



Australian Government

Department of Agriculture,
Fisheries and Forestry

Report on the second review of the Wheat Port Code

Department of Agriculture, Fisheries and Forestry



© Commonwealth of Australia 2024

Ownership of intellectual property rights

Unless otherwise noted, copyright (and any other intellectual property rights) in this publication is owned by the Commonwealth of Australia (referred to as the Commonwealth).

Creative Commons licence

All material in this publication is licensed under a [Creative Commons Attribution 4.0 International Licence](https://creativecommons.org/licenses/by/4.0/) except content supplied by third parties, logos and the Commonwealth Coat of Arms.



Cataloguing data

This publication (and any material sourced from it) should be attributed as: DAFF 2024, *Report on the second review of the Wheat Port Code*, Department of Agriculture, Fisheries and Forestry, Canberra, July. CC BY 4.0.

This publication is available at agriculture.gov.au/publications.

Department of Agriculture, Fisheries and Forestry
GPO Box 858 Canberra ACT 2601
Telephone 1800 900 090
Web agriculture.gov.au

Disclaimer

The Australian Government acting through the Department of Agriculture, Fisheries and Forestry has exercised due care and skill in preparing and compiling the information and data in this publication. Notwithstanding, the Department of Agriculture, Fisheries and Forestry, its employees and advisers disclaim all liability, including liability for negligence and for any loss, damage, injury, expense or cost incurred by any person as a result of accessing, using or relying on any of the information or data in this publication to the maximum extent permitted by law.

Acknowledgement of Country

We acknowledge the Traditional Custodians of Australia and their continuing connection to land and sea, waters, environment and community. We pay our respects to the Traditional Custodians of the lands we live and work on, their culture, and their Elders past and present.

Contents

Summary	v
Findings of the review	v
Recommendations.....	vi
Review Process	1
Terms of Reference	1
Consultation process	1
1 Background on the code	4
1.1 History of the code	4
1.2 Operation of the code	4
1.3 First Review	6
2 Is the code still required?	7
2.1 Changes to the industry since the code's introduction.....	7
2.2 Fitness for purpose of the code's provisions.....	11
2.3 Industry self-regulation	16
2.4 Stakeholders' views on the need for a code	18
2.5 Overall finding	19
3 Potential amendments to the code	22
3.1 Removal of the additional regulatory requirements contained in Parts 3 to 6	22
3.2 Retention of power to exempt cooperatives under subclause 5(1).....	22
3.3 Amendments to the requirement to publish daily port loading statements	23
3.4 Information on obligation to act in Good Faith.....	25
3.5 Inclusion of enforcement	25
3.6 Extension to all grains.....	26
3.7 Improvement of definitions.....	27
3.8 Extension up-country.....	28
3.9 Removal of exemptions	29
4 Effect of the code on upstream and downstream markets.....	30
5 Non-code Issues	32
6 Recommendations	33
Glossary.....	35
References	36
Attachment A.....	37

Figures

Figure 1 Australian Wheat exports, 2014-15 to 2024–25 (Million tonnes)	9
--	---

Maps

Map 1 Australia’s bulk grain port terminal facilities and grain growing regions	8
---	---

Boxes

Box 1 Deferral of sunseting	v
Box 2 Exporter engagement with the review	3
Box 3 National access regime	11
Box 4 ACCC exemption assessment process	13
Box 5 Recommendation 4 from first review	24
Box 6 Recommendation 2 of the first review	28

Tables

Table 1 Options for the future of the code	33
Table 2 Report glossary	35

Summary

The *Competition and Consumer (Industry Code – Port Terminal Access (Bulk Wheat)) Regulation 2014* (the regulation), prescribes a mandatory code of conduct (the Wheat Port Code – hereafter ‘the code’) that regulates the behaviour of bulk wheat port terminal service providers (PTSPs) towards bulk wheat exporters without their own port terminals (known as third-party exporters).

The code seeks to ensure PTSPs that export wheat do not use their market power to unfairly favour exporting their own wheat over wheat they are contracted to export by third-party exporters. When the code was introduced in 2014 there was little competition in the provision of port terminal services and PTSPs had considerable market power as they operated as regional monopolies.

The regulation is scheduled to sunset (be automatically repealed) on 1 October 2026, unless a decision is made by government to re-make an unchanged or amended code. This review is designed to inform the government’s sunsetting decision. This review is also designed to satisfy the requirements of section 5 of the regulation that require the code be periodically reviewed.

The common purpose of the sunsetting and section 5 reviews is to assess whether the code remains fit for purpose. If the review finds that the code is no longer fit for purpose it should sunset, be repealed or amended so it is fit for purpose. Section 5 of the regulation goes into more detail about the matters that the review must consider, which can be broadly grouped into three key questions:

- What effect has the Wheat Port Code had?
- Is the Wheat Port Code still necessary?
- If it is still necessary, could the Wheat Port Code be improved?

We consider a fit for purpose code is one that promotes competition in the delivery of port terminal services so third-party exporters have appropriate access to these services.

Box 1 Deferral of sunsetting

The regulation was scheduled to sunset on 1 October 2024. On 26 August 2024 the Attorney-General issued the [*Legislation \(Deferral of Sunsetting—Competition and Consumer \(Industry Code—Port Terminal Access \(Bulk Wheat\)\) Regulation\) Certificate 2024*](#) which deferred the date of sunsetting to 1 October 2026 to provide time for the government to consider this review’s recommendations and implement any agreed outcomes.

Deferring sunsetting of the regulation means the Wheat Port Code will continue to remain in operation until 1 October 2026, unless a decision is made by government to either remake or repeal the code at an earlier date.

Findings of the review

In considering all the information presented in public submissions and through consultations, our **overall finding** is that the code in its current form is no longer fit for purpose. Beyond our overall finding that the code is no longer fit for purpose, we made four further findings that guide our recommendations to government about next steps. These findings are outlined in further detail in Chapter 2 of this report.

- Our **first finding** is that the national market for port terminal services has changed significantly since 2014, which has resulted in an overall increase in competition between PTSPs.
- Our **second finding** is that Parts 3 to 6 of the code are the least fit for purpose. We consider this part of the code may be acting as a barrier to new PTSPs entering the market, and this perverse outcome outweighs any benefits to exporters and growers in keeping Parts 3 to 6 of the code. We also consider little evidence has been provided to demonstrate there is a market failure in the wheat export supply chain that would require the retention of these provisions.
- Our **third finding** is that the outcomes achieved by Part 2 of the code including Good Faith and the provision of information through port loading statements, port loading protocols, and standard terms and reference prices, provide a positive benefit to the wheat export industry.
- Our **fourth finding** is that there is some evidence a mechanism is required to ensure PTSPs continue to undertake practices such as publishing port loading statements. We did not however find sufficient evidence to establish this can only be done by continuation of the code, rather than through industry self-regulation.

Recommendations

Based on the Report's findings we recommend that:

1. Grain Trade Australia work with the grain export industry to develop an industry managed code that includes:
 - a. A commitment to deal in Good Faith with grain exporters
 - b. Principles and guidelines for managing demand for port terminal services
 - c. A commitment to timely publication of port loading statements.
 - d. A commitment to publish standard terms and reference prices
 - e. A dispute resolution mechanism.
2. As soon as the industry managed code is ready, the existing Wheat Port Code be repealed or allowed to sunset.
3. The government should review the operation of the industry managed code within 5 years of the commencement of its operation and consider re-regulation if the industry managed code does not maintain the outcomes of Part 2 of the code.

Review Process

Terms of Reference

The review's terms of reference were developed to be consistent with the requirements of a sunset review and section 5 of the regulation. Section 5 requires the review to identify opportunities to ensure well managed deregulation to free and open competition in the Australian wheat export market, while maintaining Australia's international reputation for quality and reliability. In particular, the review must consider whether there are appropriate alternative mechanisms to achieve this outcome.

The terms of reference for the review were to:

1. Examine the rationale, role and objectives of the code including:
 - a) the justification for the continued operation of the code over and above the generic access regime established by Part IIIA of the *Competition and Consumer Act 2010*
 - b) the effect of any changes to market conditions in the wheat export supply chain on the rationale for, and operation of, the code.
2. Assess the performance of the code in meeting its rationale and objectives, including:
 - a) the effect of the code on the economically efficient operation of, use of, and investment in, port terminal facilities
 - b) the effect of the code on the promotion of competition in upstream and downstream markets.
3. Provide advice on possible amendments to the code and whether its provisions continue to be 'fit for purpose', including:
 - a) the power to exempt cooperatives under subclause 5(1)
 - b) the additional regulatory requirements contained in Parts 3 to 6
 - c) the requirement for all port service providers to make available a port loading statement each business day under clause 7.
4. Consider the availability and transparency of relevant market information to participants in the export supply chain.
5. Consider the effectiveness of, and level of competition existing under current arrangements for the transport, storage and distribution of wheat in contributing to a sustainable supply chain from farm gate to export load port.

The methodology for the review was developed to ensure these matters could be adequately and appropriately addressed, recognising the range of stakeholders and varied interests across the wheat export supply chain.

Consultation process

From 19 October 2023 until 9 February 2024, stakeholders were invited to make submissions to the review via the review's [Have Your Say](#) page. To assist stakeholders to prepare submissions we published a discussion paper that set out a range of questions, drawn from the review's terms of reference, that sought to address the key questions of:

- Is the code still necessary?
- What effect has the code had?
- Could the code be improved?

The discussion paper also included specific questions for wheat producers, wheat exporters and PTSPs on their experience of the code. The discussion paper remains available on the review's Have Your Say page.

