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20 November 2024

Crops Section  
Department of Agriculture, Fisheries and Forestry  
GPO Box 858  
Canberra ACT 2601

Dear Crops Section

### **Re: Final Report on the second review of the Wheat Port Code**

Thank you for providing the ACCC with the Department of Agriculture, Fisheries and Forestry's (the Department) final report on the second review of the Wheat Port Code (Report).

The ACCC's submission in response to the second review's Discussion Paper noted that on balance the Code should be allowed to sunset because the current code is not fit for purpose. The submission also noted that the ACCC did not wish to pre-empt the outcome of the second review and that industry participants are best placed to comment on the impact of the Code and whether it remains necessary.

The Report indicates that industry participants generally supported the Code's Part 2 obligations and includes a finding (informed by stakeholder views) that the outcomes achieved by Part 2 provide a positive benefit to the wheat export industry.

The purpose of this letter is to provide the ACCC's view on the next steps for the consideration of the Code. Specifically, to set out the ACCC's views that:

- if industry considers the Code's Part 2 transparency obligations are beneficial and should continue then an amended or new mandatory industry code of conduct (mandatory code) is likely to be the best regulatory tool for providing maximum benefits to industry, rather than a voluntary industry led code
- an amended or new mandatory code should be appropriately targeted to address issues of industry concern and reflect the proposed shift away from an access focused code (e.g. the removal of Parts 3 to 6).

### **Potential transparency benefits of a mandatory code**

The ACCC considers there are likely greater benefits associated with including revised transparency obligations in a mandatory code rather than a voluntary industry led code. These benefits would include:

- greater certainty over which industry participants will be subject to obligations

- stronger incentives for port terminal service providers (PTSPs) to comply with the relevant obligations
- the ability to schedule a further review that must be undertaken via a specified process and within a required timeframe.

### **Certainty over which industry participants will be subject to Code obligations**

Including transparency obligations in a mandatory code will provide confidence and certainty over which industry participants will be subject to obligations.

The ACCC notes that industry participants can choose not to sign up to a voluntary industry led code and may opt-out at any time. The ACCC raised this concern in relation to other industry specific codes, such as the Voluntary Code of Conduct for the Negotiation and Development of Gas Supply Agreements between Gas Suppliers and Gas Customers in Australia and the voluntary Food and Grocery Code of Conduct.<sup>1 2</sup>

The Report indicates exporters consider the information published under the Code's Part 2 obligations positively impacts their dealings with PTSPs and ability to compete in markets. The ACCC considers it important to highlight that a voluntary industry led code will not necessarily provide certainty over who the obligations will apply to (and therefore who will be required to publish this information). This has the potential to significantly diminish the potential benefits that could be gained from improved transparency arrangements provided for in the code.

### **Stronger incentives for PTSPs to comply with obligations**

The ACCC considers that a PTSP's incentives to comply with obligations will be stronger under a mandatory code. This is because:

- compliance would be monitored by an independent entity (the ACCC)
- there would be clear and credible consequences associated with noncompliance (assuming the inclusion of penalty provisions as recommended by the Report).

### **Certainty about a further review to assess the effectiveness of obligations and any consequences associated with removing Parts 3 to 6 of the Code**

Despite increases in the number of participants in the PTSP market, in the 2022–23 shipping year (1 October 2022 to 30 September 2023) it is estimated that CBH, GrainCorp and Vitol combined to load approximately 78% of the bulk grain exported from Australia.<sup>3</sup> As a result, the ACCC considers it important that any impacts from removal of the access obligations contained in Parts 3 to 6 of the Code are effectively assessed by the scheduling of a review of any new or amended obligations. Retaining the transparency obligations in a mandatory code will provide certainty over when such a review will take place and what it will involve.

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<sup>1</sup> Treasury, *Summary of the Australian Competition and Consumer Commission Advice to Government*, available at <https://treasury.gov.au/consultation/c2022-343998>, accessed 10 October 2024; ACCC, ACCC submission to the Independent Review of the Food and Grocery Code of Conduct 2023–2024, available at: <https://treasury.gov.au/sites/default/files/2024-06/c2024-489934-acc.pdf>, accessed 10 October 2024.

