Australian Government
Department of Agriculture

REGULATION IMPACT STATEMENT
Early assessment document

Mandatory Code of Conduct for Grain Export Terminals (Bulk Wheat Exports)
June 2014

This document has been prepared to gain stakeholder feedback on potential regulatory changes to port access arrangements for bulk wheat exports. It is expected that information gained through consultation will inform the development of a final Regulation Impact Statement to be considered by the Australian Government when making a final decision.

Contents

Background

Wheat is by far the most important grain crop grown in Australia in terms of area sown, volume of grain produced and value of the crop. In 2012-13, Australia produced a total of 22.4 million tones, with the major wheat producing states being Western Australia, New South Wales, South Australia, Victoria and Queensland[1].

The Australian wheat industry is heavily export oriented with about 70-80 per cent of annual production going to overseas markets[2]. Australia is among the world's top four wheat exporting nations, with 21.3 million tonnes of wheat shipped to more than 26 markets in 2012-13[3]. The volume of exports is forecast to rise in the short to medium term along with the export value, expected to increase by 2 per cent to around $6.4 billion 2013-14.[4]

While wheat may be exported in bags, containers or in bulk, the majority of wheat exported is in bulk. There are currently eight port terminal operators that facilitate the export of bulk wheat through 22 ports across Australia. Four of these operators are regulated by industry-specific legislation that requires them to pass an 'access test' in order to export; the other four are not. There are also two additional port terminal developments announced, but are yet to begin exporting bulk wheat.

In 2008, the Australian Parliament passed the *Wheat Export Marketing Act 2008* (the Act) to end the single-desk marketing arrangement that had operated under the Australian Wheat Board's legislation and introduce competition for Australian bulk wheat exports. In transitioning to a more competitive environment, industry raised concerns that regional monopoly port terminal operators with associated wheat export businesses may be able to exercise control over port access that would unfairly advantage their own operations at the expense of other exporters.

To address these concerns, the Act requires port terminal operators with bulk wheat export businesses to pass an industry-specific 'access test' and have an access undertaking approved by the ACCC as a condition of export. Port terminal operators without an associated wheat marketing business and those that export commodities other than bulk wheat, such as other grains or minerals, are not captured by this requirement.

The Act also required that the Productivity Commission complete a review of the new marketing arrangements and report to government by 1 July 2010[5]. The commission did so and presented a number of findings and recommendations as part of its final report, *Inquiry Report into Wheat Export Marketing Arrangements.* In relation to port access arrangements, the commission found that the industry had successfully transitioned to a more deregulated environment and that the access test had provided greater certainty for traders. The test assisted by making access easier, timelier and less costly than it would have been if traders had relied solely on general infrastructure declaration provisions under Part IIIA of the *Trade Practices Act 1974* (now *Competition and Consumer Act 2010, CCA*)[6].

The commission found; however, that the benefits of the access test would 'rapidly diminish in the post-transitional phase, leaving only the costs'[7] and recommended that test, and the Act in its entirety, be removed on 30 September 2014. It further recommended that from this date, all grain export terminals should comply with the continuous disclosure rules[8], which require that a range of information about access policies and the daily status of loading ships are published, and access be governed by general competition law supplemented by a voluntary code of conduct. Industry

[1] ABARES (2013) *Agricultural Statistics 2013;* crop year (1 October – 30 September)
[2] Ibid
[3] July - June year; ibid
[4] ABARES (2014) *Agricultural Commodities* March Quarter 2014 Vol. 4 no. 1
[5] *Wheat Export Marketing Act 2008*, s89 'Review of Act'
[6] Productivity Commission (2010) *Wheat Export Marketing Arrangements,* Report no. 51, Canberra.
[7] Ibid
[8] See Definitions for details

established a Code Development Committee (CDC) to develop a voluntary code of conduct, in response to a formal decision to accept the commission's recommendations.

In 2012, legislative changes were introduced in the Australian Parliament to give effect to the recommendations of the Commission. During debate over the Bill, amendments were made to require that a mandatory code of conduct, rather than a voluntary code, must be in place to enable the Act to be repealed. The Bill was passed by both houses and received Royal Assent on 3 December 2012.

Provisions in the Act (as amended) provide for its repeal on 1 October 2014 if, before that date, a mandatory code of conduct is in place. The Act requires that the Minister for Agriculture not approve a code unless he is satisfied that the code will[9]:

a) deal with the fair and transparent provision to wheat exporters of access to port terminal services by the providers of port terminal services
b) require providers of port terminal services to comply with Continuous Disclosure Rules[10]
c) be consistent with the operation of an efficient and profitable wheat export marketing industry that supports the competitiveness of all sectors through the supply chain
d) be consistent with any guidelines made by the ACCC relating to industry codes of conduct.

The CDC reformed itself as a Code Development Advisory Committee (CDAC) to assist the government to prepare a mandatory code.

There have been significant investments in grain export terminal infrastructure to introduce competition for services at the port and reduce the potential for market power to be exerted by particular operators. For example, in April 2014 the ACCC has undertook an analysis into the services at the port of Newcastle and announced its intention to significantly reduce the level of regulation applied to the Carrington facility operated by GrainCorp (see page 7).

Problem/reason for government intervention

There is some concern in industry over the potential for monopolistic behaviour by grain export terminal operators with associated wheat export businesses to the detriment of other exporters. The current regulation has been criticised as being administratively burdensome, inequitable, poorly targeted and restricting Australia's competitiveness in the global market[11] .

The Productivity Commission has also made calls to the government to intervene and remove the existing access arrangements and move to harmonize bulk wheat exports with other industries over time[12].

Objectives of government action

The objectives of government action are to create a regulatory environment conducive to the operation of an efficient, competitive and profitable bulk wheat exporting industry, and reduce the potential for monopolistic behaviour. The government is also committed to reducing unnecessary regulatory burden to encourage greater investment, more innovation and improved productivity in agriculture.

Options

The government is considering the following options for regulation of an efficient, competitive and profitable bulk wheat export industry. The government has developed this early assessment document to encourage industry feedback on these options.

[9] *Wheat Export Marketing Act 2008* (as amended), s12 'Minister to approve code of conduct'
[10] Ibid, s9 'Access Test'
[11] Australian Financial Review (2 May 2014) '*Grain handlers stymied by port regulation*'.
[12] Productivity Commission (April 2014), *Submission to the Agricultural Competitiveness Taskforce,* p. 17.

Option 1 Continue with current access arrangements

This option continues with the current access arrangements which require port terminal operators that export wheat, or that have an associated entity that does, to pass the access test as a condition of export. This option does not require government action as the current arrangements will continue unless a mandatory code is in place by 1 October 2014.

Option 2 Introduce a mandatory code of conduct that includes a 'one size fits all' approach

This option would see the introduction of a mandatory code of conduct for all grain export terminals. The code would be based on principles developed by CDAC and apply to all port terminal operators without distinction.

Option 3 Introduce a mandatory code of conduct that can adjust to competition levels and vertical integration

This option would see the introduction of a mandatory code of conduct for all grain export terminals and include the principles developed by CDAC. The code would have; however, a tiered application to allow for a lower level of compliance at ports where competition exists and for port operators that are not vertically integrated.

Option 4 Repeal the Wheat Export Marketing Act 2008 by 30 September 2014

This option would require new legislation be introduced to repeal the *Wheat Export Marketing Act 2008* in its entirety and subject bulk export wheat port access arrangements to normal competition law.

