



Our ref: 62575  
Contact officer: Katie Young  
Contact phone: 03 9290 6980

Level 17, Casselden  
2 Lonsdale Street  
Melbourne Vic 3000  
GPO Box 520  
Melbourne Vic 3001  
tel: (03) 9290 1800  
www.accc.gov.au

10 May 2018

Daryl Quinlivan  
Secretary  
Department of Agriculture and Water Resources  
GPO Box 858  
CANBERRA ACT 2601

Sent electronically: [Daryl.Quinlivan@dbcde.gov.au](mailto: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.'<sup>1</sup>

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 services<sup>2</sup>
- 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.<sup>3</sup> 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.

<sup>1</sup> 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.

<sup>2</sup> In this submission, references to grain include cereal grains, pulses and oilseeds.

<sup>3</sup> 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'.<sup>4</sup> Further, a number of other submissions simply referred to 'grain' rather than 'wheat' when discussing the Code, or used the two terms interchangeably.<sup>5</sup> 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

---

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

<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

### ***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

---

<sup>6</sup> 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>.

<sup>7</sup> 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.<sup>8</sup>

### ***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.<sup>9</sup>

### ***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

---

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

<sup>9</sup> 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'.<sup>10</sup> 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.<sup>11</sup> 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'.<sup>12</sup>

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.<sup>13</sup> 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

---

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

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

<sup>12</sup> Finding 3, Interim report p 18.

<sup>13</sup> 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'.<sup>14</sup> 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'.<sup>15</sup> 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

---

<sup>14</sup> Interim report, p. 39.

<sup>15</sup> 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'.<sup>16</sup> 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.<sup>17</sup> 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.

<sup>16</sup> Interim report, p. 45.

<sup>17</sup> 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.<sup>18</sup>

### 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.<sup>19</sup> 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.

---

<sup>18</sup> In this attachment, references to grain include cereal grains, pulses and oilseeds.

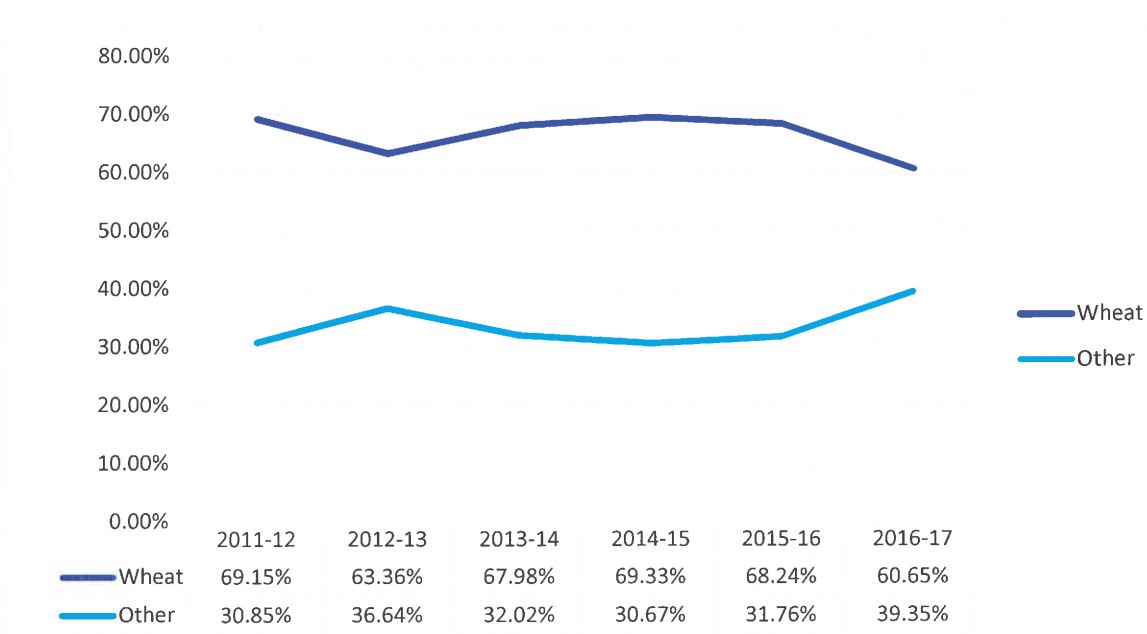
<sup>19</sup> ACCC *Bulk wheat ports monitoring report 2016-17*, December 2017.



**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 %
<b>Grand Total</b>	<b>31,770,731</b>	<b>100 %</b>

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.



