

EXPLANATORY STATEMENT

SELECT LEGISLATIVE INSTRUMENT No. 136, 2014

Issued by Authority of the Minister for Agriculture

Competition and Consumer Act 2010

*Competition and Consumer (Industry Code—Port Terminal Access (Bulk Wheat))
Regulation 2014*

Legislative Authority

Section 51AE of the *Competition and Consumer Act 2010* (the Act) provides that regulations may prescribe an industry code or specified provisions of an industry code and declare that the industry code to be a mandatory industry code or a voluntary industry code.

Section 139G of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed for carrying out or giving effect to the Act.

Section 12(1) of the *Wheat Export Marketing Act 2008* (the Marketing Act) provides for the Minister responsible for administering that Act may approve a code as long as it meets the criteria set out in section 12(2) of that Act.

Purpose

The purpose of the Regulation is to:

- ensure that exporters of bulk wheat have fair and transparent access to port terminal services and
- trigger the automatic repeal of the Marketing Act.

The Regulation introduces a mandatory industry code of conduct for access to port terminal facilities for bulk wheat exports, as allowed for under section 12(1) of the *Wheat Export Marketing Amendment Act 2012*. The objectives of the code of conduct, which is a schedule to the Regulation, are to:

- promote the operation of an efficient and profitable bulk wheat export industry;
- provide a regulatory framework to ensure all bulk wheat exporters have port terminal access; and
- reduce unnecessary regulatory burden on port terminal service providers.

Bulk wheat is defined as wheat to be loaded into a ship for export, but does not include wheat in a container or a bag not capable of holding more than 50 tonnes of wheat.

Background

The Australian wheat industry is heavily export-oriented with about 75 per cent of annual production going to overseas markets. In 2012-13, Australia produced 22.5 million tonnes of wheat, valued at \$6.8 billion to the economy.

The Marketing Act removed the previous single-desk marketing arrangements in 2008 and introduced competition for marketing of Australian bulk wheat exports. The current

regulatory arrangements for bulk wheat export marketing were introduced in 2012 when the Marketing Act was amended.

Since 2008, the industry has benefited from the presence of competition during periods of record wheat production. However, the composition of the industry has evolved and there is now a risk that the benefits of these arrangements no longer justify the costs. Indeed, industry has criticised the current arrangements as being administratively burdensome, inequitable, poorly targeted and restricting Australia's competitiveness in the global market.

The arrangements introduced in 2008 were reviewed by the Productivity Commission in 2010 and it found that industry had successfully transitioned to a less regulated environment. The Commission recommended that the Marketing Act be removed in its entirety on 30 September 2014. Many stakeholders expressed concern that the industry was not yet ready to rely on general competition law and argued for a level of industry-specific regulation to remain.

Owners and operators of port terminal facilities control significant bottle-neck infrastructure required for export of bulk wheat. There is concern within industry over behaviours in the supply chain related to potential abuse of market power and monopolistic behaviour, particularly by port terminal operators with associated wheat export businesses. The need for continued regulatory oversight was recognised in the *Wheat Export Marketing Amendment Act 2012* which provides that a mandatory code of conduct, if in place by 1 October 2014, will replace the Marketing Act.

Impact and Effect

The Regulation applies to the providers of services supplied via port facilities capable of handling bulk wheat and exporters that wish to use those services. It regulates the commercial behaviour between port terminal service providers and exporters, and facilitates the ACCC's role as the regulator (e.g. by requiring certain records to be kept for several years).

Approximately ten port terminal service providers are likely to be affected by the Regulation in the first two years of operation. The financial impact on these service providers to comply with all the requirements of the Regulation is estimated at less than \$340 000 per operator per annum. When compared to the existing arrangements this is a reduction in regulatory compliance costs of about \$260 000 per operator per annum for those service providers that have access undertakings in place with the ACCC, as required by the Marketing Act.

Provisions within the Regulation provide for the Minister for Agriculture and the ACCC to exempt an operator of port terminal services from Part 3 to Part 6 of the code, provided certain conditions are met. An exemption would significantly reduce a service provider's level of compliance requirements to an estimated cost of less than \$20 000 per operator per annum. The lower level of compliance consists of publishing policies and procedures for managing demand for services and listing information about ships that are scheduled to load grain at its facility. To ensure orderly implementation, the code will not apply to those service providers that do not have an access undertaking in place immediately before the code takes effect, until 1 October 2015. It is expected that at least five operators will obtain an exemption during the 12-month transitional period provided for under the Regulation, and therefore minimise compliance costs.