We received 19 submissions through this process, including:

- five from PTSPs
- five from businesses/individuals involved in the wheat export supply chain
- seven from grower representative organisations
- one from Grain Trade Australia
- one from the Australian Competition and Consumer Commission (ACCC).

Following the public consultation period, we also undertook face-to-face meetings with key stakeholder groups that had submitted to the review.

We note stakeholders' submissions to the review primarily addressed the key question of the necessity of the code, and to a limited extent the effect the code has had. Submissions generally provided limited evidence as to what market failure existed in the supply chain for wheat only the code could address. Submissions suggested the following specific changes to the code to improve its operation:

- inclusion of enforcement provisions
- extension of the code to all grains
- extension of the code up-country
- removal of the exemption provisions of the code.

In addition to the public consultation process, to support and facilitate further targeted consultation with wheat export industry stakeholders we established a Wheat Port Code Review Reference Group (the reference group).

The reference group consisted of representatives from:

- Grain Producers Australia
- GrainGrowers Limited
- Grain Trade Australia

The ACCC also participated in reference group meetings as an observer.

Box 2 Exporter engagement with the review

The primary intended beneficiaries of the code are third-party wheat exporters. These businesses are therefore best placed to inform the review of the necessity of the code and the benefits it provides them. However, despite best efforts on behalf of the reviewers, the majority of these businesses did not provide a submission to the review.

In response, in April 2024, after consulting the Reference Group, the department prepared an additional survey, targeted at third-party wheat exporters. The survey was distributed to (Class A and B) third-party exporters and PTSP members by Grain Trade Australia. The survey sought feedback on the impact of possible amendments to the code. The review received responses from seven organisations, including five PTSPs (all of whom submitted as both PTSPs and exporters) and two third-party exporters.

1 Background on the code

1.1 History of the code

Wheat marketing had been regulated in Australia for nearly 100 years when the *Wheat Export Marketing Act 2008* and associated legislation ended the single desk arrangements for wheat exports. As part of this deregulation, the government introduced a mandatory access test for bulk wheat port terminals to address concerns vertically integrated grain bulk handling companies might seek to deny port terminal access to third-party exporters in the newly deregulated market (Australia, House of Representatives 2008).

In 2010 the Productivity Commission reviewed the wheat export arrangements. The Productivity Commission found the benefits of the access test would diminish and could become costly in the long-term, and recommended the abolishment of the access test requirements for grain port terminal operators on 30 September 2014. The commission recommended that, from 1 October 2014, regulated access should rely on Part IIIA of the *Competition and Consumer Act 2010*, supplemented by a voluntary code of conduct. It also recommended the continuous disclosure rule component (mandatory reporting of port access policies and procedures and port loading statements) of the access test should continue to be legislated, separate from the voluntary code (Productivity Commission 2010).

The then government accepted the commission's recommendations in principle and agreed a non-prescribed voluntary code of conduct, including continuous disclosure rules, should be developed to complement general competition law (Australian Government 2011). However, some in the industry felt some form of industry-specific access regulation was still needed. In particular, there were concerns monopoly powers could be abused via a refusal to supply, that would involve a vertically integrated PTSP (where the PTSP is also a wheat or grain exporter) denying access to its port terminal services to third-party exporters in order to artificially limit competition in related markets (grain acquisition or up-country transport and storage) to increase its own profits.

The need for continued regulatory oversight was recognised in the *Wheat Export Marketing Amendment Act 2012*, which made repeal of the *Wheat Export Marketing Act 2008* contingent on the establishment of a mandatory industry code before 1 October 2014. To meet this requirement, on 1 October 2014 the code commenced operation, with the purpose of regulating the conduct of PTSPs to ensure that exporters of bulk wheat have fair and transparent access to port terminal services.

1.2 Operation of the code

The code is designed with a two-tiered regulatory arrangement. The intent of this two-tiered arrangement is to enable government interventions and the associated costs on business to be reduced at ports where market forces or the port terminal operator's business structure provides sufficient incentives for desirable behaviour.

Under the code, All PTSPs must comply with Part 2 of the code, but only those that have not been exempted under subclauses 5(1) and (2) of the code must comply with Parts 3 to 6.

Part 2

Part 2 of the code sets out general obligations that apply to all PTSP and exporters. This includes:

- The obligations for PTSPs and Exporters to deal in Good Faith
- The requirement for PTSPs to publish a daily statement about ships due to load at the port (shipping stem)
- The requirement for PTSPs to publish standard information about how they allocate capacity and manage demand for their services (port loading protocol)
- The requirement for PTSPs to publish standard terms and reference prices available to all exporters.

Parts 3 to 6

In addition to Part 2, PTSPs that have not been exempted must:

- have a capacity allocation system, and have it approved by the ACCC if it involves the allocation of capacity more than 6 months in advance.
- have an access agreement in place when providing services
- publish certain information on its website, such as the amount of capacity available on a weekly and annual basis, performance indicators and grain stocks at each port terminal
- undertake a process to amend its port loading protocol, including consultation
- comply with dispute resolution processes (including mediation and arbitration).

Part 3 of the code also provides that, when exporters and PTSPs are negotiating an access agreement, either party may request mediation or arbitration. Participation in mediation is voluntary, while participation in arbitration is mandatory and any arbitration initiated under the code must be advised to the ACCC. The parties choose a mediator or arbitrator, and the process is conducted independently of the ACCC.

1.2.1 Exemptions

Subclause 4(8) of the code says Parts 3 to 6 of the code will not apply to a PTSP if a determination has been made under clause 5 that it is an exempt service provider.

Subclause 5(1) of the code provides the Minister for Agriculture, Fisheries and Forestry may determine a PTSP is an exempt service provider if satisfied the provider is a grower-owned cooperative that meets specified criteria. On 17 November 2014 the minister declared exempt CBH Group's port terminals at Albany, Esperance, Geraldton and Kwinana in Western Australia.

Subclause 5(2) of the code provides that the ACCC may determine a PTSP is an exempt service provider after having regard to matters (a) to (j) in subclause 5(3). To date the ACCC has granted exemptions relating to 21 port terminal facilities. The ACCC's predominant consideration in exemption determinations has been the existence of effective inter- or intra-port terminal competition.

Currently 7 port terminals are covered by Parts 3 to 6 of the code. This includes three of GrainCorp's seven terminals (Mackay and Gladstone in Queensland and Portland in Victoria) and four of Viterro's six terminals (Port Lincoln, Port Giles, Thevenard and Wallaroo in South Australia). However,

GrainCorp's non-exempt ports in Mackay and Gladstone play only a small role in the industry as these ports handle relatively small volumes of wheat. The ACCC's submission noted that this means in 2021–22 only around 11% of bulk grain exported from Australia was loaded via a facility where the PTSP was required to provide services in accordance with all the code's obligations.

1.3 First Review

The code was first reviewed by then Department of Agriculture and Water Resources in 2017–18.

The [final report for the first review](#) was released on 18 October 2018, and made

12 recommendations (refer to [Attachment A](#)). The review found the code was fit for purpose, but its operation could be improved with some technical amendments.

Key recommendations from the review included:

- introduction of civil pecuniary penalties for serious and egregious breaches of the code
- changes to some of the code's reporting requirements
- clarification of some key definitions and terms under the code
- extending the code to cover all grains.

The [Australian Government responded to the review](#) in October 2020, supporting 11 of the review's recommendations (the government did not support extending the code to cover all grains)

(DAWE 2020). This included supporting nine recommendations that required amendments to the code. However, the code was not amended at that time to implement the recommendations, and implementation was further delayed by the 2022 federal election and change of government.

In September 2023 the Minister for Agriculture, Fisheries and Forest, the Hon Murray Watt MP determined that given the significant time that has passed since the first review was undertaken, these recommendations may be out of date, and it was better to commence a second review of the code rather than to amend the code to implement potentially outdated recommendations.

2 Is the code still required?

At the highest level, the purpose of this review is to consider whether the code should continue or be repealed. In seeking to determine if the code is still required, we note the Industry Codes of Conduct Policy Framework (Treasury 2017) states that:

The Government will only prescribe mandatory or voluntary codes in very limited circumstances —when it is absolutely necessary for supporting the efficient operation of markets or the welfare of consumers.

and that:

Government intervention will only be considered where there is a demonstrable problem affecting industry participants or consumers which the market cannot or will not overcome, and where such intervention is likely to result in a net public benefit.