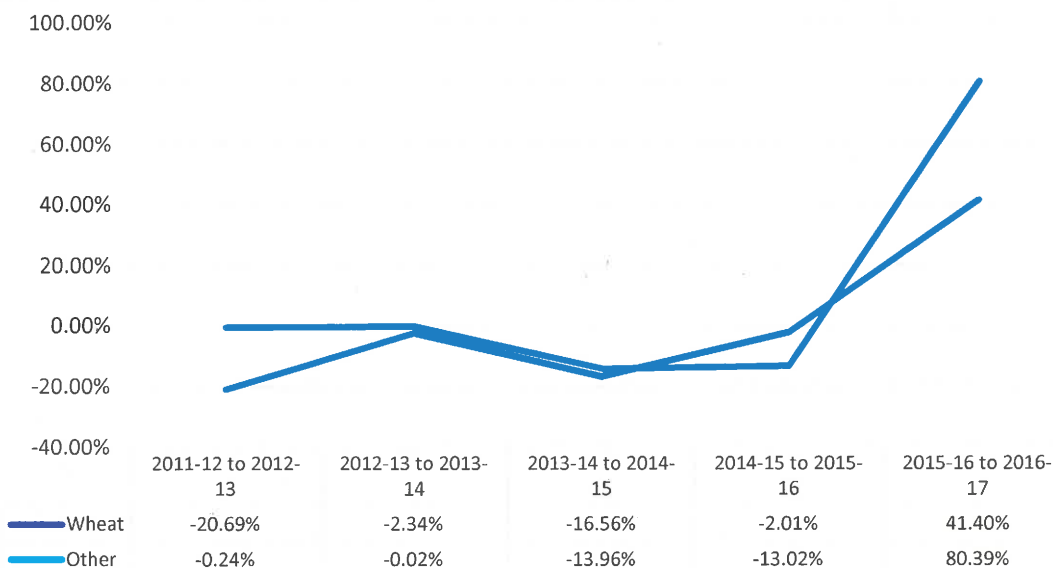
**Figure 1: Wheat and non-wheat grains as a proportion of all exports**

**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.

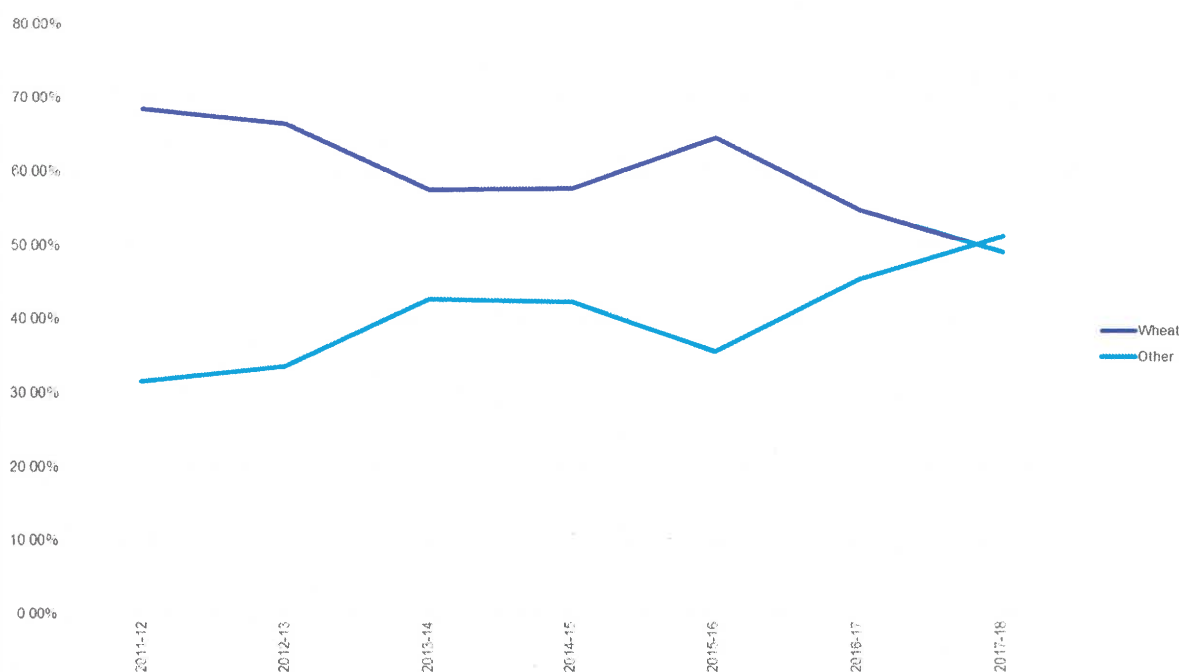
**Figure 2: Proportional changes in wheat exports and non-wheat exports**