Table 1: Summary of options by port terminal service provider obligations

	Port terminal operators with associated wheat export business	Port terminal operators without associated wheat export business
Option 1	Required to have in place an access undertaking with the ACCC in order to pass the access test under the Act.	No specific regulatory obligations.
Option 2	Comply with all provisions of a mandatory code of conduct, including requirements to provide an equal opportunity for all exporters to access services; develop access agreements; and compliance with the continuous disclosure rules.	Comply with all provisions of a mandatory code of conduct, including requirements to provide an equal opportunity for all exporters to access services; develop access agreements; and compliance with the continuous disclosure rules.
Option 3	Comply with all provisions of a mandatory code of conduct, including requirements to provide an equal opportunity for all exporters to access services; develop access agreements; and compliance with the continuous disclosure rules.	Comply with specific provisions of a mandatory code of conduct; the continuous disclosure rules and publishing of capacity allocation practices.
Option 4	No specific regulatory obligations.	No specific regulatory obligations.

Preliminary impact analysis

Option 1 – Continue with current access arrangements

Option 1 is to take no action and therefore retain the current arrangements under the *Wheat Export Marketing Act 2008*, which requires port terminal operators that export wheat, or have an associated entity that does, to have an access undertaking in place with the ACCC as a condition of export.

There are currently four port terminal operators that have an access undertaking for this purpose: Co-operative Bulk Handling Ltd (CBH), Emerald Logistics Pty Ltd (Emerald), GrainCorp Operations Ltd (GrainCorp) and Viterra Operations Ltd (Viterra). Other operators invoved in exporting bulk wheat are not subject to this requriement. A list of all grain export terminal operators is provided at **Attachment A.**

An access undertaking is a legally binding agreement between the ACCC and the port terminal operator. In the case of bulk wheat exports, these agreements typically include:

- obligations on the port terminal operators not to discriminate or hinder access in the provision of port terminal services
- having clear and transparent port loading protocols for managing demand for port terminal services
- obligations on port terminal operators to negotiate in good faith with eligible wheat exporters for access to port terminal services
- the ability of wheat exporters to seek mediation or binding arbitration on the terms of access in the event of a dispute, and
- an obligation to comply with Continuous Disclosure Rules.

The ACCC has monitored compliance with undertakings since 2009[13]. While the ACCC has received and investigated complaints involving allegations of non-compliance, to date the ACCC has not been required to prosecute any port terminal operator for breaches of its undertaking. Nor has the ACCC been required to arbitrate any formal disputes between a port terminal and exporter relevant to an undertaking. This is despite periods of record wheat export volumes[14] and therefore periods of high demand for grain loading facilities.

In 2010, the Productivity Commission found that while the current access arrangements had been beneficial for traders during the transition period, those benefits would 'diminish and could become costly in the long term'[15]. As a result, the commission recommended that 'from 1 October 2014, regulated access should rely on Part IIIA [of the *CCA*], with continuation of mandatory disclosure, supplemented by a voluntary code of conduct by all port terminal services operators'[16]. In 2014, there is still some concern that the costs of continuing port terminal access arrangements for wheat export have become unduly burdensome[17].

Part IIIA of the *Competition and Consumer Act* 2010 (CCA) establishes the National Access Regime, which provides a mechanism by which parties may gain access to monopoly infrastructure facilities[18]. The Regime is a regulatory framework that provides an avenue for firms to access essential infrastructure services owned and operated by others, when commercial negotiations on access are unsuccessful. Under Part IIIA, the National Competition Council can recommend that the Minister for Small Business declare nationally significant infrastructure if the criteria in Part IIIA are

[13] Australian Competition & Consumer Commission website (accessed 13/03/14): www.accc.gov.au/regulated-infrastructure/wheat-export/accc-role-in-wheat-export
[14] See 1
[15] See 6
[16] See 6
[17] Co-operative Bulk Handling Ltd (2013) *National Access Regime: CBH submission to Productivity Commission* (accessed 13/03/14):http://www.pc.gov.au/__data/assets/pdf_file/0020/123374/sub047-access-regime.pdf
[18] Productivity Commission (2013) *National Access Regime Inquiry Report*

satisfied. Following declaration, if commercial discussions do not lead to negotiated access, parties can apply to the ACCC for arbitration to set access terms and conditions.

Since the Commission's review in 2010, there has been significant new investment in bulk wheat export infrastructure in Australia. Bunge Australia has recently invested more than $30 million in export storage capacity at an existing port terminal in Bunbury, WA. The facility is expected to be operational in mid-2014[19]. In March 2014, Qube Holdings Ltd announced a $50 million investment to establish a new grain handling facility at Port Kembla, NSW, as part of a joint venture with Noble Group [20]. In Newcastle, NSW, the new $30 million Newcastle Agri Terminal (NAT) made its first shipment of grain in February 2014[21]. These port terminal operators do not have an access undertaking in place with the ACCC as a condition of export.

The presence and effect of these new investments has been recognised to contribute positively to competition and allay fears of monopolistic behaviour in their respective regions. On 10 April 2014, the ACCC released its proposal to approve an application by GrainCorp to vary its undertaking at the Carrington port terminal in Newcastle. In proposing this decision, the ACCC considered that GrainCorp's Carrington facilities were subject to sufficient competition, including from NAT, to reduce regulation applied to GrainCorp's facility to the minimum level allowed for under the Act, without undue consequences. The Act in its current form, however, restricts the ability for all port terminal operators to operate under the same level of regulation. This has resulted in highly variable levels of regulation being applied to operators exporting bulk wheat from the same port.

The access undertakings for CBH, Emerald and GrainCorp are due to expire on 30 September 2014. If a code of conduct is not in place by that date, these undertakings must be renewed before expiry to enable those companies to continue to export wheat. It is likely that extending or renewing these undertakings would be a significant cost to each business affected. CBH has estimated that its direct costs associated with the introduction of a new access undertaking, consultation and compliance in 2014 could cost up to $700 000[22]. Outside of these direct costs to business, the ACCC has estimated its direct costs under Option 1 for 2014–15 to be $1 002 000 and for 2015–16 to be $1 022 000.

Retaining the current arrangements may result in regulation being inequitably applied to port terminal operators, even at the same port, based on ownership structure alone. The potential for new investment proposals to adopt or change business structures to avoid this regulation is significant. While Part IIIA of the *Competition and Consumer Act 2010* does provide for port terminal operators to apply to vary an existing undertaking, as was the recent case with GrainCorp at Newcastle, this can be a resource intensive and lengthy process.

Regulatory Burden and Cost-Offset Estimate Table

The figures provided below are based on limited industry estimates. It would benefit from further information about current compliance costs under existing arrangements.

[19] Bunge Australia (2014) Media Release – *New Bunbury contracts increase choice for WA grain growers* (accessed 17/04/14):http://www.bunge.com.au/news/38-new-bunbury-contracts-increase-choice-for-wa-grain-growers

[20] Qube Holdings Ltd (2014) *Media Release - Further Investment in Grain Rail Haulage and Infrastructure* (accessed 17/04/14): http://www.qube.com.au/downloads/announcements/Further_Investment_in_Grain_Rail_Haulage_and_Infrastructure.pdf

[21] Newcastle Agri Terminal (2014) *Media Release - First Grain Shipment for Newcastle Agri Terminal* (accessed 17/04/14): http://www.naterminal.com.au/index.php/latest-news/51-media-release-first-grain-shipment-for-newcastle-agri-terminal

[22] See 17

Table 2: Option 1 Compliance Cost Table

	Vertically-integrated businesses	Non-vertically integrated businesses
(A) Compliance with current arrangements	$2.8m[23]	$0
(B) Likely cost of compliance under Option 1	$2.8m	$0
Difference between (A) and (B)	$0	$0

Stakeholder questions
*1. What is the total compliance cost to your business, per calendar year, of the current regulation applied to port access for bulk wheat exports? Describe how you have calculated this amount against various cost types, namely: administrative costs; substantive compliance costs (e.g. operational purchases); delay costs; and fees and charges [see **Attachment D**].*
2. Given the level of new investment in port terminal export facilities, is there a net benefit to retaining the current access arrangements, which were developed to address concerns about monopolistic behaviours?

