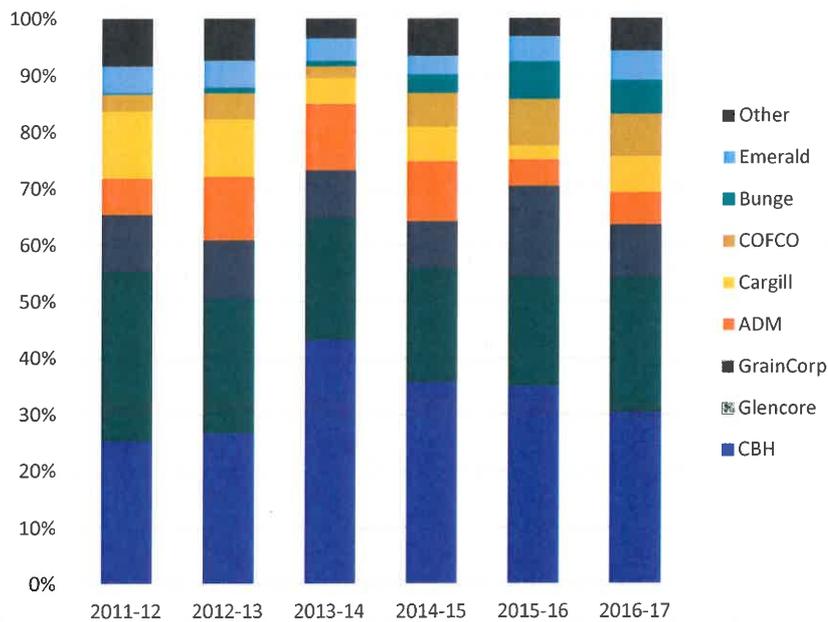
Figure 5: market shares by commodity for the 2016-17 season



Bulk non-wheat market share time series

In the bulk non-wheat market, the market dominance of the three major exporters CBH, Glencore and GrainCorp has continued across the seasons from the 2011-12 season to the 2016-17 season. The six-year average from the 2011-12 season to 2016-17 season for the three major exporters CBH, Glencore and GrainCorp, is a collective 66 per cent market share for bulk non-wheat exports, whereas the average in the bulk wheat export market is a collective 53 per cent of market share.