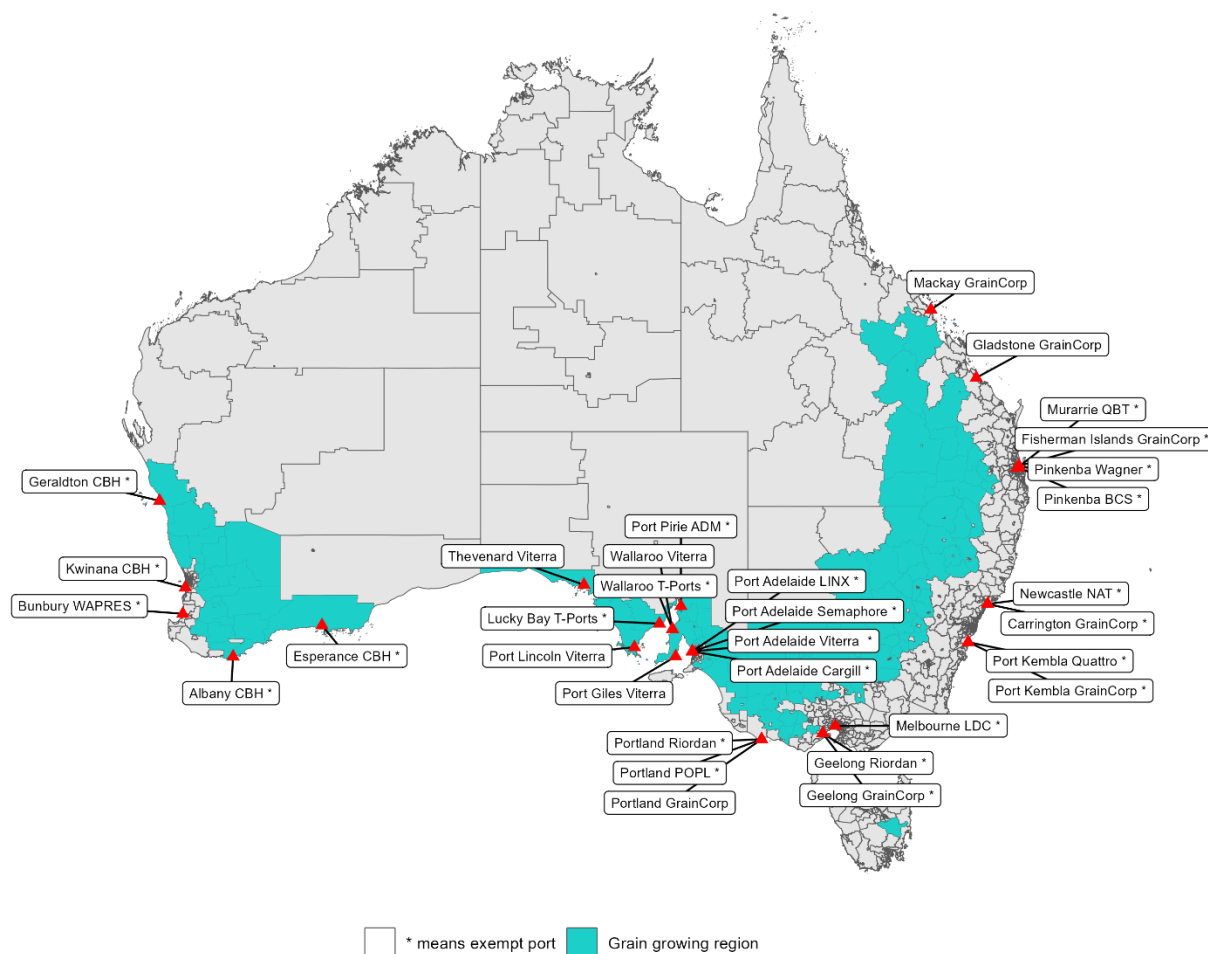
In essence, we consider the code should only be retained where there is an identifiable problem (that is, a market failure) for it to address, and where there is and will continue to be a net benefit to industry and Australia more broadly from the operation of a code.

This chapter outlines the evidence we considered when determining if the code was still required.

2.1 Changes to the industry since the code's introduction

There have been significant changes to Australia's bulk grain industry since the introduction of the code. Since 2014, nine new bulk grain port facilities have commenced operation, increasing the total number of facilities covered by the code to 32.

Map 1 Australia's bulk grain port terminal facilities and grain growing regions



Source: Australian Bureau of Statistics (ABS), 7121.0 – Agricultural Commodities, Australia, 2015–16 SA2 data, and company websites.

These new entrants mean that more Australian ports now have multiple providers of bulk grain export port terminal services. The presence of multiple providers of services in specific grain catchment areas was cited by the ACCC in its submission to the review as one of the key reasons why it has granted PTSPs exemptions from Parts 3 to 6 of the code in relation to 21 of the 32 currently operational facilities (please note four other facilities are exempt under Subclause 5 (1) as they are owned by co-operatives).

Another significant change to the industry since 2014 is the adoption of novel and smaller-scale operational business models. This includes the use of hired mobile ship loaders and, in the case of T-Ports, a transshipment vessel.

In relation to PTSPs that have recently adopted these novel models the ACCC observed that:

- four new mobile loaders commenced operation during the record 2020–21 and 2021–22 seasons, bringing the total number of mobile loaders in operation in the 2021–22 season to seven.
- T-Ports commenced bulk grain loading services using a transshipment vessel at two South Australian ports (Lucky Bay in 2020 and Wallaroo in 2023). Lucky Bay was responsible for 5% of

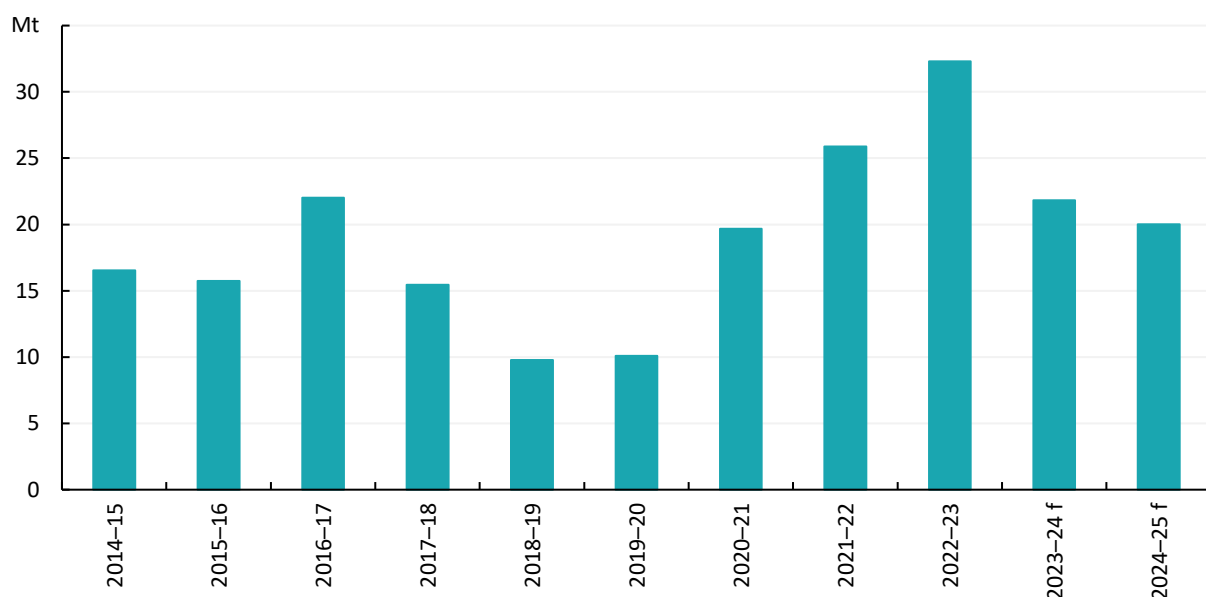
South Australia's grain throughput in 2020–21, increasing to 8% in 2021–22. Bulk grain loading services at T-Ports' Wallaroo facility commenced in July 2023.

The ACCC further noted in its submission that:

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

The export capacity of Australia's grain ports has also increased since the introduction of the code. In 2022–23 Australia exported a record 32.3 million tonnes of wheat (Figure 1), significantly higher than the pre-code record of 23 million tonnes in 2011–12.

Figure 1 Australian Wheat exports, 2014-15 to 2024-25 (Million tonnes)



Source: ABARES; ABS

Note: Reported in financial years, 1 July to 30 June. Data for 2023-24 and 2024-25 flagged with an f indicate forecasts.

While some of the increase in capacity is the result of the creation of new port terminal facilities, export capacity at existing ports has also improved through investment in the upgrade of port-terminal assets, improvements in the supply chain transporting grain to port, changed operating arrangements, and improved procedures governing the allocation of capacity. Investments in expansion of port export capacity has been driven by forecast growth in the size of Australia's grain crops, with CBH noting in its submission that:

The average WA crop size is growing, and by 2033 it is forecast that it will increase from the current average of around 16-17 million tonnes to an average of 22 million tonnes, with a peak crop of almost 30 million tonnes.

and that:

as a result, CBH has put in place a strategy to increase its export capacity from 1.6 million tonnes per month to 3.0 million tonnes per month by 2033.

Increasing ship loading capacity at existing port terminals can help overcome possible capacity constraints. This both reduces the incentive for incumbent vertically integrated PTSPs to favour their own trading arms over third-party exporters and creates an incentive for them to provide access on fair terms to increase utilisation of the terminal's increased capacity.

PTSPs also face additional competition from rising domestic demand for wheat. Domestic demand has increased since the code's introduction in 2014, and demand, mostly in eastern Australia, is forecast to further increase due to population growth and food preferences that increasingly draw on feed grains (Kingwell 2021). Grain Trade Australia observed that this growth:

led to competitive pressure on PTSPs to deliver efficient and effective services to maximise throughput in their terminals versus any competition (such as domestic market and other PTSP).

Similarly, containerised exports of wheat (which are not covered by the code) also places competitive pressure on PTSPs by providing an alternative pathway to export markets. This is particularly true in the eastern states where around a third of grain exports is via container (AEGIC 2022).

Notwithstanding the changes to the industry since 2014, the ACCC noted in its submission that:

Vertically integrated PTSPs (CBH, GrainCorp and Viterro) continue to provide the majority of bulk grain export port terminal services nationally, and in their respective regions of operation.

In 2021–22 these 3 PTSPs combined to:

- load (as providers of port terminal services) 31.9 of the 40.6 million tonnes of bulk grain exported from Australia (78.6%)
- export (as acquirers of port terminal services) 23.4 of the 40.6 million tonnes of bulk grain exported from Australia (57.6%).