Total regulatory impact of the Regulation on industry, allowing for expected exemptions, has been estimated at \$1.8 million per annum. Compliance costs under the existing arrangements total \$2.41 million per annum, resulting in a net reduction in regulatory burden of approximately \$0.63 million per annum.

Consultation

On 3 June 2014, the Minister for Agriculture released the early-assessment Regulation Impact Statement for public consultation. It was published, along with a draft mandatory code of conduct and consultation paper, at www.daff.gov.au/portcode.

An email alert was also sent to more than 60 industry stakeholders, in addition to posts on social media, through the Department's twitter account. The Minister's media release was picked up by a number of media outlets and featured in the rural press.

From 3 to 24 June 2014, representatives from the Department of Agriculture, along with the ACCC, held meetings with a broad range of stakeholders across the country. As a result of the high level of industry interest, it met with more than 50 interested stakeholders, including the Code Development Advisory Committee, the Australian Grain Exporters Association and state farming groups. A total of 24 written submissions were received by the closing date of 24 June 2014.

The Department also consulted the departments of the Prime Minister and Cabinet and the Treasury in preparing the regulation.

As a result of the consultation, the draft code was modified to better address stakeholder concerns and Australian Government policy objectives. The Regulatory Impact Statement for the mandatory Code of Conduct for Grain Export Terminals was modified accordingly and approved by the Office of Best Practice Regulation (ID 16234).

The Regulation is compatible with the human rights and freedoms recognised or declared under section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A full statement of compatibility is set out in Attachment B.

Details/ Operation

The Regulation will be a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulation is to commence on 30 September 2014.

Details of the *Competition and Consumer (Industry Code—Port Terminal Access (Bulk Wheat)) Regulation 2014*

Section 1 – Name of Regulation

This section provides for the title of the Regulation to be *Competition and Consumer (Industry Code—Port Terminal Access (Bulk Wheat)) Regulation 2014* (Code of Conduct).

Section 2 – Commencement

This section provides for the Regulation to commence on 30 September 2014.

Section 3 – Authority

This section notes the legislative authority for making the Regulation as the *Competition and Consumer Act 2010*.

Section 4 – Code of Conduct

This section provides for the code set out in Schedule 1 being a prescribed mandatory code for the purposes of section 51AE of the *Competition and Consumer Act 2010*.

Section 5 – Review of operation of this Regulation

This section provides for the Minister to cause a review of the operation of the Regulation to begin before the end of the third year of operation of the Regulation. The review must consider a range of specified matters, including whether the code should be repealed or amended.

Section 6 – Further review of operation of this regulation

This section provides for the Minister to cause a further review of the operation of the Regulation should it continue to be in operation for more than six years. The review must begin between the sixth and eighth years of operation of the Regulation.

Schedule 1 – Port Terminal Access (Bulk Wheat) Code of Conduct

Part 1 – Definitions and Application

Clause 1 specifies the name of the mandatory code of conduct to be Port Terminal Access (Bulk Wheat) Code of Conduct.

Clause 2 specifies its purpose, which is to regulate the conduct of port terminal service providers so as to ensure that exporters of bulk wheat have fair and transparent access to port terminal services.

Clause 3 specifies the definitions in the Code of Conduct. Notes are provided on each definition below:

ACCC

This definition provides that ‘ACCC’ means the Australian Competition and Consumer Commission.

access agreement

This definition provides that ‘access agreement’ means an agreement between a port terminal service provider and an exporter for the supply of a port terminal service.

Act

This definition provides that ‘Act’ means the *Competition and Consumer Act 2010*.

associated entity

This definition provides that ‘associated entity’ has the meaning given by section 50AAA of the *Corporations Act 2001*.

bulk wheat

This definition provides that ‘bulk wheat’ means 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.

capacity of a port terminal facility

This definition provides that ‘capacity of a port terminal facility’ means the total amount of grain in tonnes that can be loaded onto a ship during a shipping window, as determined by the port terminal service provider that owns or operates the facility.

capacity allocation system

This definition provides that ‘capacity allocation system’ means a system that a port terminal service provider uses to allocate, to exporters, capacity of a port terminal facility owned or operated by the provider.

entity

This definition provides that ‘entity’ has the meaning given by section 64A of the *Corporations Act 2001*.