Figure 6: Non-wheat market share time series

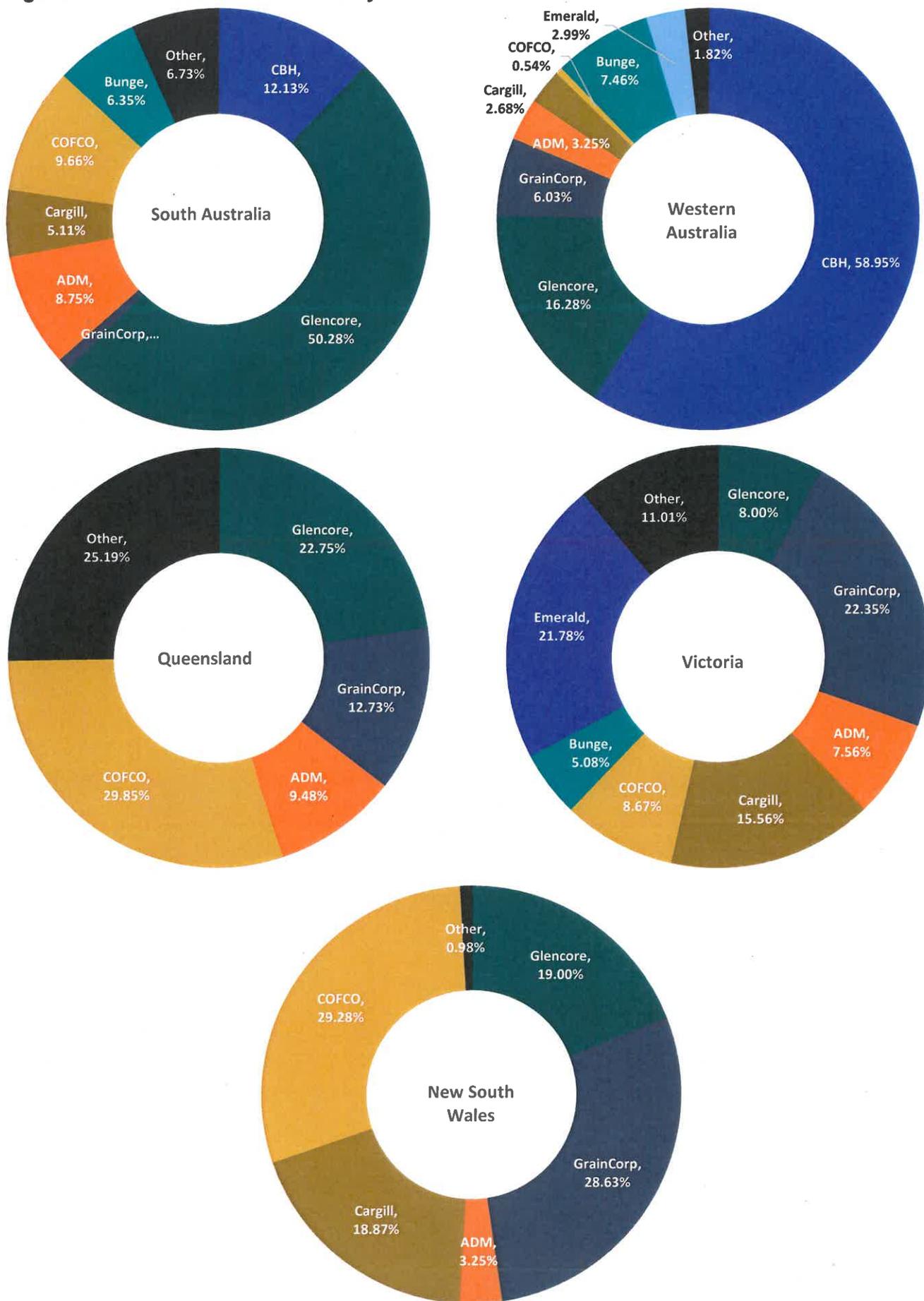


	CBH	Glencore	GrainCorp	ADM	Cargill	COFCO	Bunge	Emerald	Other
2011-12	25.30%	30.05%	9.99%	6.40%	11.88%	2.99%	0.16%	4.81%	8.41%
2012-13	26.68%	23.82%	10.30%	11.26%	10.12%	4.62%	0.99%	4.82%	7.38%
2013-14	43.18%	21.58%	8.42%	11.76%	4.52%	2.11%	0.92%	4.00%	3.50%
2014-15	35.75%	20.16%	8.21%	10.66%	6.09%	5.95%	3.22%	3.34%	6.63%
2015-16	34.98%	19.41%	15.96%	4.70%	2.41%	8.23%	6.64%	4.51%	3.16%
2016-17	30.40%	23.76%	9.36%	5.69%	6.41%	7.44%	5.94%	5.24%	5.78%
6 Year average	32.41%	23.39%	10.13%	8.36%	7.09%	5.21%	2.99%	4.52%	5.90%

Bulk non-wheat market share by state

In states like SA and WA there is currently less competition to purchase non-wheat grains. For example, in WA this can be seen in CBH's market share of nearly 59 per cent, which is a result of CBH's dominance in barley and canola exports. This is despite non-wheat exports making up around 40 per cent of all exports in these states. New South Wales, which has proportionately greater wheat and less non-wheat export volumes, also has a more equal market share profile as seen in figure 7 below.

Figure 7: non-wheat market shares by state for the 2016-17 season

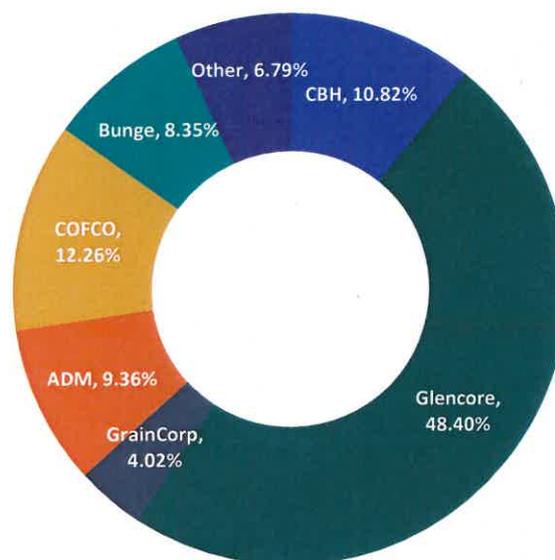


Market share at non-exempt ports

At the non-exempt ports, generally one exporter dominates the bulk non-wheat market. Key provisions in Parts 3 to 6 of the Code, which apply to non-exempt ports, currently focus on the export of bulk wheat. Expanding the Code to apply to all grains will help ensure that port access is not a barrier to increasing competition in these markets.