In submissions to the review, a number of grower representative organisations noted that despite the increase in competition in the market, they continue to have ongoing concerns about the market power of CBH, GrainCorp and Viterro. We acknowledge that despite the increase in competition, it has not been possible to fully quantify its specific impacts on the export grain industry. This means the review cannot categorically establish that competition is sufficient to ensure no misuse of market power could otherwise occur in the absence of the code. However, we equally did not receive any evidence (including anecdotal evidence) that would indicate PTSPs have been misusing their market power.

Review finding 1

- The national market for port terminal services has more players than it did in 2014.
- New entrants are adopting novel and smaller-scale operational business models not envisioned at the time of the code's creation.
- The export capacity of Australia's grain ports has increased since the introduction of the code.

2.2 Fitness for purpose of the code's provisions

2.2.1 Access provisions under Parts 3 to 6 of the code

The purpose of the code is to guard against vertically integrated PTSPs discriminating against exporters in favour of their own exporting arm or exporters to which they are associated. Its primary mechanism for doing so is through the access provisions in Parts 3 to 6 of the code, which currently apply to a small number of non-exempted ports. Under the terms of reference, the review is required to examine the justification for the continued operation of the code over and above the generic access regime established by *Part IIIA of the Competition and Consumer Act 2010* (CCA).

Box 3 National access regime

The national access regime sets the legal right for third parties to gain access to certain infrastructure services, with terms and conditions that are reasonable. The national access regime is limited to the services of nationally significant infrastructure facilities where, broadly:

- It is not economic to develop another facility to provide the service
- access would promote competition in the market.

The regime provides a number of mechanisms by which the terms and conditions of access to services may be determined. One way is for the relevant minister to declare a service or services provided by a facility based on a recommendation from the National Competition Council. Such declarations are made against a set of criteria established in the CCA, including consideration of the possible negative effects on incumbent asset owners. If declaration occurs, access seekers have an enforceable right to negotiate terms and conditions of access with the service provider and, failing agreement, a right to arbitration of the dispute before the ACCC.

Alternatively, the service provider (or a person who expects to be the provider of a service) may give an access undertaking to the ACCC. An access undertaking sets out matters relevant to obtaining access to a particular service. These matters may include the terms and conditions on which the service provider will offer access, the price for the service, and dispute resolution processes in the event the parties cannot agree. Access undertakings are court enforceable.

Parts 3 to 6 of the code sets out the obligations that apply only to non-exempt service providers. This part of the code is relatively 'heavy touch' in comparison to the lighter regulatory costs of Part 2 of the code, with the regulatory impact statement (RIS) prepared prior to the code's introduction estimating the costs of complying with the code for non-exempt PTSP was \$360,000 per year, compared to \$20,000 per year for exempt ports.

In addition to the direct regulatory costs imposed on PTSPs to meet these requirements, PTSPs also noted there was an indirect cost from these provisions in terms of reduced operational flexibility for non-exempt ports. PTSPs noted Parts 3 to 6 of the code impeded their ability to respond quickly and efficiently to changing markets, or to disruption to the wheat supply chains caused by unpredictable

weather conditions or events such as fires or floods. In particular, the significant lead-times to develop or change capacity allocation protocols (including seeking ACCC approval of any changes) reduced their ability to reallocate or change capacity to ensure the most efficient use of port terminal facilities at non-exempt ports.

We acknowledge that reduced flexibility is likely to be an inevitable outcome of any access regulations. It is therefore imperative that this reduced flexibility be balanced by a demonstrable benefit being provided to industry greater than the regulatory cost. In this regard, some stakeholders considered the access component had allowed for greater export competition through an increase in the number of mid-tier grain export companies, with Grain Producers SA's submission noting the code:

has played an important role for South Australian grain producers, predominantly for those with few alternatives to enter the export wheat supply chain, and particularly for access to grain traders.

However, a number of other stakeholders, in particular the ACCC, raised concerns Parts 3 to 6 of the code are not operating as intended. They considered these provisions both impose a greater regulatory cost on PTSPs than had been envisioned when the code was created and provide less access benefits than originally intended.

Greater regulatory burden and barrier to entry

The regulation of bulk wheat exports applies more broadly, and to different kinds of PTSPs, compared to when the code commenced, with the ACCC's submission noting that:

- The *Wheat Export Marketing Act 2008* (which applied before the code commenced) applied to four large-scale, vertically integrated PTSPs with a monopoly or near-monopoly market positions.
- The code currently applies to 16 PTSPs, and increasingly to smaller-scale, non-vertically integrated PTSPs entering markets already serviced by one or more existing providers (including one of the large-scale, vertically integrated incumbents).

This means the overall regulatory burden of the code, and Parts 3 to 6, continues to grow, even as the code is increasingly applied to smaller-scale and non-vertically integrated new entrants that are already subject to high levels of competition. This regulatory burden growth occurs even in situations in which PTSPs meet the requirements for exemption from Parts 3 to 6, as these PTSPs still need to engage in the ACCC's exemption assessment process, which can impose significant legal and consulting costs.

Box 4 ACCC exemption assessment process

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

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

A PTSP seeking to enter the market must manage the application process alongside numerous other government regulatory processes.

Of concern to the ACCC, and this review, is that these regulatory costs may be a potential barrier to entry that could disincentivise potential PTSPs from entering markets, with the ACCC observing that:

it is particularly difficult for new entrant PTSPs to control the timing of when they will commence providing port terminal services and ensuring all regulatory processes are satisfied within the requisite timeframes.

This means that new PTSPs experience a high relative regulatory burden (compared to existing PTSPs), requiring them to spend resources that could instead have been applied to developing their new business and thereby increasing competition in the market. In some instances this may mean potential PTSPs choose not to enter the market when they otherwise would have.

Limitations of the operation of Parts 3 to 6

A significant change since the introduction of the code in 2014 has been the adoption of long-term agreements (LTAs). The first review of the code noted stakeholders considered LTAs were a major improvement over the previously used auction system for allocation of shipping capacity at ports (DAWR 2018).

Under LTAs, the majority of a port's shipping capacity may be pre-allocated to exporters who have entered into LTAs, with the remaining capacity allocated to exporters on an annual basis. This means that a significant proportion of future shipping capacity at non-exempt ports is already allocated to a range of exporters. The review notes the ACCC has observed that the outcome of this is that there is a significant reduction in the total shipping capacity that would otherwise potentially be available to a wheat exporter seeking access to a port terminal facility through the access provisions of the code. This means that any changes relating to capacity allocation and terms and conditions of access under the code would likely have limited practical impact.

We consider the operation of the access provision of the code are limited by LTAs, such that it is unlikely Parts 3 to 6 of the code could provide a significant net benefit to industry. Addressing this would likely require limitation or prevention of the use of LTAs. However, LTAs deliver a range of benefits including providing greater certainty to PTSPs to undertake infrastructure investments. The first review of the code noted in regard to revocation of LTAs that while PTSPs could in theory operate by providing only short-term agreements this could disadvantage customers and have a serious negative effect on the PTSP's business (DAWR 2018).

We also note there is no clear evidence improved access provisions are required, or that they would provide a significant benefit to industry. We received little evidence of any market failure in the wheat export supply chain that would necessitate the retention of these provisions (that is, that

exporters ability to access bulk grain ports is dependent on ongoing use of the access provision of Parts 3 to 6 of the code). This includes no significant systematic - or even anecdotal - evidence that PTSPs have been, or are at significant risk of, misusing their market power by providing preferential treatment to themselves or associated exporters, or otherwise hindering exporters port access.

While the review has not found evidence of misuse of market power, we acknowledge it is possible the existence of the access provisions, even taking into account the limitations of their operation, could still have a deterrence effect that discourages PTSPs from hindering exporters' access to port terminal facilities. If so, we note there is a risk this deterrence factor could be lost if exporters only option to seek access to a port terminal facility is through Part IIIA of the CCA. However, we consider this risk must be balance against the stronger evidence that the provisions pose a risk of reducing competition.

Review finding 2

- That Parts 3 to 6 of the code are a barrier to entry for new participants.
- That Parts 3 to 6 impose a regulatory burden that requires new PTSPs to divert resources that otherwise could be used to increase competition in the market.
- That Parts 3 to 6 have the perverse outcome of reducing overall competition in the wheat export supply chain.
- That this reduction in competition is likely to outweigh any benefits it provides to exporters and grain producers.
- That this outcome is likely to continue if Part 3 to 6 is retained in the code.
- That there is little evidence of a market failure in the wheat export supply chain that would necessitate the retention of these provisions.

2.2.2 General provisions under Part 2 of the code

Part 2 of the code contains the 'light touch' general provisions that apply to all PTSP. The review found stakeholders generally supported the purpose and outcome of these provisions, seeing them as providing a positive benefit to industry with minimal cost. The publication of port loading statements in particular was seen by all stakeholders as providing important transparency to exporters to enable them to effectively undertake export operations.

Obligation to act in Good Faith

Stakeholders were generally supportive of the obligation to act in Good Faith with PTSPs noting acting in Good Faith is an important business practice they consider should be observed regardless of the continued operation of the code.

Some stakeholders, including the ACCC in its submission to the first review, expressed concerns about the adequacy of enforcement mechanisms under the code. As it currently operates, the code does not provide any mechanisms for enforcing breaches of Good Faith. Nevertheless, even though it is not currently enforceable, one exporter observed that the requirement to act in Good Faith had a positive impact amongst industry participants by setting general expectations for behaviour.

Requirement for PTSPs to publish port loading statements

Industry stakeholders reported they placed significant value on the information provided in port loading statements (known in the industry as the shipping stem), with one submission noting:

The Shipping Stem updates are invaluable to non-port owners to gauge what is being exported, how quickly exports are running, and what is being exported in the immediate future by whom.