Option 2 – Introduce a mandatory code of conduct with a 'one size fits all' approach

In May 2013, the Code Development Advisory Committee (CDAC) provided advice to the government on key principles for development of a mandatory code of conduct. CDAC was convened by Grain Trade Australia with membership comprising representatives of key stakeholder organisations across the supply chain including growers, exporters and port terminal operators[24].

Option 2 would be to introduce a mandatory code which reflects these principles and requires all port terminal operators to:

- allocate available port terminal capacity through a mechanism which applies equally to all exporters irrespective of identity (principle 2)
- publish standard terms and reference prices which are available to all exporters (principle 2 (b))
- publish port loading protocols for allocation of capacity (principle 2 (c))
- not to hinder access to a port terminal service unless the exporter is in breach of its access agreement (principle 3)
- publish certain information, for example the amount of capacity available on a weekly and annual basis (principle 4)
- publish key performance indicators (principle 10)
- undertake a process for amendments to port loading protocols, including the requirement to consult (principle 11)

The principles are provided at **Attachment B**.

The introduction of a mandatory code provides an opportunity to address concerns that the current regulation is inequitably applied across port terminal operators. As discussed in Option 1, significant new port terminal infrastructure investment has avoided needing to pass the access test as a condition of export. In some instances, this has resulted in highly variable levels of regulation being applied to operators exporting the same product from the same port.

A code based on the CDAC principles would be a 'one size fits all' approach and apply to all port terminal operators equally. It is expected that this code would provide more flexible arrangements for port terminal operators that have an access undertaking; removing the requirement for capacity

[23] Based on predications of CBH Ltd (see 18) and multiplied by number of operators with an access undertaking
[24] Code Development Advisory Committee (2012) accessed 15/04/2014: www.graintrade.org.au/sites/default/files/file/Port%20Access%20Code%20of%20Conduct/Code%20Development%20Advisory%20Committee(2).pdf

allocation mechanisms to be pre-approved and may, therefore, assist in business responsiveness to changes in the market and operational demands.

The 2010 Productivity Commission report recommended that all port terminal operators be required to only comply with the continuous disclosure rules, which is reflected in the requirements for a code under the Act. These rules are consistent with existing provisions in the Act and are two-fold: an operator must publish a statement setting out its policies and procedures for managing demand for services, including procedures relating to the nomination and acceptance of ships to be loaded; and a daily statement about scheduled ships to be loaded at the port, which includes:

a) if the port terminal service provider knows the name of the ship—the ship's name;
b) the time when the ship is nominated to load grain using the port terminal service;
c) the time when the ship is accepted as a ship scheduled to load grain using the port terminal service;
d) the estimated time when the ship is to arrive at the port terminal facility through which the port terminal service is to be provided;
e) the estimated time when grain is to start being loaded onto the ship;
f) the estimated time when the ship is to leave the port terminal facility through which the port terminal service is being provided;
g) the name of the exporter of the grain;
h) the quantity of grain to be loaded onto the ship using the port terminal service;
i) the type of grain to be loaded onto the ship using the port terminal service;
j) if the grain has started to be loaded onto the ship, but the loading has not been completed—that fact;
k) if the loading of grain has been completed—the time when the loading was completed.

The CDAC principles, however, require all operators comply with the code in its entirety. This would significantly increase the regulation applied to non-vertically integrated port terminal operators and may act as a disincentive, particularly for those operating on a smaller scale, to new investment and discourage competition if compliance costs are too high.

The CDAC principles represent a broad agreement as to industry requirements for the code. However, a code based on these principles would lack a general non-discrimination provision and recourse to arbitration if negotiations between parties fail. These issues are addressed in Option 3.

In addition, while there may be a benefit in terms of blanket equity under this option, a code drafted in line with these principles would not enable the ACCC to recognise the presence or lack of competition at a particular port, or level. Neither would it recognise vertical integration, and the resulting incentives (or lack of incentives) a port terminal operator would have to discriminate in favour of its own trading arm. As a result, regulation would not be able to be adjusted in instances where a port terminal operator is able and has an incentive to exert significant market power or in cases where sufficient competition and/or a lack of incentive exist. This may also act as a disincentive for additional investment, and therefore competition, in bulk wheat export infrastructure.

The ACCC has estimated the direct costs it would incur under Option 2 to be $1 314 000 up-front in 2014–15, and $1 071 000 each year from 2015–16. While the ACCC's role in relation to wheat export port terminal access is likely to be reduced compared to its current role in relation to the access undertakings, the broader scope of regulation will require ACCC interaction with a higher number of port terminal operators and an initial education campaign.

The potential costs to business include establishing systems to report daily port loading operations, developing and publishing port loading protocols and key performance indicators, and potential opportunity costs associated with providing 30-days advanced notice for amendments to port loading protocols. In comparison to the current arrangements, it is expected that compliance costs for port terminal operators currently subject to the access test to decrease as access undertakings with the ACCC would no longer be required. Costs to other grain export terminal operators, however, are expected to increase in order to meet the requirements of the code in its entirety.

There may be capital investment required to set up appropriate monitoring and reporting systems, in addition to staff time. Feedback from stakeholders that may be affected by a code drafted in line with Option 2 is required to quantify these assumptions.

Regulatory Burden and Cost Offset Estimate Table

This table will be updated using information provided by stakeholders during this consultation process. A consolidated list of questions requiring stakeholder input is provided at page 16.

Table 3: Option 2 Compliance Cost Table

	Vertically-integrated businesses	Non-vertically integrated businesses
(A) Compliance with current arrangements	$2.8m	$0
(B) Likely cost of compliance under Option 2	To be determined	To be determined
Difference between (A) and (B)	To be determined	To be determined

Stakeholder questions (cont.)
3. If a code were to be developed based on the principles at Attachment B, what compliance costs would be borne by your business per calendar year? Describe how you have calculated this amount against various cost types, namely: administrative costs; substantive compliance costs (e.g. operational purchases); delay costs; and fees and charges.
4. If a code were to be developed based on the principles at Attachment B, would any other costs be borne by your business? Please describe with reference to Attachment D.
5. Do you believe the principles developed by CDAC under Option 2 should be applied to all port terminal operators, regardless of the level of competition and/or vertical integration at the port? Why / why not?
6. Explain if the principles listed by CDAC under Option 2 are sufficient to ensure the efficient operation of the export supply chain?

Option 3 – Introduce a mandatory code that can adjust to competition levels and vertical integration

Option 3 is to develop a mandatory code of conduct which would reflect the majority of the CDAC principles, but provide a pathway to limit regulation to where it is most needed. Subject to review, the code would be a transitional measure and operate for a period of five years, at which time it is envisaged that bulk wheat exports would be fully deregulated, relying only on the provisions of Part IIIA of the CCA.