<sup>2</sup> On 11 July 2023 the mandatory Competition and Consumer (Gas Market Code) Regulations 2023 commenced (the Explanatory Statement notes that the Regulations intend to improve upon the voluntary code). In June 2024 the Australian Government response to the Independent Review of the Food and Grocery Code of Conduct agreed that the Food and Grocery Code should be made mandatory.

<sup>3</sup> PTSP loading statements and ACF Shipping stem and market share report.

While the Report recommends that government should review the industry managed code within 5 years of its commencement, any requirement in an industry managed code is not mandated.

The ACCC recommends that a prescribed review should commence within 3 years of a new code or any amendments to the current Code commencing and should consider matters including:

- the appropriateness and effectiveness of relevant obligations (including whether they should be retained and if so, whether they should be improved or refined)
- whether the removal of the access obligations in Parts 3 to 6 of the Code has had any unintended consequences.

### **Transparency obligations need to be improved in an amended or new mandatory code**

While the above outlines why the ACCC considers a mandatory code would provide greater benefits over an industry managed code, to be effective the clauses within the code must also be clearly defined and enforceable.

Chapter 3 of the Report provides the review's advice on how the Code could be amended to improve its operation. The ACCC notes that many of the proposed amendments in Chapter 3 relating to Parts 1 and 2 of the Code are consistent with amendments proposed by the ACCC during the first Code review. The ACCC continues to consider that these proposed amendments would improve the clarity and (in the case of obligations) enforceability of the relevant clauses.

In addition to the Chapter 3 amendments, the ACCC has identified several additional ways that Parts 1 and 2 of the Code could be amended to improve their clarity. Some of these proposed improvements are based on queries or suggestions from industry participants.

The ACCC would be pleased to discuss these potential improvements and assist with the development of any amendments to Parts 1 and 2 of the Code or obligations in a new mandatory code.

### **Further consideration of the Code's purpose and which industry participants will be subject to obligations**

The ACCC considers that prior to a decision on the Code's future, further consideration should be given to the Code's purpose and which industry participants will be subject to obligations.

The Code's Explanatory Statement indicates that the Code was introduced due to '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.'<sup>4</sup> Over time the Code has increasingly applied to smaller-scale, non-vertically integrated service providers that have neither the ability nor incentive to abuse market power.

The ACCC considers that now is an opportune time, in consultation with industry, to clarify the problem that a mandatory code would be seeking to address and then (if the Code is to be retained or a new mandatory code developed) tailor obligations to address those specific problems.

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<sup>4</sup> Explanatory Statement, Select Legislative Instrument No. 136, 2014, <https://www.legislation.gov.au/F2014L01250/asmade/text/explanatory-statement>.

## Further consultation

The ACCC notes that the Department is currently undertaking public consultation on the recommendations of the Report.<sup>5</sup> The ACCC welcomes this opportunity for further engagement on the Code's future, and for stakeholders to clarify their views on the Report's analysis, findings and recommendation. The ACCC considers it particularly important to understand stakeholder views regarding:

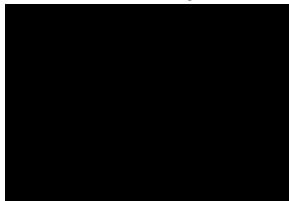
- the PTSP behaviours (if any) that are of concern (including what these behaviours are and the impact they are having on competition) and whether these concerns relate to all PTSPs or certain categories of PTSPs (for example, large-scale, vertically-integrated PTSPs)
- the information asymmetry or transparency issues that need addressing (including what the nature of these issues are and their impact on competition)
- whether industry is confident that a voluntary industry led code without an independent adjudicator and compliance framework will provide PTSPs with sufficiently strong incentives to comply with the obligations contained in the code
- whether there is value in certainty over the timing and nature of a review to assess the effectiveness of obligations and any consequences associated with removing Parts 3 to 6 of the Code.

In addition, the ACCC notes that the Report acknowledged the broader bulk grain supply chain concerns expressed by stakeholders over the course of the Code and during the review. The ACCC considers it may be useful to explore these issues further when considering the Code's purpose and the industry participants that should be subject to obligations.

The ACCC thanks you for the opportunity to provide views on the review findings and recommendations.

If you would like to discuss any of the matters raised in this letter in further detail, please contact Katie Young at [REDACTED] or on [REDACTED].

Yours sincerely



Anna Brakey  
Commissioner

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<sup>5</sup> [Government response to the Second review of the Wheat Port Code Report - Agriculture hub.](#)