Exporters reported that information from the shipping stem enables them to better plan vessel movements and upcountry supply chain logistics and provides key information for supply and demand estimates and trade flow modelling. Stakeholders also noted publication of shipping stem information ensures PTSPs operate in a fair and transparent manner regarding shipping allocation, by providing visibility that a PTSP is not favouring execution of their own vessels. For this reason, some stakeholders raised concerns that in the absence of a requirement to publish this information, PTSPs may cease publication of some or all of this information. They considered this reduction in transparency could reduce the level of competition in the market, with one submission noting the removal of this transparency raised fears that:

integrated trading companies could increasingly corner the market for port capacity in a zone, leading to an artificially low basis level (i.e. domestic price versus world market) offered to growers.

Consultations with PTSPs indicated that while they did not support the need for a regulatory requirement to publish shipping stem information, they also valued the information for their own export operations. They also considered publishing of shipping stems information is a standard industry practice and they would likely continue to publish this information even in the absence of the code. PTSPs noted that they had an incentive to publish this information as it provided an indication to customers and potential customers about the efficiency of their port terminal operations. PTSPs also noted the regulatory burden of this provision is low, with GrainCorp's submission noting that:

notwithstanding the complexity involved in establishing the processes to support this publication, there is no material ongoing impact on our business arising from this requirement.

The ACCC's submission raised concerns the requirement for new entrants to publicly report on upcoming uses of its services through a port loading statement may be detrimental to the overall competitiveness of the market, and that this may be acting as a barrier to entry for new participants. However, we consider this risk is relatively low, particularly as publication is seen as a standard practice, and that the benefits to industry of publication of this information likely outweigh any impact it may have on new entrants.

Port loading protocols and standard terms and reference prices

Exporters, including PTSPs that also have their own export operations, reported publication of PTSPs' policies and procedures for managing demand (known as port loading protocols) provided

transparency by allowing exporters to undertake a comparative assessment of PTSPs and their operations, and provided confidence they would receive a consistent level of service.

Similarly, exporters observed that standard terms and reference prices ensured they had sufficient information to assist in managing price risk and to enable them to compare all PTSPs' terms and rates. This information allowed them to apply competitive pressure between PTSPs regarding standard terms and pricing.

As with publication of port loading statements, PTSPs did not support the need for publication to be prescribed by a code, but generally considered both requirements had relatively low costs. One PTSP observed it would continue to publish this information in the absence of a code, as to do otherwise would risk putting themselves at a disadvantage relatively to other PTSPs, by creating a barrier for potential export customers.

Review finding 3

- the outcomes achieved by Part 2 of the code including Good Faith, port loading statements, port loading protocols, and standard terms and reference prices, provide a positive benefit to the wheat export industry.

2.3 Industry self-regulation

The main point of difference between stakeholders on Part 2 of the code is whether it is the only mechanism that could deliver the benefits Part 2 currently delivers. Stakeholder views fall into three broad categories:

- Those who considered that, in the absence of a prescribed code, some or all PTSPs could cease to undertake activities such as publishing port loading statements.
- Those who considered industry self-regulation is sufficient to ensure all PTSPs continue to undertake these activities.
- Those who considered neither the code nor self-regulation is required, either because the requirements of Part 2 are now standard business practices engrained across the industry, or that the industry could effectively function without these practices being maintained.

The code was originally envisaged as a non-prescribed code, consistent with the then government's response to the Productivity Commission (2010) inquiry into wheat marketing. Parliamentary debate to secure passage of the *Wheat Export Marketing Amendment Act 2012* resulted in the intention for a non-prescribed code changing to require the development of a mandatory prescribed code (DAWR 2018).

In considering appropriate alternative mechanisms to the code, the review focused particular attention on the question of whether the same outcomes could be achieved through industry self-regulation, such as a non-prescribed voluntary industry code of practice or similar industry managed framework.

Industry codes of practice are voluntary codes developed and maintained by an industry body. When compared to mandatory industry codes, the benefits of non-prescribed voluntary industry codes are:

- increased flexibility, including the ability to be amended more efficiently to keep abreast of changes in industries' needs
- less intrusive than government regulation
- a greater sense of ownership of the code.

However, mandatory codes tend to be favoured over voluntary industry codes when problematic behaviour between industry participants stems from an imbalance of bargaining power (ACCC 2011).

Grain Trade Australia, as the peak industry body for the grain trade noted in its submission that:

an alternative to the Wheat Port Code regulatory approach to better support the objective could be for industry to develop a self-regulatory industry approach or model.

In survey responses to the review, PTSPs indicated in-principal support for an industry managed framework. Aspects that PTSPs considered important for such a framework to cover were largely reflective of the existing provisions set out in Part 2 of the code, including:

- commitment to acting in Good Faith
- publishing of:
 - port loading statements
 - standard terms and reference prices
 - port loading protocols.

In many instances PTSPs indicated they would continue to undertake these activities in the absence of the code as they considered them part of standard operating practices.

PTSPs also noted their own export operations benefited from the industry continuing these practises due to their use of port facilities belonging to other PTSPs. Some PTSPs therefore considered no regulation of the industry is required but supported self-regulation over the existing code. Other PTSPs directly supported self-regulation.

We consider there is some evidence a mechanism is required to ensure that the outcomes of Part 2 are maintained. Viterro noted in its submission that:

If the industry believes it is worthwhile, Viterro would continue to provide a port loading statement each business day as it has since the code was introduced. This would be done on the basis that all port terminal operators are required to provide the same information.

We consider that this situation largely represents a coordination problem, in which industry overall benefits from all PTSPs taking the same action, but individual PTSPs may not choose to do so if they believe there is a risk others will also do the same. Self-regulation through an industry code of practice could address this by ensuring participants commit to abide by the required practices.

A number of stakeholders raised concerns self-regulation carries the risk it will not be sufficient to ensure that the desired practices are maintained. They consider a prescribed code is required as a failsafe method to ensure this does not occur. While we acknowledge these stakeholders' concerns, we do not consider the evidence provided to the review is sufficient to conclude industry

self-regulation would not be able to achieve a similar outcome. We note that in the event industry self-regulation fails to do so, the government is not precluded from re-introducing regulation to remedy this failure. We consider if industry-self regulation is introduced, it should be subject to a review after several years in operation to assess if it continues to achieve the outcomes currently provided by Part 2 of the code.

Review finding 4

- Stakeholders are divided on if the outcomes of Part 2 can only be achieved through retention of the code.
- There is some evidence a mechanism (such as a prescribed code, or self-regulation) is required to ensure PTSPs continue to undertake practices such as publishing port loading statements.
- There is not sufficient evidence to establish this can only be done by continuation of the code, rather than through other mechanisms such as industry self-regulation.

2.4 Stakeholders' views on the need for a code

There were divergent views presented to the review on the future of the code, with no one option emerging as a clear preference. Some stakeholders considered that the code, or aspects of the code, were operating as intended and should be retained. However, the majority of stakeholders considered the code in its current form is not fit for purpose but held contrary views on what this meant for the future of the code.

Grain Trade Australia and the PTSPs who engaged with the review consider that the code is not fit for purpose and no longer required as changes to the industry since its introduction mean there is sufficient competition amongst PTSPs. They also consider there is no evidence of a market failure in the wheat export supply chain that would justify the ongoing need for a code.

Exporters and other businesses involved in the wheat export supply chain held mixed views about the code. Some exporting businesses considered the code had led to a general increase in competition in the export supply chain and noted the importance of the transparency provided by the publication of port loading statements. On this basis they supported the code remaining with minor amendments. Other exporting businesses considered that no code was required as there was sufficient competition amongst PTSPs.

Most, but not all, grower representative organisations argued that regulation of the export supply chain was still required to address ongoing concerns about the potential for misuse of market power by PTSPs. We note that these grower groups see their members as indirect beneficiaries of the code as increased transparency for third-party exporters should result in increased transparency (and better prices) for growers that sell their grain for export by third-party exporters. These grower representative organisations considered the code is not fit for purpose, but that the government should address this by either substantially amending the code or replacing it with a more effective regulatory regime.

Features proposed by grower representative organisations for an alternative regulatory mechanism included that it should:

- apply to all grains

- apply equally to all ports (that is, no exemptions)
- should extend up-country, and
- that the ACCC should be given greater enforcement powers.

The ACCC considers that the code is not fit for purpose, noting in particular that:

- The code's regulatory burden continues to increase as new PTSPs enter the market, particularly given new entrants are typically smaller-scale operators competing with large-scale operators
- All of the code's obligations apply to new entrant PTSPs by default, despite new entrants often entering grain catchment areas where significant and well-established port terminal facilities are already operating.
- There are significant limitations to the enforceability of the code's access obligations.

The ACCC further noted that:

While the code's limitations could be addressed through a series of significant amendments (the ACCC recommended a series of amendments in the first code review), the ACCC considers that the regulatory burden of an amended code is likely to still outweigh its benefits.

And that

maintaining the code may falsely perpetuate the appearance of robust regulatory arrangements. Such an outcome is unhelpful for all stakeholders.

The ACCC therefore formed the view that in the interests of reducing regulatory burden on industry and removing the potentially negative impacts the code has on new PTSPs entry and the competitiveness of (particularly smaller-scale) new entrants, the code should be allowed to sunset.

2.5 Overall finding

In considering all the information presented in public submissions and through consultations, our **overall finding** is that the code in its current form is no longer fit for purpose. We consider the access provisions of the code may be acting as a barrier to new PTSPs entering the market and thereby stifling competition. We consider the threat to competition in the market posed by this perverse outcome outweighs any benefits to exporters and growers in keeping the access component. We also consider there is little evidence of a market failure that would require the retention of these provisions. We recommend against re-making the code in its current form. The code should instead either be amended to improve its fitness or replaced by industry self-regulation.