A code drafted in line with Option 3 would require that all port terminal operators comply with the continuous disclosure rules, as per the Act. To ensure market power is not abused, however, port terminal operators with an incentive to engage in uncompetitive conduct due to vertical integration and lack of competition (referred to as 'Tier 1' port terminal operators) would also be required to comply with additional provisions. These provisions would require Tier 1 operators to:

- **comply with a non-discrimination clause** to prevent port terminal operators discriminating in favour of their own trading arm or that of an associated entity. This is intended to address the incentive for operators to favour their own trading arm at the expense of third party exporters, thereby potentially damaging competition;
- **publish the standard terms and prices** on its website, and advise of any changes to the standard at least 30 days before commencement. The publishing of standard terms and prices assist in providing transparency for users and establishes a benchmark for exporters to commence negotiation for access, if applicable;
- **enter into an access agreement** when supplying services to exporters to provide transparency and certainty of conditions for both parties;

- **undertake dispute resolution** if a dispute arises with an exporter while negotiating an access agreement, mediation and arbitration mechanisms apply. These provisions are intended to facilitate agreement on the future terms of access;
- **publish port loading protocols which include a capacity allocation system** approved by the ACCC. This provision enables the ACCC to identify any concerns, particularly in relation to non-discrimination, ahead of time. In the absence of this provision, the ACCC would have to rely on the injunction and damages provisions in the CCA to remedy any concerns with a port's capacity allocation plans. In approving the system, the ACCC would consider specific criteria related to ensuring efficient and fair access to services;
- **provide 30 days advanced notice of proposed variations to port loading protocols** on the website and through direct communication with exporters. Operators must also invite submissions from stakeholders and consider those submissions. This provision will assist exporters to plan and manage proposed changes to specific port operations before they are implemented;
- **publish expected export grain capacity for a 12 month period** beginning on 1 October each year to enable exporters and customers to more accurately plan shipping and supply schedules;
- **publish key performance indicators each month**, including the expected capacity allocated for loading grain and the actual amount of grain loaded per shipping window. This information improves transparency of bulk wheat exports from Australia and will assist exporters and stakeholders to monitor if capacity is going unused despite peak demands;
- **publish stock information weekly**, consistent with current requirements under the access undertaking arrangement. This provision enables exporters and other stakeholders to gain an understanding of grain stocks by port and assists to monitor export volumes; and
- **maintain records** of access agreements and disputes for a period of at least six years. This provision will ensure information about access to services is retained and, in the case of an audit, will assist in verifying compliance with the code;
- **publish a port loading statement** each business day, and provide to the ACCC, which includes the following information for each listed ship:
    - the name (if known)
    - the time nominated to load grain
    - the time the ship is accepted as a ship scheduled to load grain
    - estimated time when the ship is to arrive at the port terminal facility
    - estimated time when grain is to start being loaded
    - estimated time when the ship is to leave the port terminal facility
    - name of the exporter
    - quantity of grain to be loaded
    - type of grain
    - the fact that grain has begun loading, when relevant; and
    - the time loading was completed.

A code of conduct based on Option 3 has been drafted and is available for comment from the Department of Agriculture's website at www.daff.gov.au/portcode.

The code would also provide an opportunity for regulation to be reduced for Tier 1 port terminal operators that face competitive constraint (as was the case for GrainCorp's Carrington port) to be categorised as Tier 2. This is an important difference to Option 2 as the code is able to respond to a changing marketplace and reduce regulation where it is not required. In these cases, the ACCC would conduct a competition analysis on a port-by-port basis and consider specific matters before exempting a port from complying with the code in its entirety.

The introduction of a code drafted in this manner may address stakeholder concern that the industry in not yet ready for full deregulation by providing a transitional mechanism with tapered regulatory burden. It is envisaged that as competition develops, Tier 1 ports will progressively phase out over time. The code will also be reviewed within two years of its operation to ensure its suitability and, if not extended, will then expire after five years and bring the bulk wheat export industry in line with other export commodities.

The cost to operators required to pass the access test is expected to decrease under this option as there would be direct savings associated with the removal of access undertakings, and potential for further regulatory savings as competition emerges at Tier 1 ports. Other operators would be expected to report daily port loading operations and publish port loading protocols, which would be at some cost. Feedback from stakeholders that may be affected by a code drafted in line with Option 3 is required to quantify these assumptions.

As Tier 1 compliance under the code is based on vertical integration, there may be a risk that new investment proposals may adopt, or existing port terminal operators may change, business structures to avoid regulation as Tier 1 entities. Marketing arms and port terminal infrastructure businesses can separately generate millions of dollars in turn-over each year, while Tier 1 compliance with the code is expected to be less than the current arrangements. The economic incentive for businesses to divest themselves of one of these assets in order to avoid Tier 1 compliance under the code is, therefore, extremely low.

The ACCC has estimated the direct costs it would incur under Option 3 to be approximately $1 314 000 in the first year, and $1 071 000 each year afterwards. This estimate is the same as that provided for Option 2, as there would be similar costs associated with the education, compliance and enforcement activities under either code.

Regulatory Burden and Cost Offset Estimate Table

This table will be updated using information provided by stakeholders during this consultation process. A consolidated list of questions requiring stakeholder input is provided at page 16.

Table 4: Option 3 Compliance Cost Table

	Vertically-integrated businesses	Non-vertically integrated businesses
(A) Compliance with current arrangements	$2.8m	$0
(B) Likely cost of compliance under Option 3	To be determined	To be determined
Difference between (A) and (B)	To be determined	To be determined

Stakeholder questions (cont.)

7. If a code were to be developed based on the draft code available from www.daff.gov.au/portcode, what compliance costs would be borne by your business per calendar year? Describe how you have calculated this amount against various cost types, namely: administrative costs; substantive compliance costs (e.g. operational purchases); delay costs; and fees and charges.

8. Are there any costs associated with providing a tiered compliance option as described in Option 3 that have not been considered in this paper?

9. Do you believe the compliance provisions for Tier 1 port terminal operators are appropriate? Why / why not?

10. Do you think the ACCC need to approve capacity allocation systems of Tier 1 ports? Why / why not?

11. Do you believe the compliance provisions for Tier 2 port terminal operators are appropriate? Why / why not?

12. Do you think undertaking a review of the code within 2 years of its commencement is appropriate? Why / why not?

Option 4 – Repeal the Wheat Export Marketing Act 2008 by 30 September 2014

Option 4 is to repeal the *Wheat Export Marketing Act 2008* (the Act) and remove industry-specific regulation from the bulk wheat export industry by 30 September 2014. If repealed by this date, port terminal operators and government would avoid the costs associated with renewing existing access undertakings and continued monitoring.

As discussed in Option 1, the current arrangements place regulatory burden on particular port terminal operators that may inhibit investment in bulk wheat export facilities[25]. Removal of regulatory costs may improve the cost-benefit equation for new investments and create an incentive for additional or improved services to be made available to the industry.

If the Act was repealed, Part IIIA of the CCA would enable particular infrastructure services to be assessed and declared, if appropriate. As in Option 1, Part IIIA facilitates third party access to critical infrastructure services and operates as part of the general competition law. Repeal of the Act would provide for bulk wheat exports to be dealt with under this existing framework and bring the industry into line with other bulk agricultural commodities. Under this arrangement, the ACCC would enforce normal competition law and would no longer be required to monitor access undertakings for bulk wheat exports.