exempt service provider

This definition provides that ‘exempt service provider’ means a port terminal service provider exempted under clause 5.

exporter

This definition provides that ‘exporter’ means an entity seeking access to, or using, port terminal services for the purpose of exporting bulk wheat.

negotiation request

This definition provides that ‘negotiation request’ has the meaning given by paragraph 11(6)(b). That is, a request, in writing, from an exporter to a port terminal service provider to commence negotiations on the terms and conditions of access to the port terminal facility.

port loading protocol

This definition provides that ‘port loading protocol’ means a statement of a port terminal service provider that sets out the port terminal service provider’s policies and procedures for managing demand for its port terminal services.

port terminal facility

This definition provides that ‘port terminal facility’ means a ship loader that is:

- (a) at a port; and
 - (b) 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:
- (c) an intake/receival facility;
 - (d) a grain storage facility;
 - (e) a weighing facility;
 - (f) a shipping belt.

port terminal service

This definition provides that ‘port terminal service’ means a service (within the meaning of Part IIIA of the *Competition and Consumer Act 2010*) provided by means of a port terminal facility, and includes the use of a port terminal facility.

port terminal service provider

This definition provides that ‘port terminal service provider’ means the owner or operator of a port terminal facility that is used, or is to be used, to provide a port terminal service.

PPS Register

This definition provides that ‘PPS Register’ means the Personal Property Securities Register established under section 147 of the *Personal Property Securities Act 2009*.

reference prices

This definition provides that ‘reference prices’ means the standard prices a port terminal service provider charges for port terminal services on the standard terms at a port where the port terminal service provider owns or operates a port terminal facility.

shipping slot

This definition provides that ‘shipping slot’ means a specific time allocated for the loading of a ship.

shipping window

This definition provides that ‘shipping window’ means a period of a week, fortnight or month, as determined by a port terminal service provider, in which shipping slots are allocated to exporters in order to ship bulk wheat.

standard terms

This definition provides that ‘standard terms’ means the standard terms and conditions, developed by a port terminal service provider, on which port terminal services are made available at a port where the port terminal service provider owns or operates a port terminal facility.

Clause 4 specifies the general application of the Code of Conduct. It sets out the circumstances when particular parts and clauses do not apply to particular service providers. It also provides that the code does not immediately apply to some service providers.

Clause 5 specifies the factors the Minister for Agriculture and, separately, the Australian Competition and Consumer Commission (ACCC) must consider when determining a port terminal service provider can be classified an exempt service provider. An exempt port terminal service provider must meet the reporting requirements stated in Part 2 of the Regulation but is exempted from the requirements in Parts 3 to 6 as set out in Clause 4 (8) of the Regulation. Sub clause 5 (2) includes a note clarifying the circumstances in which the ACCC may make such an exemption determination.

Part 2 – General obligations of port terminal service providers and exporters

Clause 6 specifies that a port terminal service provider and an exporter must at all times deal with each other in good faith.

Clause 7 specifies that the port terminal service provider has to publish on its website a port loading statement for each ship scheduled to load grain at the terminal each business day, including the name of the grain exporter and the type and quantity of the grain to be loaded. This information must be also provided to the ACCC.

Clause 8 specifies that the port terminal service provider must publish on its website its policies and procedures for managing demand of its port terminal services.

Clause 9 specifies that the port terminal service provider must publish on its website its current standard terms and reference prices for each port terminal facility that it owns or operates.

Part 3 – Access to port terminal services provided by a port terminal service provider Division 1 – General matters

Clause 10 specifies that the port terminal service provider not discriminate or hinder an exporter's access to port terminal facilities.

Clause 11 specifies the conditions an exporter must meet and the circumstance whereby a port terminal service provider must either enter into a port services access agreement with an exporter or enter into negotiations regarding an access agreement, the conditions in which the exporter has an opportunity to provide additional information to the port terminal service provider and the timeframes for negotiating the access agreement.

Clause 12 specifies the timeframes for the port terminal service provider when dealing with an incomplete application from an exporter.

Clause 13 specifies the requirements of an access agreement, including that an access agreement must be based on standard terms and reference prices, the terms negotiated and agreed by the parties, or as determined by an arbitrator.

Clause 14 specifies the process of dealing with disputes during negotiations for an access agreement.

Clause 15 specifies the arbitration process when negotiating the future terms of agreements for port access between a port terminal service provider and an exporter.