Stakeholders in the grain export supply chain predominantly agree the code is no longer fit for purpose but propose very different next steps. PTSPs argue it should be repealed in favour of self-regulation or complete deregulation. The direct beneficiaries of the code - third-party exporters - have mixed views, either supporting its retention or supporting industry self-regulation. Almost all grain grower groups consider that the code is inadequate because it does not sufficiently address their concerns about price and supply chain issues. They consider that government regulation of the grain export supply chain is still required, with a number of state-based groups calling for a broader government inquiry into the grains industry and either significant amendments to the code or

replacement with a new regulatory regime. They considered the code should be retained until this inquiry takes place.

A review of any regulation's fitness for purpose must consider whether the benefits arising from regulation outweigh the regulatory burden on entities that are subject to it. Regulation must also continue to be focussed on solving a problem that the market cannot solve. In other words, regulation must address a market failure that can't be addressed any other way than through regulation.

The code was established in 2014 to solve the problems that arose (or were perceived to arise) from large PTSPs having monopoly (or near monopoly) power in their respective regional markets. Consistent with this, the terms of reference for this review require that it must identify opportunities to ensure well managed deregulation to free and open competition in the Australian wheat export market, while maintaining Australia's international reputation for quality and reliability. In particular, the review must consider whether there are appropriate alternative mechanisms to achieve this outcome.

Beyond our overall finding that the code is no longer fit for purpose, we have made four further findings that guide our recommendations to government about next steps. Our **first finding** is that the national market for port terminal services has changed significantly since 2014. The market has more players than it did in 2014 (particularly in the South Australian port terminal services market). These players are also using novel and smaller-scale operational models not envisioned at the time of the code coming into force. In addition to this, there has been a significant increase in export capacity of bulk grain ports. We consider this has resulted in an overall increase in competition between PTSPs.

Our **second finding** is that Parts 3 to 6 of the code are the least fit for purpose. The Australian Competition and Consumer Commission (ACCC) is the regulator of the code and has observed the code may be acting as a barrier to new PTSPs entering the market. One reason for this is that new PTSPs entering the market must choose to either develop systems to comply with Parts 3 to 6 or seek an exemption from the ACCC. Both these processes incur a regulatory burden that may discourage new players, and even if they are not prevented from entering the market, require PTSPs to devote resources that could instead be applied to developing their business. We agree with the ACCC that the code may be a hurdle to new entrants to the port terminal services market and may be disincentivising new PTSPs from entering markets. This risks stifling competition, and this perverse outcome is likely to continue if the code is re-made in its current form. We consider the threat to competition in the market posed by this perverse outcome outweighs any benefits to exporters and growers in keeping Parts 3 to 6 of the code. We also consider little evidence has been provided to the review to demonstrate there is a market failure in the wheat export supply chain that would require the retention of these provisions. We received no evidence that PTSPs have provided preferential treatment to their own exporting arms at the expense of access to port terminal services by third-party exporters.

Our **third finding** is that the outcomes achieved by Part 2 of the code including Good Faith, and the provision of information through port loading statements, port loading protocols, and standard terms and reference prices, provide a positive benefit to the wheat export industry. These benefits were generally observed by participants in the supply chain.

However, while stakeholders generally observed these benefits, they are divided about the code being the only way in which to ensure that they are maintained.

Our **fourth finding** is that there some evidence a mechanism is required to ensure PTSPs continue to undertake practices such as publishing port loading statements. We did not find sufficient evidence to establish this can only be done by continuation of the code, rather than through industry self-regulation.

3 Potential amendments to the code

The terms of reference for the review require it to provide advice on possible amendments to the code and whether its provisions continue to be ‘fit for purpose’, including

- a) the power to exempt cooperatives under subclause 5(1)
- b) the additional regulatory requirements contained in Parts 3 to 6
- c) the requirement for all port service providers to make available a port loading statement each business day under clause 7.

In general stakeholders’ submissions to the review primarily focussed on the overall necessity of the code, and generally provided little input concerning changes that could be made to improve the code’s operation. As such we have primarily focussed on the relevance of the amendments recommended by the first review of the code (noting these recommendations have not been implemented). We have also outlined our consideration of some of the amendments to the code proposed by stakeholders. While our findings in this chapter are intended to provide advice to government on how it could amend the code to improve its operation, we note they would also provide useful guidance for the development of any industry self-regulation.

3.1 Removal of the additional regulatory requirements contained in Parts 3 to 6

For the reasons outlined in Chapter 2 of this report, the review considers Parts 3 to 6 of the code are not fit for purpose.

The review considered the recommendations made by the first review regarding potential amendments to Parts 3 to 6 (refer to [Attachment A](#)). The majority of stakeholder submissions did not address the fitness of these recommendations or discuss specific amendments that could be made to this part of the code, focusing instead on the larger question of the necessity of a code as a whole. We consider amendments to these provisions while possibly marginally improving its operation, would not enable it to provide benefits greater than its regulatory costs. For this reason the review has recommended these provisions should not be retained in either an amended code or an industry managed framework.

Review finding

- That Parts 3 to 6 of the code are not fit for purpose and should not be retained.

3.2 Retention of power to exempt cooperatives under subclause 5(1)

Subclause 5(1) allows the Minister for Agriculture, Fisheries and Forestry to determine that a PTSP that is a cooperative is exempt from Parts 3 to 6 of the code where the PTSP has:

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

Stakeholders' views on the exemption provision were mixed. A number of stakeholders, including the ACCC, were of the view that exempting a PTSP based only on its cooperative status, without having regard to its ability and incentive to exert market power, was not an appropriate basis for deciding the level of regulation that should apply to a PTSP.

However other stakeholders were supportive of the exemption. CBH's submission noted the exemption provided by subclause 5(1) had enabled it to put in place contractual arrangements that supported its investment in supply chain infrastructure to increase its export capacity. CBH considered that in the absence of the exemption, there would not have been sufficient regulatory flexibility to enable this investment.

We have recommended Parts 3 to 6 of the code not be retained. This would have the effect of rendering subclause 5(1) inoperable. However, should the government determine Parts 3 to 6 of the code should be retained, we consider the exemption provided under subclause 5(1) remains fit for purpose. The removal of subclause 5(1) would result in a significant new regulatory burden being placed on CBH, through the need to seek an exemption from the ACCC under subclause 5(2), and/or through the need to meet the additional regulatory requirements contained in Parts 3 to 6 of the code. There was no evidence provided to the review that either of these outcomes would provide any significant benefit to industry that would outweigh its regulatory cost.

Review finding

- That if Parts 3 to 6 of the code are retained, the power to exempt cooperatives under subclause 5(1) should be retained.

3.3 Amendments to the requirement to publish daily port loading statements

We consider the requirement to publish port loading statements under clause 7(2) of the code is largely fit for purpose, but amendments could be made to improve its operation.

Recommendation 4 from the first review of the code (see Box 5) supported the continuation of clause 7(2), but proposed two amendments intended to clarify expectations and establish requirements for when information should be included on the port loading statement. The review did not receive any submission opposing this recommendation and considers the rationale put forward in the first review for these amendments remains valid. On this basis we support the proposed amendment.

Box 5 Recommendation 4 from first review

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.

The review also considered if any amendments are required to the individual items PTSPs are required to report on under parts 7(2)(a) to (k). Stakeholder feedback generally supported all of the items, with the exception of:

- 7(2)(b) – the time when the ship is nominated to load grain using the port terminal service
- 7(2)(c)—the time when the ship is accepted as a ship scheduled to load grain using the port terminal service.

The ACCC submission called out these two terms as potentially no longer being of value to exporter or relevant for many PTSPs, noting that:

the obligation to provide the time a nomination was received from an exporter and then accepted was originally intended to provide transparency over the allocation of capacity by large-scale PTSPs at a time when there was less capacity available across the industry.

The survey of PTSPs and exporters sought their view on potential changes to parts 7(2)(a) to (k). Several PTSPs' responses noted the format for port loading statements could be simplified, with (b) and (c) being potentially non-beneficial. However, this change was not identified by all PTSPs, and was not supported by the third-party exporters who responded to the survey.

As there was no clear consensus on this change, we have not made a finding recommending removal of the clauses at this time. We consider further industry consultation should be undertaken on the appropriateness of this change should the government determine a remade code is required, or else industry could consider this matter as part of the development of an industry managed code.

The code also includes a requirement for PTSPs to provide the port loading statement to the ACCC on a daily basis. The ACCC noted in its submission to the first review that this information is primarily used to conduct industry monitoring and to enable review of exemptions, and suggested this requirement could be replaced with a monthly retrospective report. The first review ultimately recommended the retention of the requirement to provide daily reports, but also recommended the ACCC be provided with a retrospective monthly report (Recommendation 5).

We have considered both these matters. In regard to provision of daily reports, we consider that if Parts 3 to 6 of the code are not retained this requirement would no longer be fit for purpose, as it imposes a regulatory burden on PTSPs without a clear purpose. We consider its removal would not materially impact the operation of the code. In regard to provision of monthly retrospective reports,

we consider that, on balance, the benefits of providing monthly retrospective reports to the ACCC would not outweigh the regulatory burden imposed on PTSPs, and that this information is not required for the effective functioning of Part 2 of the code.