The Productivity Commission found that 'access to ports is the most critical issue in ensuring the success of deregulation[26]'. The complete removal of specific regulation for bulk wheat exports, however, is still of significant concern to some industry groups. For example, in response to the prospect of a voluntary code of conduct for port access arrangements, the NSW Farmers' Association stated that:

> *... the proposed move away from a regulated port access … will result in behaviour from those operating port terminals [that] will lead to sub-optimal competition and reduced reliability of shipping movements to customers. This in turn will reduce value which would otherwise flow to all segments of the market[27].*

In 2012, the Rural and Regional Affairs and Transport Legislation Committee undertook an inquiry into the Wheat Export Marketing Amendment Bill 2012 and recommended that the Bill be passed[28]. There was a dissenting report, however, by the Australian Greens and the Coalition which echoed the concerns of NSW Farmers' Association and other stakeholder groups about changes to port access regulation. Dissenting senators agreed that it was 'too early to consider further deregulation'[29] and suggested that if a code of conduct was developed 'the code should be mandatory'[30] to address concerns of oversight and compliance.

The access undertakings for CBH, Emerald and GrainCorp are due to expire on 30 September 2014. Therefore, the best time to repeal the Act would be before that date because, if the code is not in place, nor amendments made to the legislation by that date, undertakings must be renewed to enable those companies to export wheat. Extending or renewing these undertakings would be a significant cost to each business affected, as well as to the ACCC. There may also be additional costs associated with the high level of regulatory uncertainty, potentially delaying or preventing new investment.

If the Act were to be repealed, there may be savings to government of $1 002 000 in 2014–15 and $1 022 000 in 2015–16[31]. When compared to the current arrangements, this option may also produce direct savings for port terminal operators subject to the access test in the vicinity of $700 000 per annum, depending on the operator[32]. There would also be no affect on operators not subject to the access test and, therefore, no associated compliance cost. Indirectly, however, there

[25] Rural and Regional Affairs and Transport Legislation Committee (2012) *Inquiry Report into the Wheat Export Marketing Amendment Bill 2012 [Provisions]* p.31
[26] See 6, p.29.
[27] NSW Farmers' Association (2012) *Submission to the Senate Rural and Regional Affairs and Transport Legislation Committee*, Submission 11, p. 12.
[28] See 25, p. 57
[29] Rural and Regional Affairs and Transport Legislation Committee (2012) *Inquiry Report into the Wheat Export Marketing Amendment Bill 2012 [Provisions],* Joint Dissenting Report by Senators for the Coalition and the Australian Greens, p. 60
[30] Ibid, p.62
[31] As compared with the expected to cost to government in current arrangements were maintained.
[32] See 18

may be opportunity costs for exporters that would no longer have the certainty of fair and transparent access in areas where port terminal operators may be able to exert significant market power. Specific details on the potential costs and feedback from stakeholders is required.

Option 4 - Regulatory Burden and Cost Offset Estimate Table

Option 4 removes all regulation applied specifically to the bulk wheat export industry. This table estimates that there will zero costs to businesses as a result.

Table 5: Option 4 Compliance Cost Table

	Vertically-integrated businesses	Non-vertically integrated businesses
(A) Compliance with current arrangements	$2.8m	$0
(B) Likely cost of compliance under Option 3	$0	$0
Difference between (A) and (B)	-$2.8m	$0

Stakeholder questions (cont.)
13. Are there any additional costs to you or your business associated with the repeal of the Wheat Export Marketing Act 2008 on 30 September 2014? If so, please describe.
14. Are there any benefits to you or your business associated with the repeal of the Wheat Export Marketing Act 2008 on 30 September 2014?
15. Is it appropriate to remove industry-specific regulation for bulk wheat exports by 30 September 2014? Why / why not?

Consultation

Port terminal operators, exporters / traders and wheat producers have a significant interest in the development, or otherwise, of a mandatory code of conduct. Key stakeholders have been engaged in the discussion about a code since 2012, including through the Code Development Advisory Committee process.

To assist in the development of this Regulation Impact Statement and the draft code of conduct, the department has developed a consultation plan to obtain key stakeholder feedback. This plan was developed in line with *The Australian Government Guide to Regulation*[33].

It is intended that this early assessment be released for broad industry consideration. The department will also consult with state and federal counterparts where appropriate. Key stakeholders (see **Attachment C**) will be contacted directly for feedback that will then be used to formulate the final RIS and draft code, if required, for government consideration.

The department will undertake the following activities:

Direct communications to affected entities

- ✓ Direct emails will be sent to alert stakeholders[34] of the exposure draft and RIS consultation period
- ✓ Each directly affected party will be provided with an opportunity to discuss the exposure draft, either in person or on the telephone, with the department
- ✓ An alert will also be sent through the Department of Agriculture's mailing list to broaden awareness

[33] See The Australian Government Guide to Regulation at www.cuttingredtape.gov.au/
[34] See **Attachment C.**

Direct public engagement of peak bodies or other representative groups

- ✓ The department will ask to reform the Code Development Advisory Committee, comprising representatives from the production, trade and port terminal operator sectors, to provide consolidated feedback
- ✓ Face-to-face meetings with port terminal operators, exporters and producer representative groups will be held to discuss the exposure draft and the RIS
    - o This will include meetings in major wheat exporting states, including New South Wales, Victoria, South Australia and Western Australia
- ✓ The department will also be available via telephone and email to answer queries directly

Public initiatives

- ✓ The department will use its online presence (through platforms such as Twitter) to raise awareness of the consultation period and invite submissions
- ✓ A new webpage on the department's site will invite public comment on the RIS and draft code.

Conclusion

The Australian wheat export industry is continuing to evolve in response to changing market demands. The current regulation (through the Act) aims to 'promote the operation of an efficient and profitable bulk wheat export marketing industry that supports the competitiveness of all sectors'. Any changes to this level of regulation should, therefore, be consistent with this objective, and encourage, rather than inhibit, competition.

Ultimately, the preferred regulatory option will be informed by the outcomes of wider consultation and will be based upon the approach that delivers the maximum net benefit to both industry and the community.

Implementation and review

The implementation details and any review of the preferred option will be developed on the basis of the recommended option, following consultation.

Compiled list of stakeholder questions

Option 1

*1. What is the total compliance cost to your business, per calendar year, of the current regulation applied to port access for bulk wheat exports? Describe how you have calculated this amount against various cost types, namely: administrative costs; substantive compliance costs (e.g. operational purchases); delay costs; and fees and charges [see **Attachment D**].*

2. Given the level of new investment in port terminal export facilities, is there a net benefit to retaining the current access arrangements, which were developed to address concerns about monopolistic behaviours?

Option 2

*3. If a code were to be developed based on the principles at **Attachment B**, what compliance costs would be borne by your business per calendar year? Describe how you have calculated this amount against various cost types, namely: administrative costs; substantive compliance costs (e.g. operational purchases); delay costs; and fees and charges.*

*4. If a code were to be developed based on the principles at Attachment B, would any other costs be borne by your business? Please describe with reference to **Attachment D**.*

5. Do you believe the principles developed by CDAC under Option 2 should be applied to all port terminal operators, regardless of the level of competition and/or vertical integration at the port? Why / why not?

6. Explain if the principles listed by CDAC under Option 2 are sufficient to ensure the efficient operation of the export supply chain?

Option 3

7. If a code were to be developed based on the draft code available from www.daff.gov.au/portcode, what compliance costs would be borne by your business per calendar year? Describe how you have calculated this amount against various cost types, namely: administrative costs; substantive compliance costs (e.g. operational purchases); delay costs; and fees and charges.

8. Are there any costs associated with providing a tiered compliance option as described in Option 3 that have not been considered in this paper?