Clause 16 specifies the conditions under which the port terminal service provider must provide information, during negotiations, that has been requested by the exporter.

Clause 17 specifies the conditions when negotiations can be taken as concluded. Sub clause (3) allows the bulk wheat exporter to make a new application under Clause 11 if negotiations with the port terminal service provider ended without the parties entering into an access agreement.

Division 2 – Mediation

Clause 18 specifies the rules of mediation to resolve disputes. The rules specify the time and place for mediation, and the use of proxies who are able to enter into an agreement on behalf of the party. The clause also details the requirements for a party to be taken as trying to resolve a dispute

Clause 19 specifies the conditions for terminating mediation between the port terminal service provider and the exporter. Sub clause (5) requires that the ACCC must be also notified if mediation of a dispute has been terminated.

Clause 20 specifies how the costs of mediation should be shared between the parties.

Clause 21 specifies that the right to take legal proceedings is not affected by the access agreement.

Division 3 – Standard terms and reference prices

Clause 22 specifies that a dispute resolution mechanism must be included in a port terminal service provider's standard terms. The clause provides the parties with an option to ask the Institute of Arbitrators and Mediators Australia to appoint a mediator if the parties cannot agree about who should be the mediator.

Clause 23 specifies that a port terminal service provider may vary its standard terms and reference prices provided details of the variation are made available on its website at least 20 business days before the variation is due to commence. The clause provides that the variation would not apply to existing access agreements unless explicitly allowed for in the agreement.

Part 4 – Port loading protocols of port terminal service providers

Division 1 – General Requirements

Clause 24 specifies that the port terminal service provider must make available on its website its port loading protocol for each port terminal that it owns or operates.

Clause 25 specifies the port terminal service provider must have a port loading protocol that includes information about the terminal's capacity allocation system and which must be published on its website. If the system allocates capacity more than six months in advance, the port terminal service provider must also obtain ACCC approval of the capacity allocation

system for that particular terminal. The section also specifies the matters the ACCC must have regard in deciding whether or not to approve a port terminal service provider's capacity allocation system.

Clause 26 specifies that the port terminal service provider must comply with the port loading protocols and capacity management system for that facility.

Division 2 – Varying a port loading protocol

Clause 27 specifies the conditions and timeframes under which the port terminal service provider may vary its port loading protocol. The clause separates variations into two categories, variations to approved capacity allocation system and all other miscellaneous variations. Variations to an approved capacity allocation system must be approved by the ACCC. The requirements for all other variations are set out in sub clause (4).

Part 5 – Port terminal service provider to publish certain information

Clause 28 specifies the conditions under which the port terminal service provider must report on its website the port terminal's total expected capacity. The clause sets the initial reporting period to start from 8 October 2014 to 30 September 2015. Subsequent reporting periods will commence from 1 October 2015 and are for a period of 12 months. The clause specifies that a port terminal service provider must update this information on its website at least once a week.

Clause 29 specifies that the performance indicators that the port terminal service provider must publish no later than two weeks after the beginning of each month. That is, the port's monthly allocated capacity and loaded amount, number of demurrage days for each ship, number of ships that failed survey and an explanation if the order for loading ships changes.

Clause 30 specifies that the port terminal service provider publish weekly on its website the total amount of bulk wheat, barley, canola and any other bulk grains held at the port, together with the names of the top three grades of wheat, at the end of the previous week.

Part 6 – Record keeping

Clause 31 specifies that the port terminal service provider retain the access agreements entered into by the provider, and documents evidencing variations made to the agreements, for at least six years.

Clause 32 specifies that both the port terminal service provider and the exporter retain records relating to disputes in relation to the access agreement for at least six years after the dispute is concluded.

Clause 33 specifies the records that the port terminal service provider must create in relation to the provider's port terminal services acquired by an exporter and maintain for at least six years from the date that the record is created.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Competition and Consumer (Industry Code—Port Terminal Access (Bulk Wheat)) Regulation 2014

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The purpose of the Regulation is to ensure that exporters of bulk wheat have fair and transparent access to port terminal services and to trigger the automatic repeal of the *Wheat Export Marketing Act 2008* (the Marketing Act). The Regulation, and the consequential repeal of the Marketing Act, will provide the necessary protection against potential abuse of market power and responds to increased competition by reducing the regulatory burden, thus supporting competition.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

**The Hon. Barnaby Joyce MP
Minister for Agriculture**