Review finding

- Recommendation 4 of the first review should be implemented.
- Further industry consultation on the potential removal of clauses 7(2)(b) and 7(2)(c) should be undertaken prior to either remaking the code or establishing an industry managed framework.
- The requirement to provide the ACCC with daily port loading statements should not be retained.

3.4 Information on obligation to act in Good Faith

The code sets out a minimum behavioural standard for both PTSPs and Exporters, requiring that they deal with each other in Good Faith. Good faith is not defined under the code, as the meaning of this term reflects historical judge-made law, known as the ‘common law’. The Attorney-General’s Department undertook an inquiry into the use of the term Good Faith in civil penalty and offence provisions in Commonwealth legislation, including in codes of conduct (Attorney-General’s Department, 2021). The inquiry recommended that where appropriate, explanatory materials accompanying future legislation should include specific information about the intended scope and operation of the use of the term Good Faith in civil penalty and offence provisions. Consistent with this finding, the obligation to act in Good Faith under the code could be improved by the inclusion of further information on its scope and operation, such as where it applies, or matters that should be taken into consideration when determining if a party has acted in Good Faith. This could include for example that in determining if a party has acted in Good Faith court should take into consideration whether the party acted honestly and not arbitrarily. The inclusion of this additional information would bring the code into alignment with other codes of conduct, such as the Dairy Industry Code and Horticulture Code.

Review finding

- The obligation to act in Good Faith should include further information on its scope and operation.

3.5 Inclusion of enforcement

The first review of the code recommended remedies, including civil pecuniary penalties and thereby infringement notices, be considered for serious and egregious breaches to encourage PTSPs to take specific actions within a specific period required by the code (Recommendation 3).

The ACCC’s submission noted a lack of enforcement provisions had limited the effectiveness of the code, observing that:

For a code to be effective, the consequences of contravention must be sufficiently serious to incentivise compliance.

The ACCC considered a lack of enforcement provisions had particularly reduced the potential effectiveness of the access provisions under Parts 3 to 6 of the code, but ultimately concluded that:

although the code could be amended to address its enforcement, scope and drafting limitations, its overall regulatory burden is still likely to outweigh its benefits.

We agree with the ACCC's view, which was one of the deciding factors in our decision to recommend that Parts 3 to 6 of the code not be retained. However stakeholders, including the ACCC, have also raised concerns about enforcement of Part 2 of the code, particularly as it relates to Good Faith and the timely publication of port loading statements.

While the code requires that PTSPs and exporters must act in Good Faith, it does not provide any penalties for failing to do so. While they have not alleged that PTSPs have failed to act in Good Faith, a number of stakeholders questioned the value of a Good Faith clause that is not able to penalise parties for breaching it.

Similarly, under the code there is no enforcement mechanism that can be used by the ACCC to compel PTSPs to meet required timeframes. For example, while most PTSPs are meeting the code's publication requirements for publication of port loading statements, at the time the review was undertaken there were some PTSPs whose last available statement was outside of that required by the code.

Consistent with the findings of the first review, we consider a lack of enforcement provisions reduces the fitness of the code. Should the code be retained, we consider enforcement provisions could strengthen the application of the code, allowing for remedies, including civil pecuniary penalties and thereby infringement notices, for serious and egregious breaches of Part 2 of the code.

We acknowledge a finding that the code could be improved by inclusion of enforcement provisions could be seen as at odds with the review's overall recommendation that a self-regulated approach should be adopted. However, we do not consider the finding is incompatible with our recommendation. Industry self-regulation can also include mechanisms to ensure signatories abide by the terms of a code, with the Industry Codes of Conduct Policy Framework observing that

Enforcement of these codes and dealing with breaches is a matter for industry itself and the Government does not enforce such codes. For example, an industry group may establish its own code administration body, tasked with activities such as promoting, enforcing and maintaining the code on behalf of signatories to the code.

The review would strongly encourage industry to consider how it can best assure that signatories to an industry managed code will meet its requirements.

Review finding

- That remedies, including civil pecuniary penalties and thereby infringement notices, should be available for serious and egregious breaches of Part 2 of the code.

3.6 Extension to all grains

The code currently applies to exporters of bulk wheat only and does not include other bulk grains. A number of stakeholders, including grower groups, some exporters, and the ACCC have argued the code should be extended to cover all grain (including oilseeds and pulses). This position was opposed

by PTSPs on the basis that they did not consider there was any market failure in the export of these commodities to justify extension of the code.

This matter was considered extensively by the first review of the code, which recommended that the code should be extended to all grains. However, the Australian Government Response to the review did not support this recommendation (see [Appendix B](#)) stating that:

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 review acknowledges the Government Response indicated that there was not sufficient evidence to support extension of the code to all grains. We consider that in order to justify expansion of the code under the Industry Codes of Conduct Policy Framework, there would need to be evidence that this is required. We do not consider such evidence has been provided.

However, should Parts 3 to 6 of the code be removed, extension of Part 2 of the code to all grains would appear to have a relatively minor impact. The main effects of doing so would be to:

- Extend the requirement to act in Good Faith to cover dealings between PTSPs and exporters related to all bulk grains.
- Extend the requirement to publish standard terms and reference prices to include all bulk grains (we note in many cases PTSPs already include non-wheat grains in their standard terms and reference prices).

We consider extension of Good Faith to cover dealings related to all bulk grains (including oilseeds and pulses) would improve the operation of the code. Restricting the code to only dealings related to bulk wheat creates potential uncertainty between parties as to if and when Good Faith applies due to the potential for substitution of commodities. This could occur for example if an exporter engages with a PTSP seeking shipping capacity intending to export barley, but subsequently decides to use some or all of that capacity to export wheat.

We therefore consider if the government agrees to our recommendation to transition to an industry managed code, that this code should apply to all grains, rather than being restricted to bulk-wheat exports.

3.7 Improvement of definitions

The ACCC's submissions to the first review observed that several of the code's definitions lack clarity, which can create uncertainty as to when the code's provisions apply. For this reason, the first review recommended that key clauses of the code should be amended.

Box 6 Recommendation 2 of the first review

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 ACCC subsequently noted in its submission to this review that:

Since that time this issue has been exacerbated as PTSPs have adopted new forms of entry and entered into different types of business arrangements to provide port terminal services not envisioned when the code was developed.

The review agrees with the ACCC that these parts of the code lack clarity and considers that the recommendations of the first review are still relevant.

Review finding

- That the code's definitions should be amended in line with recommendation 2 of the first review.

3.8 Extension up-country

Grain Producers SA proposed the code should be extended to cover up-country storage facilities. Extension of the code to up-country facilities was considered extensively in Chapter 7 of the report on the first review of the code. The first review did not recommend extending the code to include up-country infrastructure, finding that:

Despite there being a foreseeable risk of a vertically integrated PTSP operating its up-country network to disadvantage competing exports with anti-competitive behaviour, the review did not find evidence of such practices.

Recommendation 12 of the first review recommending that:

If, despite action by industry, new evidence emerges of a non-exempt PTSP 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.

Grain Producers SA's submission raised the risk that PTSPs may be advantaged over other grain buyers due to lack of transparency over grain volumes held at up-country facilities or terms and conditions for storage. While we acknowledge this could occur, we do not consider this on its own is evidence that PTSPs are using their 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. We have therefore not recommended extension of the code to up-country facilities. Consistent with Recommendation 12 of the first review, should evidence emerge of PTSPs abusing their market power in this way, the need for intervention should be considered.

3.9 Removal of exemptions

The NSW Farmers Association's submission proposed the code should be amended to remove the exemptions from Parts 3 to 6 to ensure these provisions apply to all PTSPs, noting that:

in large seasons in particular, the level of competition at ports even where there are multiple PTSPs is constricted, meaning the code should still operate.

NSW Farmers considered the regulatory burden of the code would be reduced by removing the exemption process for new PTSPs, accompanied by a streamlining of reporting requirements.

We did not support this proposal. While removing exemptions would remove the regulatory burden of applying for an exemption, it would result in a significantly greater regulatory burden being placed on these ports, even accounting for any potential streamlining of reporting requirements.

Furthermore, we did not receive any evidence that wheat exporters seeking access to exempt port terminal facilities were not receiving fair and transparent access due to PTSPs misusing their market power. Such evidence would need to be provided to justify extending Parts 3 to 6 of the code to these ports. We note that in making a determination that a port is exempt under section 5(2) of the code, Section 5(3)(d) of the code already requires that the ACCC must have regard to the likelihood that exporters of bulk wheat will have fair and transparent access to port terminal services.

4 Effect of the code on upstream and downstream markets

The terms of reference for the review require it to assess the effect of the code on the promotion of competition in upstream and downstream markets.

In theory, competition between traders for wheat at up-country sites helps to ensure farmers receive a fair and reasonable share of the prevailing price for wheat at that location. This competition can come from traders seeking to acquire grain for the domestic or export markets, bulk or containerised export trades or traders seeking to accumulate grain to sell on to other traders (DAWR 2018). The review has received evidence publication of port loading statements, port loading protocols, and standard terms and reference prices improves the efficiency of grain exporting businesses' operations. We consider this may in turn have a positive effect on upstream competition by facilitating the export operations of third-party exporters.

The review also received evidence that called into question the effectiveness of the access provisions of Parts 3 to 6 of the code (as outlined in Chapter 2). This likely significantly limits any effect that this part of the code would have on increasing up-country competition.