9. Do you believe the compliance provisions for Tier 1 port terminal operators are appropriate? Why / why not?

10. Do you think the ACCC need to approve capacity allocation systems of Tier 1 ports? Why / why not?

11. Do you believe the compliance provisions for Tier 2 port terminal operators are appropriate? Why / why not?
12. Do you think undertaking a review of the code within 2 years of its commencement is appropriate? Why / why not?

Option 4

13. Are there any additional costs to you or your business associated with the repeal of the Wheat Export Marketing Act 2008 on 30 September 2014? If so, please describe.

14. Are there any benefits to you or your business associated with the repeal of the Wheat Export Marketing Act 2008 on 30 September 2014?

15. Is it appropriate to remove industry-specific regulation for bulk wheat exports by 30 September 2014? Why / why not?

Acronyms and abbreviations

ACCC	Australian Competition and Consumer Commission
CCA	*Competition and Consumer Act 2010*
CDAC	Code Development Advisory Committee
CBH	Co-operative Bulk Handling Ltd
RIS	Regulation Impact Statement
The Act	*Wheat Export Marketing Act 2008* (as amended)
The Bill	Wheat Export Marketing Amendment Bill 2012
The code	Mandatory Code of Conduct for Grain Export Terminals

Definitions

Access undertaking has the same meaning as in Part IIIA of the *Competition and Consumer Act 2010*, which is, in effect, an agreement between a provider of a service and the ACCC about the provision of access to the service. Refer to Part IIIA of the *Competition and Consumer Act 2010* for the full definition.

Associated entity has the same meaning as in the *Corporations Act 2001*, which includes the provision that an associate and the principal are related bodies corporate. Refer to the *Corporations Act 2001* for a full definition.

Bulk Wheat means wheat for elevation to a ship, and does not include wheat that is exported in a bag or container that is not capable of holding more than 50 tonnes of wheat; or out-turned for domestic use.

Continuous Disclosure Rules in relation to a port terminal service means that, among other things, there is a current statement setting out a unique slot reference number for each ship scheduled to load grain and associated details published on the port terminal operator's website. Refer to the *Wheat Export Marketing Act 2008* (as amended) for a full definition.

Exporter means a person, corporation, partnership, co-operative or other type entity seeking access to Port Terminal Services, which may include a Related Body Corporate of a port terminal operator.

Port Terminal means a port terminal owned, controlled or managed by a port terminal operator.

Port Terminal Facility means a ship loader that is:

(a) at a Port Terminal; and

(b) capable of handling bulk wheat;

and includes any of the following facilities:

(c) an intake / receival facility;

(d) a grain storage facility

(e) a weighing facility

(f) a shipping belt;

that is:

(g) at the Port Terminal; and

(h) associated with the ship loader; and
(i) capable of dealing with bulk wheat.

Port Terminal Service means a service (within the meaning of Part IIIA of the *Competition and Consumer Act 2010*) in relation to bulk wheat provided by means of a port terminal facility, and includes the use of a port terminal facility to export bulk wheat.

Port Terminal Operator means a person who provides Port Terminal Services and an owner, controller or manager of a Port Terminal.

Attachment A - Port terminal operators (bulk wheat exports)

Port terminal operators and port locations

Port terminal facility operator/owner	Location (number of ports)
Co-operative Bulk Handling Ltd	Multiple, WA (4)
Emerald Logistics Pty Ltd	Melbourne, Vic (1)
GrainCorp Operations Ltd	Multiple, Qld, NSW, Vic (7)
Viterra Operations Ltd	Multiple, SA, Vic (6)
Newcastle Agri-Terminal	Newcastle, NSW (1)
Quattro Grain[35]	Proposed at Port Kembla, NSW (1)
Qube Ports & Bulk	Newcastle, NSW (1)
Queensland Bulk Terminals	Brisbane / Fisherman Islands, Qld (1)
VicStock Grain / Heilingjiang Feng Agricultural[36]	Proposed at Albany, WA (1)
W.A. Chip & Pulp Co Pty Ltd	Bunbury, WA (1)

[35] Announced on 27 March 2014 and expected to be operational in mid-2016.
[36] Recent media reports suggest that an alternative operator may be sought : https://au.news.yahoo.com/thewest/business/a/22650725/china-drops-port-development-plans/

Attachment B – Code Development Advisory Committee (CDAC) principles

CDAC comprises representatives of key stakeholders, namely:

- Established port owners -CBH, GrainCorp, Viterra and ABA (Emerald) (4 nominations)
- Major users -Australian Grain Exporters Association (AGEA) (3 nominations)
- Production -Grain Producers Australia (GPA) (1 nomination)
- Production -National Farmers' Federation (NFF) (1 nomination), and
- Industry -Grain Trade Australia (GTA) (1 nomination).

Membership was also extended to Queensland Bulk Terminal, Newcastle Agri Terminal, Louis Dreyfus Australia and Pastoralist and Graziers Association of WA.

In May 2013, CDAC provided government with a set of principles for the development of a mandatory code of conduct for grain export terminals. These principles, excluding comments, are as follows:

1. Objectives

The Objectives of the code are to:

- deliver fair and transparent provision to Exporters of access to Port Terminal Services for the export of bulk wheat by Port Terminal Operators;
- ensure compliance with continuous disclosure rules by Port Terminal Operators; and
- be consistent with the operation of an efficient and profitable wheat export marketing industry that supports the competitiveness of all sectors through the supply chain.

The further and remaining Principles in this code shall be read subject to this Objectives Principle. To the extent that they may be inconsistent, the Objectives Principle will prevail.

2. Scope

Port terminal operators must provide fair and transparent access to Exporters to Port Terminal Services for the export of bulk wheat. Fair and transparent access means that:

(a) Port Loading Protocols and the method or methods for allocating available Port Terminal capacity will apply equally to all Exporters irrespective of identity;

(b) Port Terminal Operators will publish Standard Terms and Reference Prices that, subject to compliance with Prudential Requirements, will be available to all Exporters;

(c) Port Terminal Operators will publish Port Loading Protocols for the allocation of available Port Terminal capacity; and

(d) Subject to paragraph (a), Exporters will be provided with an equal opportunity to negotiate their individual terms of access to the Port Terminal Services.

Subject to the Objectives Principle and to (a) - (d) above (both inclusive) in this Principle, Fair access does not require:

(a) Port Terminal Operators to publish individually negotiated agreements; or

(b) that all Exporters have or accept the same terms, although to the extent the terms offered differ from the Standard Terms the difference must be fair at the time the agreement was negotiated.

Port Terminal Operators can negotiate different terms with customers on a commercial basis in accordance with their obligations to negotiate in good faith and to provide all Exporters with an equal opportunity to negotiate. An opportunity for all Exporters to acquire capacity may also require a commitment by the Exporter to acquire, pay for and use a certain minimum tonnage of capacity

(which may not be accepted by all Exporters) and accept certain terms in their Access Agreement. Capacity or a class of capacity that has already been allocated under existing agreements will not be available for other Exporters, and Port Terminal Operators are not required to re-negotiate or revise any existing agreements as a result of a later negotiated agreement.

Transparency is provided through the obligation to publish the Standard Terms, Reference Prices and Port Loading Protocols under Principles 4, 5 and 7 together with an amendment process under Principles 8, 9 and 10 so that changes are notified in advance for industry comment.

3. Access to Port Terminal Services

Provision of access to Port Terminal Services must be under the terms of an Access Agreement.

