



## **Australian Government**

### Australian Government response to the Review of the Wheat Port Access Code of Conduct

## **Introduction**

The Australian Government notes the release of the *Review of the Wheat Port Access Code of Conduct*. The government thanks the Wheat Port Code Review Taskforce members for the work in delivering the report and associated recommendations.

Australia's grains industry can be proud of the significant contribution it makes to the Australian economy, particularly through exports. Australia has a well-earned reputation as a supplier of high-quality grains and as a reliable trading partner. A competitive grains industry is key to the Australian Government's vision for a strong, dynamic and prosperous Agricultural sector. A Wheat Port Code that is fit-for-purpose can help ensure the future prosperity of the Australian grains industry.

The Australian Government's response to this report is set out below.

## **Recommendation 1**

That the wheat port access code be retained and reviewed again in 2022.

### **The Australian Government supports the recommendation.**

A further review will help to ensure the Code remains fit for purpose.

The *Competition and Consumer (Industry Code—Port Terminal Access (Bulk Wheat)) Regulation 2014* requires a further review of its operation if the regulation continues in operation for six years or more after its commencement.

The next review is likely to commence in mid-2022.

## **Recommendation 2**

That the code be amended to require parties that jointly provide port terminal services to nominate which party is responsible for fulfilling relevant code obligations and to clarify related matters of process and responsibility.

That the definitions of ‘port terminal facility’ and ‘port terminal service provider’ be amended to clarify the facilities that fall within the scope of the code, and are subject to regulation, at a particular time—for example, by removing reference to capability and clarifying when a facility would be considered ‘used or to be used’.

### **The Australian Government supports the recommendation.**

The recommendation is intended to improve the operation and enforcement of the code.

Changes to these definitions will ensure the code is fit for the future and achieving its intended policy outcomes.

## **Recommendation 3**

That appropriate remedies, including civil pecuniary penalties and thereby infringement notices, be considered for serious and egregious breaches to encourage port terminal service providers to take specific actions within a specific period required by the code, including in relation to:

- Part 2: publication obligations, including continuous disclosure rules
- Part 3: non-discrimination, no hindering and dispute resolution provisions
- Part 4: certain aspects of the capacity allocation and protocol obligations
- Part 5: publication obligations, including regarding capacity and performance indicators
- Part 6: record-keeping obligations.

### **The Australian Government supports the recommendation in principle.**

The penalties must be restricted to serious and egregious breaches of the code, and be consistent with the current limits for penalty units within the *Competition and Consumer Act*

2010. The Government does not consider there is evidence of non-compliance or misconduct in the industry to support the introduction of a penalty scheme which would increase the penalty units applicable to all industry codes.

#### **Recommendation 4**

That port terminal service providers continue to publish prospective daily shipping stem reports on their websites (currently referred to as port loading statements), including the information required in clause 7(2).

That the code be amended to require that all accepted bookings be reported no later than three\* months before the slot opens—whether or not all clause 7(2) information is known to the port terminal service provider—or within two\* working days of a booking being accepted within this period.

That clause 7(2) information provided to and accepted by a port terminal service provider in accordance with its agreement(s) with an exporter/customer be included on the shipping stem report within two\* working days.

\* Further industry consultation may be needed to confirm the appropriateness of the suggested periods.

#### **The Australian Government supports the recommendation.**

The recommendation is intended to improve the operation and enforcement of the code.

Changes to this part of the code will reflect expectations and establish requirements for stem reporting.

#### **Recommendation 5**

That port terminal service providers be required to provide the ACCC with retrospective port loading statements setting out the bookings for each calendar month (whether executed or not) within one month of the conclusion of the calendar month and in the form and manner required by the ACCC.

That the port loading statement include:

- information from the most recent shipping stem report that included the booking
- if a port terminal service was provided, the quantity and type of grain loaded and time the ship departed
- if a port terminal service was not provided, the reason why.

That, subject to consultation with port terminal service providers about practical reporting considerations, monthly port loading statements be provided to the ACCC in .csv files, similar to current practice.

#### **The Australian Government supports the recommendation.**

The recommendation is intended to improve the operation and enforcement of the code.

Changes to this part of the code will reduce the frequency of reporting for port loading statements.

### **Recommendation 6**

That the code be amended to clarify:

- that the total baseline capacity (including allocated capacity) of a facility that is reasonably expected to be available should be reported by shipping window for the shipping year
- that changes in available capacity—both increases and decreases—and the reasons for these (including allocation of capacity) should be clearly reported in weekly updates
- that the holder/s of capacity and the capacity they hold be reported (allocated capacity).