While we are able to make these general observations, the data available to the review was not sufficient to further determine the extent to which the code has resulted in an increase in exporters participating in the market. The ACCC's 2022 bulk grain monitoring report found a record number of exporters (32) exported bulk grain in 2021–22. However, this was against the background of record high levels of production. The report also noted that despite the increase in the number of exporters, the three largest vertically integrated PTSPs (CBH, GrainCorp and Viterra) continued to export a majority of grain from Australia (57.6%). This figure has remained relatively stable for the duration of the code's operation, with the top three exporters accounting for 60% of bulk wheat exports in 2008–09, prior to the code's implementation. The number of exporters and proportional market share of individual exporters has changed from year to year over the duration of the code. However, a range of other non-code factors may be responsible for these changes, including long-term trends such as the increased use of on-farm storage (particularly in the eastern states), or seasonal factors such as yearly production levels.

Concerning competition in downstream international markets the first review of the code found that:

The code does not directly affect the level of competition in the downstream international wheat market or affect international wheat prices. Exporters competing to trade Australian wheat are essentially price-takers in this market. The international price consequently caps the price exporters are willing and able to pay for Australian wheat. This sets a limit on any benefits the code might have on domestic grain prices.

We consider this remains the case, and the code is unlikely to have any direct effect of the level of competition in the downstream international market.

We note that it is possible that the code could have an indirect impact by reducing the operational flexibility of non-exempt ports. This was observed by Viterra which noted in its submission that:

Any local regulation that restricts flexibility to export grain is ultimately going to make Australia less competitive with other grain growing countries.

While we consider it is likely any impacts are relatively small as it pertains only to wheat exported through non-exempt ports, it nevertheless has formed part of our overall consideration of the fitness of the code.

5 Non-code Issues

The ACCC's submission noted that during the course of the ACCC's Wheat Port Code related consultations industry participants have expressed a range of concerns regarding bulk grain export supply chains that relate to matters beyond the code's scope, as they did not specifically relate to an exporter seeking access to port terminal services for the purposes of exporting bulk wheat.

Common areas of concern related to:

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

Similarly, stakeholders raised a number of these issues in the consultations undertaken as part of this review.

Furthermore, a number of grower groups submissions called on the government to undertake a broader inquiry into the Australian grains market and supply chain. They considered this should be done as a first step towards introducing a broader regulatory framework to cover the grains supply chain, extending to all grains, and potentially to issues beyond just exporters' access to port terminal services.

Without seeking to diminish the concerns expressed by stakeholders on these issues, we consider they fall outside of the scope of the review's terms of reference. As such, we have made no findings or recommendations in relation to these matters. We consider it is a matter for government to determine if it is appropriate to conduct a broader inquiry into the grains supply chain to provide more information about the costs and benefits of regulation that extends beyond the scope of the code.

6 Recommendations

In determining our recommendations, we considered there were four potential options for the future of the code. As outlined in Table 1, these options ranged from the highest regulatory burden option, retaining the code in its current form (with the minor amendments recommended by the first review), to the lowest regulatory burden option of full deregulation.

Table 1 Options for the future of the code

Keep code in its current form	Streamline code by repealing Parts 3 to 6	Move to industry self-regulation	Full deregulation
Retain access provisions	Remove access provisions	Remove access provisions	Remove all code obligations
Retain obligation to act in Good Faith	Retain obligation to act in Good Faith	Include a commitment to act in Good Faith	
Retain information publication obligations	Retain information publication obligations	Include a commitment to information publication	
High Regulatory burden Low			

Based on the findings outlined in Chapter 2 of this report, we did not support the options of keeping the code in its current form or full deregulation.

We consider the two remaining options likely deliver similar outcomes, as both would see the removal of Parts 3 to 6 while seeking to retain the benefits provided to the industry by Part 2. The primary difference between these options is likely to be the associated regulatory burden, with self-regulation likely to have a lower overall burden than a prescribed code.

While streamlining the code would improve its overall fitness and would be an improvement over the existing code, we formed the view that on balance the best option is for industry to continue the path towards deregulation by transitioning to self-regulation through the use of an industry managed code.

In coming to this view, we paid particular consideration to the requirements of the review's terms of reference that we identify opportunities to ensure well managed deregulation to free and open competition in the Australian wheat export market, while maintaining Australia's international reputation for quality and reliability. In particular, that we must consider whether there are appropriate alternative mechanisms to achieve this outcome.

We also considered the principles outlined in the Industry Codes of Conduct Policy Framework, particularly that codes are only prescribed by the Government in very limited circumstances where there is a compelling case for intervention (i.e. a market failure), supported by robust evidence. The review received no evidence PTSPs have provided preferential treatment to their own exporting arms at the expense of access to port terminal services by third-party exporters, or that they are at significant risk of doing so. We therefore consider the review has not been provided with robust evidence to demonstrate there is a market failure in the wheat export supply chain that would

provide justification for the continued operation of the code over and above the generic access regime established by Part IIIA of the *Competition and Consumer Act 2010*.

The review received evidence that Part 2 of the code benefits the industry by providing information transparency that supports the operations of wheat exporters. However, we do not consider there is a compelling case that the code is the only mechanism for achieving these benefits, as we consider that self-regulation would also be capable of achieving the same outcome. On this basis, we do not consider there is a compelling case the code must be retained.

We therefore recommend that:

1. Grain Trade Australia work with the grain export industry to develop an industry managed code that includes:
 - a. A commitment to deal in Good Faith with grain exporters
 - b. Principles and guidelines for managing demand for port terminal services
 - c. A commitment to timely publication of port loading statements.
 - d. A commitment to publish standard terms and reference prices
 - e. A dispute resolution mechanism.
2. As soon as the industry managed code is ready, the existing Wheat Port Code be repealed or allowed to sunset.
3. The government should review the operation of the industry managed code within 5 years of the commencement of its operation and consider re-regulation if the industry managed code does not maintain the outcomes of Part 2 of the code.

Glossary

Table 2 Report glossary

Term	Definition
Bulk wheat	Defined under the Wheat Port Code as wheat to be loaded onto a ship for export but does not include wheat to be exported in a bag or container that is not capable of holding more than 50 tonnes of wheat.
CCA	<i>Competition and Consumer Act 2010 (Cth)</i>
code	Port Terminal Access (Bulk Wheat) Code of Conduct. Schedule 1 of the Competition and Consumer (Industry Code—Port Terminal Access (Bulk Wheat) Regulation 2014.
Downstream market	Within the context of the Wheat Port Code, this means markets for services in the bulk wheat export supply chain that follow the provision of port terminal services (e.g. exporting and marketing services).
Port terminal facility	Defined under the Wheat Port Code as a ship loader that is at a port and capable of handling bulk wheat, and includes any of the following facilities, situated at the port and associated with the ship loader, that are capable of handling bulk wheat: a) an intake/receival facility b) a grain storage facility c) a weighing facility d) a shipping belt. * Definition in clause 3 of the Wheat Port Code regulation
Port terminal service provider (PTSP)	Defined under the Wheat Port Code as the owner or operator of a port terminal facility that is used, or is to be used, to provide a port terminal service.
Mobile loader	A type of portable ship loader that can be set up and moved within and between ports as required.
up-country facilities	Storage silos or bunkers that receive grain by truck and load grain on to trucks or trains at regional sites away from the port zone.
Upstream market	Within the context of the Wheat Port Code, this means markets for services in the bulk wheat export supply chain that precede the provision of port terminal services (e.g. storage and transport services).

References

- ABARES 2024, [Agricultural commodities: March quarter 2024](#), Australian Bureau of Agricultural and Resource Economics and Sciences, Canberra, March CC BY 4.0.
- ACCC 2022, [Bulk grain ports monitoring report - data update - 2021-22](#), Australian Competition and Consumer Commission Canberra, Accessed 11 April 2024.
- ACCC 2011, [Guidelines for developing effective voluntary industry codes of conduct](#), Australian Competition and Consumer Commission, Canberra, August.
- Kingwell, R 2021, [Wheat 2030 – Opportunities in a volatile world](#), Australian Export Grains Innovation Centre, Perth, Accessed 5 June 2024.
- AEGIC 2022, [Bulk and containerised grain exports from Australia’s main grain producing states \(supplementary report\)](#), Australian Export Grains Innovation Centre, Sydney, Accessed 7 June 2024.
- Attorney-General’s Department 2020, [Guide to Managing Sunsetting of Legislative Instruments](#), Canberra, accessed 11 April 2024.
- Attorney-General’s Department 2021, [Inquiry into the use of the term Good Faith in civil penalty and offence provisions in Commonwealth legislation Final Report](#), Canberra, accessed 11 April 2024.
- Australia, House of Representatives 2008, [Wheat Export Marketing Bill 2008: Explanatory Memorandum](#).
- Australian Government 2011, [Australian Government response to the Productivity Commission recommendations on wheat export marketing arrangements](#), Canberra, accessed 14 June 2024.
- DAWR 2018, [Review of the wheat port access code of conduct](#), Department of Agriculture and Water Resources, Canberra, accessed 11 April 2024.
- DAWE 2020, [Australian Government response to the Review of the Wheat Port Access code of Conduct](#), Department of Agriculture, Water and the Environment, Canberra, accessed 11 April 2024.
- Federal Register of Legislation 2023, [Competition and Consumer \(Industry code—Port Terminal Access \(Bulk Wheat\)\) Regulation 2014 \[F2022C00982 SLI 2014 No. 136\]](#), the Office of Parliamentary Counsel, Canberra, accessed 11 April 2024.
- Productivity Commission 2010, [Wheat export marketing arrangements](#), inquiry report no. 51, Canberra, July.

Attachment A

Recommendations from the first review of the Wheat Port Code

The first review of the Wheat Port Code made the following recommendations.:

Recommendation 1

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

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.

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.

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.

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).

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.

Recommendation 8

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

Recommendation 9

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

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.

Recommendation 11

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

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 PTSP 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.