- Any Exporter that complies with the Prudential Requirements (as outlined in Principle 8) and has provided all reasonable information to complete an Access Agreement may require the PTO to enter into an Access Agreement on the Standard Terms and Reference Prices. A PTO must provide an Access Agreement for execution by the Exporter within 5 business days of the request.
- An Access Agreement may be on Standard Terms and at the Reference Prices or may be on amended terms if an Exporter has negotiated alternative terms (as outlined in Principle 7).
- If an Exporter's application for an Access Agreement is incomplete, the PTO must advise the Exporter in writing within 5 business days of receipt of the application of the additional information required to be provided by the Exporter.
- Upon receiving additional information from an Exporter, the PTO will advise within 3 business days whether sufficient information has been provided.
- If an Exporter wishes to obtain access to Port Terminal Services during a period of negotiation (as outlined in Principle 7), the Exporter may enter an interim Access Agreement on the Standard Terms and Reference Prices. A new Access Agreement will replace the interim Access Agreement when the parties reach agreement through the negotiation. The new Access Agreement will take effect from the date agreed, or if not agreed, the date the new Access Agreement is executed by the parties.
- PTO's must not hinder access to a Port Terminal Service by an Exporter who is not in breach of its Access Agreement but for the avoidance of doubt the withdrawal or suspension of service in accordance with the terms of an Access Agreement is not to be regarded as hindering.

4. Capacity Publication and Management

PTO's must publish on their public website:

- On a weekly basis, the amount of Capacity at a port terminal that is currently available to be acquired for the export of grain for a month, half month or week (each being a Shipping Window, as decided by the PTO).
- On an annual basis, by no later than 1 August in a year, the amount of Capacity at a Port Terminal that the PTO reasonably expects to be available to be utilised for the export of grain from the following 1 October to 30 September (i.e. the upcoming season).
- Published Capacity is for the export of bulk cereal grains, oilseeds (excluding cottonseed) and pulses. Capacity to be determined as what the PTO wishes to make available to all Exporters (including its own related exporter).
- Publication of capacity management procedures is covered under the Continuous Disclosure Rules.
- PTO's and Exporters must comply with the Port Loading Protocols / Port Terminal Rules / Port Protocols.

5. Reference Prices, Standard Terms and Port Loading Protocols

- PTO's must publish on their public website Standard Terms, Reference Prices and Port Loading Protocols for bulk export wheat.

- Reference Prices and Standard Terms may be limited in application to particular seasons or periods of time.

6. Variation of Reference Prices and Standard Terms

- PTO's may vary Reference Prices and Standard Terms by providing not less than 30 days notice of the varied Reference Prices and Standard Terms. A variation to Reference Prices and Standard Terms does not alter the terms of any current Access Agreement unless allowed for under the terms of the Access Agreement.
- Providing Port Terminal Operators give the required notice (that is 30 days) of the Standard Terms and Reference Prices to apply following the expiry of an Access Agreement, utilisation of Port Terminal Services after the expiry of an Access Agreement shall be deemed to be on the then current Standard Terms and Reference Prices.

7. Negotiation Process

- PTO's must set out on their public website the process and timing under which an Exporter may seek to negotiate amendments to the Standard Terms and Reference Prices (but not the Port Protocols).
- PTO's and Exporters must negotiate in good faith.
- Any Exporter that complies with Prudential Requirements (as outlined in Principle 8 below) and has provided all reasonable information to complete an Access Agreement may seek to negotiate amendments to the Standard Terms and Reference Prices.
- Exporters may request the PTO provide information reasonably required to enable a negotiation to proceed subject to:
    - A PTO is not required to disclose information that would require it to breach a confidentiality obligation or which the PTO, acting reasonably, considers is commercially sensitive;
    - A PTO is not required to disclose information about another customer of the PTO;
    - The PTO being able to refuse a request that is unduly and manifestly onerous to the PTO having regard to:
        - the operational, commercial and logistical information that is required by grain exporters around the world for use of Port Terminal Services for the exporting of bulk wheat;
        - whether the Port Terminal Operator has access to and control of the information requested, or whether compliance with the Exporter's request would require the Port Terminal Operator to engage third party consultants or advisers in order to gather, collate or present the information;
        - the Port Terminal Operator's staffing, technical and financial capability to obtain and provide the information requested by the Exporter;
        - the volume of, and timeframe within which, information is requested by the Exporter; or
    - The PTO may refuse the request if the information is not ordinarily and freely available to the PTO.
    - If a PTO does not negotiate with an Exporter it will provide written reasons for such refusal within one business day of the refusal.
- If the PTO and Exporter agree on the amendments to the Standard Terms and Reference Prices, the parties shall execute an Access Agreement in that form within 5 business days.
- The Negotiation Period will commence upon the PTO's acknowledgement of the access application and will cease upon any of the following events:
    - the execution of an Access Agreement in respect of access sought by the Exporter;
    - written notification by the Exporter that it no longer wishes to proceed with its Access Application;
    - the expiration of three months from the commencement of the Negotiation Period, or if both parties agree to extend the Negotiation Period, the expiration of the agreed extended period;
    - a notice issued by a PTO that the Exporter does not meet the Prudential Requirements becomes effective.

- Upon cessation of the Negotiation Period, the PTO will be entitled to cease negotiations with the Exporter.
- If, for any reason, the Negotiation Period ceases and an Access Agreement has not been executed, the Exporter may submit a new access application at any time.

8. Prudential Requirements

Prudential requirements apply to all access seekers.

- PTO's are entitled to require Exporters to provide evidence that the Exporter satisfies Prudential Requirements as outlined below. An Exporter required to provide evidence must do so within 7 business days.
- If the PTO reasonably considers that an Exporter does not meet the Prudential Requirements the PTO must notify the Exporter in writing within 5 business days of the reason.
- While a PTO is providing Port Terminal Services or negotiating to provide Port Terminal Services each Exporter will be required to satisfy the following Prudential Requirements:
    - the Exporter must be Solvent; and
    - the Exporter, or a Related Body Corporate of the Exporter, must not be currently, or have been in the previous two years, in material default of any agreement with the PTO based on financial issues; and
    - the Exporter must be able to demonstrate to the PTO that it has a legal ownership structure with a sufficient capital base and assets of value to meet the actual or potential liabilities under an Access Agreement, including timely payment of access charges and payment of insurance premiums and deductibles under the required policies of insurance or otherwise provides Credit Support acceptable to the PTO (acting reasonably).
- The PTO may:
    - require an Exporter to provide:
        - details of the Exporter's credit rating (if applicable);
        - the Exporter's most recent financial statements; and/or
        - commercial trade references (if available);
    - consider an Exporter's previous credit history with the Port Terminal Operator; or
    - engage an external credit review company to undertake a credit review, and for this purpose the Exporter provides its consent to disclose personal information and to conduct searches of credit registers including the PPS Register.

9. Continuous Disclosure Rules

PTO's must comply with the Continuous Disclosure Rules as provided for under the *Wheat Export Marketing Act 2008* (as amended). The Rules require, among other things, that the PTO publish in a publically available position on its public website a current statement setting out a unique slot reference number for each ship scheduled to load grain and associated details.

10. Operating KPIs

Subject to the note in Principle 9, PTOs will publish the following key operational KPIs monthly:

- Capacity offered vs. actual elevations (i.e. planned vs delivered)
- Vessels failing survey
- Relevant commentary of why planned Capacity has not been delivered (should the PTO be unable to publish an explanation e.g. due to confidentiality, a generic explanation should be published).