As an overall share of all bulk non-wheat exports from non-exempt ports, Glencore held the majority market share at 48 per cent in the 2016-17 season. In the 2011-12 season Glencore had nearly 48 per cent of the market share of bulk non-wheat exports, this declined across 2012-13 and 2013-14 but significantly increased in the 2015-16 season to approximately 50 per cent.

Figure 8: market share of non-wheat exports at non-exempt ports 2016-17 season



Coverage implications for the Code

As outlined above, the current focus of the non-discrimination and non-hindering provisions of the Code is only on bulk wheat. As expressed in the Department's interim report, this arose given the historical significance of bulk wheat exports to Australia. However, as detailed above and in various commentaries on the grain industry²⁴ Australia's grain export profile has changed over time as growers explore new plant types, connect with new markets and diversify production in response to changing climates and pest threats.

As per the data above, when looking to sell these crop types it appears growers have fewer marketing options than for bulk wheat. CBH and Glencore are considerably more dominant in the barley and canola markets, with their collective market share exceeding 50 per cent in both markets (53 per cent share in barley and 66 per cent share in canola). This is not surprising given the significant value of these grain types. The absence of active competition is disappointing for growers, as non-wheat grains often carry greater production risks.

As evident in the graphs above, the PTSPs' trading arms, who operates with less risk than their exporter competitors, are the dominant exporters of several of these bulk non-wheat

²⁴ Grains Industry National Research, Development and Extension Strategy 2017, accessed at <https://www.npirdef.org/strategy/11/Grains>.

grains. It appears the potential for one or two PTSPs to take advantage of their market power applies equally if not more so to bulk non-wheat grains.

Practically, trading and exporting bulk non-wheat grains can also be more complex than bulk wheat. In the case of bulk wheat, PTSPs and exporters generally have greater capacity to resolve quantity, quality and logistics problems at the time of shipping. Exporters may accumulate various parcels of bulk wheat and can blend as required and still fulfil market and end user demands. For bulk non-wheat grains exporters take on greater risks and may need the PTSP to blend in a certain way, comply with highly prescriptive end user regulatory requirements and outturn to specific standards. Unlike wheat, when purchasing canola or pulses an exporter is locked into shipping that commodity and grade without the option of blending, which limits their ability to meet end user demands.

High value crops like canola and chickpeas provide growers and also exporters a significant risk-reward opportunity. By way of example, canola is a potentially difficult crop to export. There is increasing regulation in destination markets and while exporters purchase wheat on the basis of minimum standards, crop oilseeds are purchased from growers on an oil content bonification basis (i.e. purchase price is based on an oil content calculation). The greater the oil content the higher the value. Exporters' contracts with end users vary in respect of whether oil content is specified, but typically this is the case. When lining up shipping exporters run the risk of receiving canola outturned to a quality significantly lower than what they paid for, unless there is a contract in place with the PTSP based on oil content. Absent recourse to dispute resolution and facing the challenge of competing against the PTSPs in this market it is clear that exporting canola can be challenging.

The reduced competition evident in non-wheat grain markets is perpetuated by the complexity of exporting non-wheat grains within vertically integrated supply chains, particularly in markets where the dominant exporter is the trading arm of the PTSP. For example, absent adequate coverage under the Code, an exporter may lack confidence to negotiate with a monopoly provider to secure access on the terms necessary to export these commodity types. In some markets this may not be a problem if there is a competing port terminal or related markets available from which to export. Where this is not the case exporters may decide to not take on such risks. In turn growers miss out on the opportunity to realise the full marketing potential of these valuable crops.

B.5. Shipping capacity booking systems

Booking capacity from PTSPs

Exporters typically seek capacity by way of tonnage, with a view to export from a port terminal a type of grain commodity or potentially a combination of grain commodities. Exporters can secure capacity many years in advance (long-term capacity), within a year or less (often known as short-term capacity) and sometimes on a more ad hoc basis several months or less before a shipment (additional capacity). There is considerable variability in the timeframes for acquiring capacity.

When making a booking an exporter is not typically required to specify the commodity it plans to export. Like the timeframe of a capacity booking, there is also variability in terms of the point at which an exporter is required to nominate their export commodity (generally, three to eight weeks before loading is due to commence). These details are set out in each PTSP's port loading protocol documents.

In practice once an exporter has secured capacity it may elect to nominate a commodity type or not provide any details. At some point ahead of shipping it may change or confirm the commodity subject to client demands, production levels and grain prices. This will become

known to the PTSP, who it may be competing with for said grain type. At some point this information should become available on the loading statement.