### 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.<sup>20</sup> 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).<sup>21,22</sup>

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.<sup>23</sup>

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

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

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

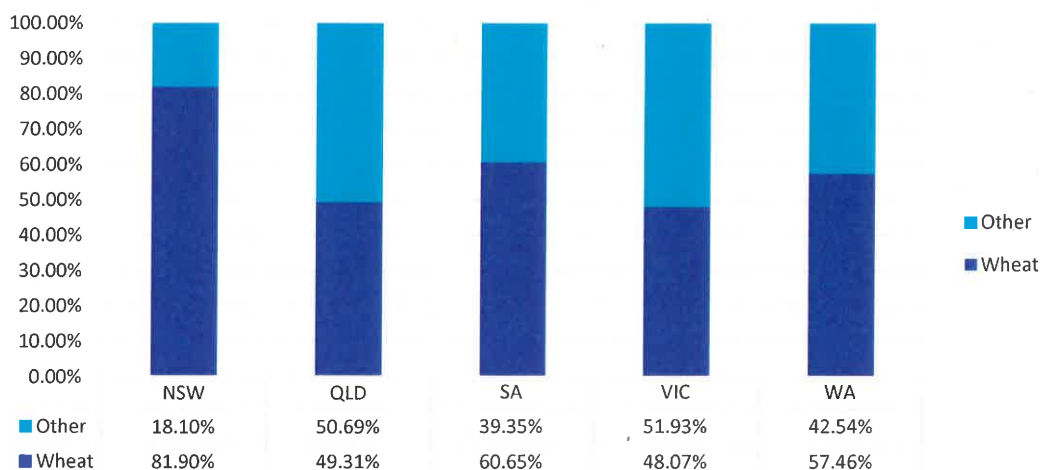
<sup>22</sup> <http://aegic.org.au/publications/australian-grains/pulses/>.

<sup>23</sup> <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.