11. Amendments to Port Terminal Rules/Port Protocols/ Port Loading Protocols

A PTO must provide a clear and fair amendment process under which the PTO may put forward amendments and consult with affected stakeholders as to changes in the PTO's policies and procedures for managing demand for the port terminal service. Any such process must provide:

- Written notice of amendments together with an explanation of the amendments on the PTO's website;
- That the PTO will make reasonable attempts to communicate the amendments to each Exporter who has an Access Agreement with the PTO;
- a reasonable and proportionate opportunity in all the circumstances for interested stakeholders to comment on proposed amendments being not less than 10 business days; and
- guidance as to what future date the proposed amendments will take effect. This future date would be:
    - Not less than 20 business days from the date the amendment notice was published for standard changes;
    - Not less than 40 business days from the date the amendment notice was published for changes to elevation capacity allocation methods.
- The ACCC will provide, on request, guidance on a without-prejudice basis to PTOs on whether it considers proposed changes to fit under the 20 or 40-day consultation category or whether proposed changes comply with the code.

12. Transition Arrangements

To provide certainty to PTOs and Exporters in the allocation of capacity during the transition from the current arrangements to the new code, the following will apply:

- PTOs that are currently subject to undertakings, can maintain current capacity allocation system under the code. As they are the same as the current Access Undertaking they will be deemed to be compliant with the objectives of the code; and
- Existing agreements with PTOs that are not currently subject to undertakings, must ensure Access Agreements meet the requirements of this code from 1 October 2014.

PTOs can introduce an amended or new capacity allocation system prior to or after the code coming into force. The introduction of any new or varied method of capacity allocation must be done in compliance with Principal 11 requirements for notice and consultation with not less than 60 business days prior to 1 October 2014.

13. Record Keeping

PTO's must keep records of vessel nominations and changes to vessel nominations requested by Exporters for not less than 2 years after a vessel has loaded bulk wheat at the Port Terminal. If a dispute is raised with the PTO it must maintain records referred to above for not less than 2 years following the conclusion of the dispute, whether that dispute is concluded by agreement, determination or inaction in pursuing the dispute by the disputer.

14. Stocks Information

In relation to the collection of stocks by Port Zone, the CDAC considered a number of views, recognising the desire of some groups for more detailed grade information by port zone, and other groups for maintenance of the current level of disclosure. The consensus view of CDAC regarding meaningful stocks by Port Zone requires the engagement of additional stakeholders and should be an urgent priority for consideration by the Wheat Industry Advisory Taskforce.

The code should incorporate the following minimum requirements for the publication of stock information by all PTOs:

- Aggregate stocks of bulk wheat held at each port terminal (on a weekly basis);
- Aggregate stocks of barley and canola held at each port terminal (on a weekly basis);
- Aggregate stocks of any other bulk grains held at each port terminal (on a weekly basis); and
- The names of the three largest grades of bulk wheat (by volume) held at each port terminal (on a weekly basis).

15. Review of the code

The code to be reviewed 2 years after commencement to consider whether the value of the benefits received from the code against a deregulated market in terms of:

- Costs of implementation, compliance and ongoing monitoring;
- Business flexibility to meet the changing and different needs of the market; and
- Limiting innovation along the grain supply chain.

Additional definitions

Capacity means the available capacity to load grain onto a vessel during any particular shipping window expressed in tonnes as published by the Port Terminal Operator.

Credit Support means either a Parent Guarantee or Security.

Negotiation Period means the period during which negotiation between a Port Terminal Operator and an Exporter is undertaken in relation to an Access Agreement.

Parent Guarantee means a guarantee given by a Related Body Corporate of the Exporter who has an investment grade credit rating or is otherwise acceptable to the Port Terminal Operator (acting reasonably).

PPS Register means the Personal Properties Securities Register

Reference Prices means the standard prices a Port Terminal Operator charges for Port Terminal Services on the Standard Terms at a Port Terminal owned, controlled or managed by that Port Terminal Operator;

Related Body Corporate has the meaning given in the Corporations Act 2001 (Cth);

Security means an unconditional and irrevocable bank guarantee, letter of credit, performance or insurance bond issued by a bank holding an Australian banking licence or such other reputable person or institution accepted by a Port Terminal Operator (acting reasonably) and which is in a form reasonably satisfactory to a Port Terminal Operator;

Shipping Window means a defined period within which an Exporter may ship bulk wheat in accordance with the relevant Port Loading Protocols. The period varies between Terminals but is generally between 14 and 30 days.

Standard Terms means the standard terms and conditions developed and published by a Port Terminal Operator upon which the Port Terminal Operator is prepared to provide Port Terminal Services at Port Terminals owned, managed or controlled by that Port Terminal Operator.

Attachment C – Key stakeholders

Port terminal operators

- Co-operative Bulk Handling Ltd
- Emerald Logistics Services Pty Ltd
- GrainCorp Operations Ltd
- Quattro Grain (as announced)
- Newcastle Agri-Terminal
- Queensland Bulk Terminals
- Qube Ports & Bulk
- W.A. Chip & Pulp Co Pty Ltd
- Viterra Operations Ltd
- VicStock Grain / Heilingjiang Feng Agricultural

Traders[37]

- Australian Grain Exporters Association
- Alfred C. Toepfer International (Australia) Pty Ltd
- Bunge Agribusiness Australia Pty Ltd
- Cargill Australia Limited
- CBH Grain Pty Ltd
- Emerald Group Australia Pty Ltd
- CHS Trading Company Australia Pty Ltd
- Gavilon Grain Australia Pty Ltd
- Gardner Smith Pty Limited
- Goodman Fielder Consumer Foods Pty Limited
- Glencore Grain Pty Ltd
- J.K. International Pty. Ltd.
- GrainCorp Operations Limited
- Marubeni Australia Ltd
- Louis Dreyfus Commodities Australia Pty Ltd
- Noble Resources Australia Pty Ltd
- Mitsui & Co. (Australia) Ltd
- PentAG Nidera Pty Limited
- Origin Grain Pty Ltd
- Quadra Commodities Pty Ltd
- Plum Grove Pty Ltd
- Riverina (Australia) Pty Limited
- Queensland Cotton Corporation Pty Ltd
- Viterra Ltd
- Touton Australia Pty Limited

[37] Indicative list of traders affected.

Production sector

- Ag Force Queensland
- Grain Growers Ltd
- Grain Producers Australia
- Grain Producers SA
- National Farmers' Federation
- NSW Farmers' Federation
- Pastoralists and Graziers Association of WA
- Victorian Farmers' Federation
- Western Australian Farmers' Federation

Attachment D – Compliance cost categories

Administrative costs

- Costs incurred by regulated entities primarily to demonstrate compliance with the regulation, usually record keeping and reporting costs, and the compliance costs associated with financial costs. This includes the costs incurred through complying with government taxes, fees, charges and levies (excluding the actual amount paid). For example, the time taken to pay a licence fee.

Substantive compliance costs

- Costs that directly lead to the regulated outcomes being sought, usually purchase and maintenance costs. Includes purchase and maintenance of plant and equipment to meet regulatory requirements, fees paid to training providers, provision of information to third parties, and operational purchases such as energy costs.

Delay costs

- Expenses and loss of income incurred by a regulated entity through:
    - An application delay, i.e. the time taken to complete an administrative application requirement that prevents the affected party from commencing its intended operations;
    - An approval delay, i.e. a delay in the time taken by the regulator to communicate a decision regarding the administrative application that prevents the affected party from commencing its intended operations. This includes the time taken to assess and consider an application.