



SUBMISSION

Second review of the Wheat Port Code

9 February 2024

The Grains Council of WAFarmers (**WAFarmersGrains**) welcomes the opportunity to make this submission as part of the Second Review of the *Competition and Consumer (Industry Code – Port Terminal Access (Bulk Wheat)) Regulation 2014* (the **Wheat Port Code** or the **Code**).

WAFarmers represents broadacre farming entities across the grains, livestock and dairy sectors in Western Australia and is the peak body with the largest membership of grain producers in Western Australia.

WAFarmersGrains has elected delegates from all of the different grain growing areas of the State. Accordingly, it is well placed to represent the views of Western Australian grain growers on this matter.

Our substantive points are set out below.

(1) **The Wheat Port Code is not fit-for-purpose in its current form.**

WAFarmersGrains believes that strong and effective regulation of port and related infrastructure is important to ensure there is competition in the Western Australian grains supply chain.

In our view, the Wheat Port Code in its current form falls well short of that:

- it only applies to wheat and does not apply to other grains that represent a significant and increasing part of the grain crop exported annually from the Western Australian market (such as canola, barley, lupins and oats);
- all of the existing port terminal service providers in Western Australia are exempt from Parts 3 to 6 of the Wheat Port Code, meaning that it currently has very limited application in Western Australia;
- there has been a lack of rigour and transparency in the granting of exemptions from the Wheat Port Code and it would appear that political considerations have prevailed over the matters that ought to have been considered having regard to the intention of the Wheat Port Code and the *Competition and Consumer Act 2010* (Cth);
- if any new entrant was to be subject to the Wheat Port Code in a manner different than the incumbents, that could represent a barrier to entry which would harm the competitiveness of the Western Australian market for port terminal services;

- the Wheat Port Code was designed when the market for port terminal services was dominated by large, vertically integrated bulk handlers that grew from former state monopolies, but the nature of that market has changed a lot since that time with the entry of smaller scale business models not contemplated by the Wheat Port Code (eg the use of transshipment vessels and mobile ship loaders);
- there is uncertainty over when many of the Wheat Port Code's provisions apply which has at times enabled port terminal service providers to avoid the intended operation of the Code;
- it does not apply to grain that is shipped to other Australian states which, in recent times with drought in the Eastern States, has been an important feature of the shipping calendar from Western Australian ports;
- it does not allow for the accurate capture of data; and
- there are no serious consequences of contravening the Wheat Port Code.

(2) The Wheat Port Code should be replaced with a more effective regulatory scheme.

In our view, if the Wheat Port Code is to sunset, the competition issues in the market for port terminal services would not be adequately addressed by the *Competition & Consumer Act 2010* (Cth) (the **Act**) alone.

That is because the Act is primarily concerned with offences for the most serious kinds of specific anti-competitive behaviour, which are very hard and expensive to prove, and where the ACCC often lacks standing to act.

We believe that, if the Wheat Port Code is permitted to sunset, it will be important to replace that with some other form of regulation to ensure that the Western Australian supply chain is and remains subject to the forces of competition for the benefit of grain growers.

Regulation of this nature would have the following benefits:

- it would be specifically tailored to the needs of the port terminal services market (whereas the Act is very general in nature);
- it could apply a systems approach where market participants have to demonstrate their compliance with certain principles (ie change the onus);
- the nature and scale of the regulatory burden could be pitched at an appropriate level to ensure that the burden does not outweigh the benefit (which can and should be reviewed at periodic intervals); and
- it could give standing to the ACCC to ensure that the code is understood and complied with.

Crucially, it should apply to all grains and all port operators. It should have clear unambiguous provisions and meaningful enforcement provisions.