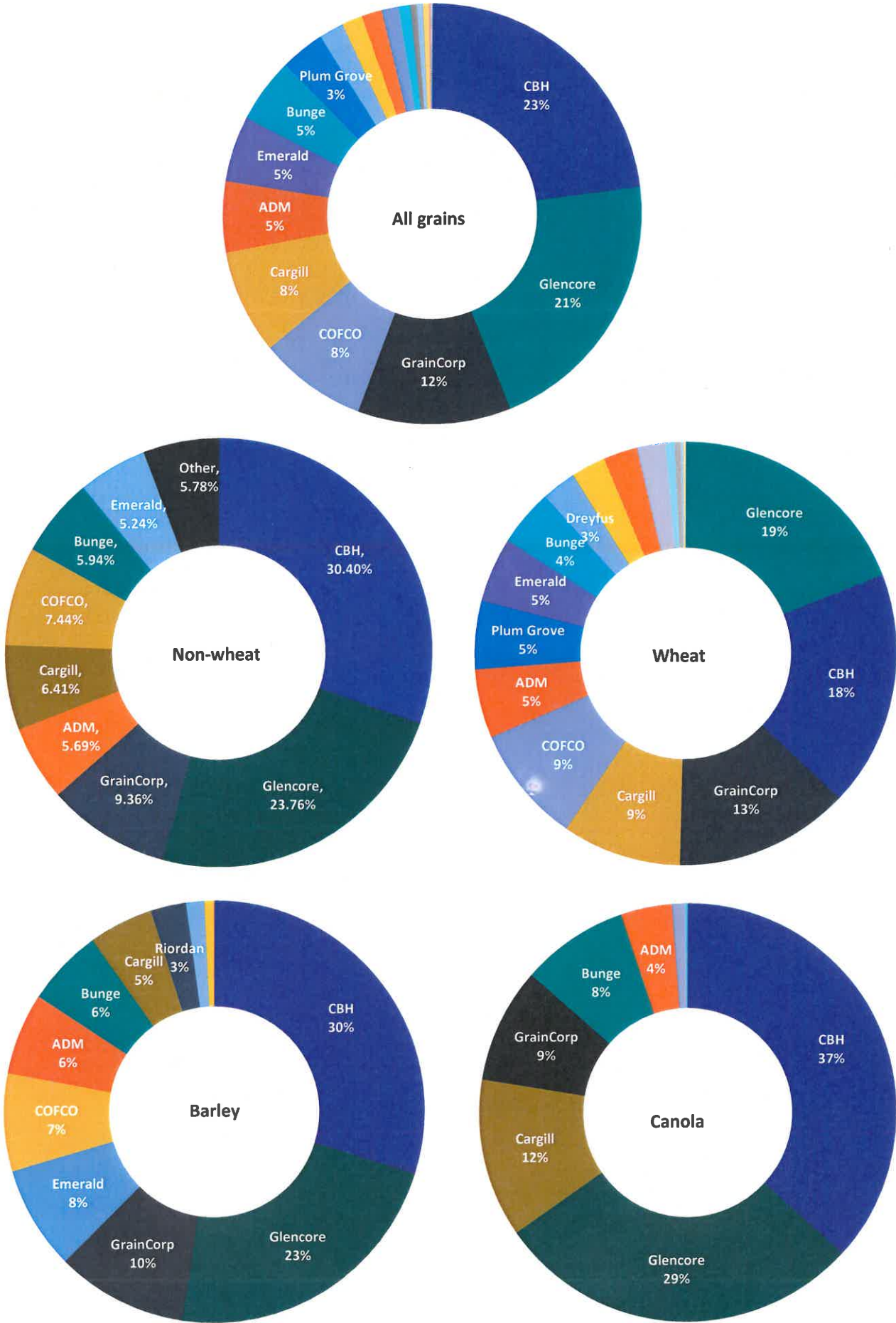
### Market shares in the 2016-17 season

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

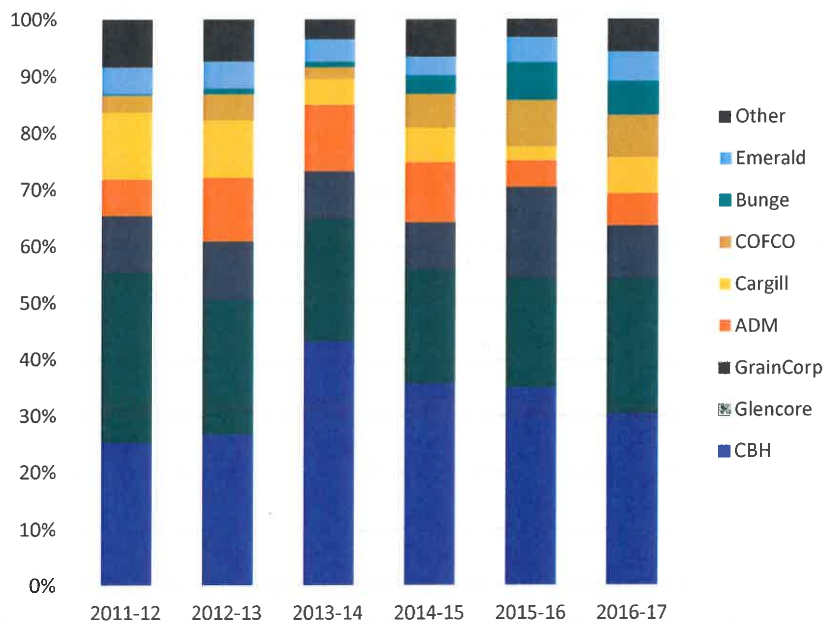




### Bulk non-wheat market share time series

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%
<b>6 Year average</b>	<b>32.41%</b>	<b>23.39%</b>	<b>10.13%</b>	<b>8.36%</b>	<b>7.09%</b>	<b>5.21%</b>	<b>2.99%</b>	<b>4.52%</b>	<b>5.90%</b>

### 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**

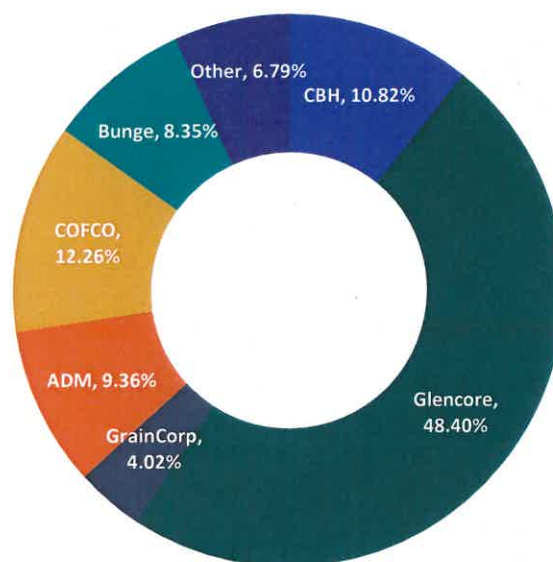


## Market share at non-exempt ports

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 industry<sup>24</sup> 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

<sup>24</sup> 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.