#### **The Australian Government supports the recommendation.**

The recommendation is intended to improve the operation and enforcement of the code.

Changes to this part of the code will make reporting about ship loading capacity more useful.

### **Recommendation 7**

That the 'allocated amount' reported under clause 29(1)(a) be the 'allocated capacity' [for each capacity holder] on the date one month before the shipping window opened.

#### **The Australian Government supports the recommendation.**

The recommendation is intended to improve the operation and enforcement of the code.

Changes to this part of the code will improve the interpretation and reporting of this data.

### **Recommendation 8**

That any requirement for port terminal service providers to report demurrage information be removed (clause 29(1)(e)).

#### **The Australian Government supports the recommendation.**

The recommendation is intended to improve the operation and enforcement of the code.

Changes to this part of the code will remove the obligation for this information to be published.

### **Recommendation 9**

That clause 30 requiring port terminal service providers to publish stocks information be deleted.

#### **The Australian Government supports the recommendation.**

The recommendation is intended to improve the operation and enforcement of the code.

Changes to this part of the code will remove the obligation for this information to be published.

### **Recommendation 10**

That clause 25 ('Port loading protocol to include capacity allocation system') continue to operate in its current form.

That consideration be given to defining the 'exceptional circumstances' or determining a process under which a capacity allocation system approved by the ACCC under clause 25 might be reviewed.

#### **The Australian Government supports the recommendation.**

The recommendation is intended to improve the operation and enforcement of the code.

Changes to this part of the code would define 'exceptional circumstances' for the purpose of triggering a review of a capacity allocation system.

### **Recommendation 11**

That the code be amended to extend its coverage from bulk export wheat at port to all bulk export grains at port.

#### **The Australian Government does not support the recommendation.**

The wheat port code is the most recent step in the deregulation of Australia's export wheat marketing arrangements. The government response to the Productivity Commission's 2010 inquiry into Australia's Wheat Export Marketing Arrangements laid out a three-stage transition towards full market deregulation. The final stage aimed for deregulation governed by general competition law, supported by a voluntary code of conduct and intended to take effect from 1 October 2014.

Come 2014, many stakeholders expressed 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 and thus the mandatory wheat port code commenced on 30 September 2014.

The Australian Government's *Industry Codes of Conduct Policy Framework* establishes the principle that the Government will only mandate an industry code where there is a compelling case for intervention, supported by robust evidence. This requires that there is a demonstrable problem affecting industry participants or consumers which the market cannot or will not overcome, and that the proposed Government intervention is likely to result in a net public benefit.

These same principles apply to expanding the scope of an existing industry code.

While the review supported expanding the code, it found no evidence to suggest consignments of non-wheat grains have had a different level of access to port terminal services than consignments of wheat or that they have been subjected to additional discrimination or hindrance and considered that expanding coverage would have minimal practical implications for negotiation of access. The review noted that Port Terminal Service Providers already effectively apply the provisions in the code to all grains and that industry participants did not object to all grains voluntarily being treated equally to bulk wheat. This behaviour indicates that the market is operating appropriately and does not warrant further government intervention at this time.

On balance, expanding the code to cover all grains does not align with the principles of the Australian Government's *Industry Codes of Conduct Policy Framework* as there is insufficient evidence of a problem requiring Government intervention and a subsequent increase in regulation.

The Australian Government notes the concerns of the Australian Competition and Consumer Commission (ACCC) around its capacity to administer regulations with 'wheat only' provisions in an environment where all grains are reliant upon access to the same port services.

The Australian Government will consider recommendations by the ACCC about the need for expanding the wheat port code to cover 'all grains' when it is reviewed again in 2022.

## **Recommendation 12**

That Grain Trade Australia take the lead in engaging with open-access up-country storage operators and third-party exporters to establish and/or confirm industry standards and expectations in relation to the reconciliation of freight differentials and other costs arising from site swaps.

If, despite action by industry, new evidence emerges of a port terminal service provider using its market power to intentionally and unreasonably restrict fair and transparent access to grain for export through operation of its up-country storage and handling network, the need for intervention, including regulation, should be considered.

**The Australian Government supports the recommendation in principle and expects the grains industry to work together to determine how best to give effect to this recommendation.**

The recommendation is for industry to consider and to report if it finds evidence of port terminal service providers using market power to intentionally and unreasonably restrict fair and transparent access to grain for export through operation of their up-country storage and handling networks.

The Australian Government will consider any evidence against the principles of the *Industry Codes of Conduct Policy Framework* and, if warranted, the need for regulatory intervention will be examined when the Code is next reviewed.