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Daryl Quinlivan
Secretary
C/O Wheat Port Code Review Taskforce
Department of Agriculture and Water Resources
GPO Box 858
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Dear Mr Quinlivan Daryl

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
Rod