Variability and uncertainty surrounding shipping are by nature key aspects of grain trading. From the time of booking to the date of execution, exporters can switch between plans to ship wheat and non-wheat commodities. An exporter may split bookings, trade some or all of their capacity, reallocate shipments across multiple ports and bookings and/or execute more than one grain type on the one vessel.

Below are two real-world examples which highlight how capacity is not typically tied to one grain type over the life of a booking:

- *Example 1:* On 9 October 2017 Bunge had nominated a shipping slot at Outer Harbor, SA for 29,000 tonnes of wheat, but on 30 October 2017 split the booking into 26,000 tonnes barley and 3,000 tonnes wheat, then loaded the barley shipment on 4 December 2017.
- *Example 2:* On 6 February 2017, ADM had nominated a shipping slot at Portland, Victoria for barley for loading in mid-April 2017. On 6 March 2017, only just over a month before the anticipated loading date, the commodity was changed from barley to wheat, and the wheat was shipped in April 2017.

Coverage implications for the Code

Given the practical experience of trading and exporting grains it is both practically difficult and legally complex to understand how and when a capacity booking will be covered by the current Code. In the case of the real life examples outlined above considerable uncertainty exists regarding when and how the non-discrimination and no hindering obligations would have applied to Viterra and GrainCorp, respectively, in relation to these shipments.

Exporters and PTSPs alike will benefit from greater clarity with respect to their rights and obligations should all grain coverage be confirmed under the Code. Capacity bookings which come in and out of coverage as nominated grain type changes will not be subject to intermittent regulatory oversight. It is the ACCC's view that an exporter's booking should be entitled to coverage under the Code for the life of that booking.

The resolution of this ambiguity is particularly important in markets where there is limited competition at port and across related supply chains. In these locations it is more likely that an exporter may realise greater confidence and increase their participation. This in turn will ensure growers are more likely to receive the best price for their grain, and not only have an offer from the PTSP available as currently seen in some markets.

A further risk relating to this uncertainty is that exporters who value coverage under the Code often already nominate bulk wheat as their planned default shipment. In practice, this is a useful way to leverage Code coverage, up until PTSP reporting deadlines. It also serves as a means to limiting the amount of information available to the PTSP and their trading arm, for whom the exporter may be competing against for grain and/or more broadly end user customers. However, this practice can also lead to the overstating of the demand for bulk wheat relative to other commodities and distort market signals.

If the regime is not extended to cover the export of all grains, clarification of this will still be useful. Such an outcome will at least provide exporters and PTSPs confirmation of their respective rights and obligations under the Code, in so far as they export bulk wheat. A decision to not extend the Code will also clarify limitations pertaining to ACCC enforcement, particularly where potential breaches and disputes arise involving bookings involving multiple commodity types.

B.6. Reporting practices

What is being reported?

Under the Code, PTSPs are required to publish a loading statement for “grain” shipments. As grain is not defined in the Code (and there are a range of definitions of grain currently used by industry) it is currently unclear in the Code whether “grain” relates only to wheat and non-wheat grains or whether it also includes commodities not always considered grains such as legumes. The ACCC has observed inconsistency between export data obtained from loading statements under the Code and other sources, and these inconsistencies appear to be greater for non-wheat grains.

Coverage implications for the Code

As detailed throughout the submission, the ACCC recognises the importance to industry of access to timely and accurate data. In relation to the loading statement, the lack of clarity surrounding the definition of “grain” appears to be resulting in inconsistent reporting practices by PTSPs. For example export data obtained by the Australian Bureau of Statistics (compiled from Home Affairs data) indicates that the exported amounts of some non-wheat grains are higher than the non-wheat grains reported in the loading statements.

The ACCC acknowledges these data sets are based on differing data collection methods, however the difference in actual export amounts and published loading statement amounts suggests there may be some confusion in relation to the coverage of the Code requirements, which should be clarified, irrespective of the broader extension of the Code to cover all grains.

The current outcome is not useful to the industry and potentially could be misleading for growers and exporters alike. It is also important for PTSPs to have clarity regarding their obligations to ensure a level playing field in terms of transparency requirements. Clarification of the scope of the loading statement reporting information will ensure PTSPs report consistently. Clarification will also provide the ACCC with clear enforcement parameters should PTSPs fail to comply. In conjunction with the introduction of proposed penalty provisions, these changes should encourage and lead to more comprehensive and consistent reporting of shipping information.