



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

Select Legislative Instrument No. 136, 2014

I, General the Honourable Sir Peter Cosgrove AK MC (Ret'd), Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following regulation.

Dated 18 September 2014

Peter Cosgrove
Governor-General

By His Excellency's Command

Barnaby Joyce
Minister for Agriculture
for the Minister for Small Business

OPC60424 - E

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1 Name of regulation

This regulation is the *Competition and Consumer (Industry Code—Port Terminal Access (Bulk Wheat)) Regulation 2014*.

2 Commencement

This regulation commences on 30 September 2014.

3 Authority

This regulation is made under section 51AE of the *Competition and Consumer Act 2010*.

4 Code of conduct

For section 51AE of the *Competition and Consumer Act 2010*, the code set out in Schedule 1:

- (a) is prescribed; and
- (b) is a mandatory code of conduct.

5 Review of operation of this regulation

- (1) The Minister administering section 1 of the *Farm Household Support Act 2014* must cause a review of the operation of this regulation to be undertaken.
- (2) The review must start before the end of the period of 3 years after the commencement of this section.
- (3) The review must identify opportunities to ensure well-managed deregulation to free and open competition in the Australian wheat export market, while maintaining Australia's international reputation for quality and reliability. In particular, the review must consider whether there are appropriate alternative mechanisms to achieve this outcome.
- (4) In conducting the review, consideration must be given to the following:

Section 5

- (a) whether the code should be repealed and the timing of any such repeal;
 - (b) whether the code should be amended and the timing of any such amendment;
 - (c) the ongoing appropriateness of the power to exempt cooperatives under subclause 5(1) of the code;
 - (d) the effectiveness of, and level of competition existing under, current arrangements for the transport, storage and distribution of wheat in contributing to a sustainable supply chain from farm gate to export load port;
 - (e) the availability and transparency of relevant market information to participants in the export supply chain;
 - (f) the promotion of the economically efficient operation of, use of and investment in port terminal facilities;
 - (g) the promotion of competition in upstream and downstream markets;
 - (h) the ongoing appropriateness of all port service providers making available a port loading statement each business day under clause 7 of the code;
 - (i) the ongoing appropriateness of the additional regulatory requirements under Parts 3 to 6 of the code;
 - (j) whether there is ongoing justification to continue the operation of the code over and above what is provided under Part IIIA of the *Competition and Consumer Act 2010*;
 - (k) any other relevant matters.
- (5) In conducting the review, the following matters must be taken into account:
- (a) the use of and access to port terminal facilities (within the meaning of the code) during the 4 years preceding the commencement of the review;
 - (b) any changes to market conditions in the wheat export supply chain, including economic trends that may have impacted on the operation of the wheat export market;
 - (c) the legitimate interest of all relevant stakeholders.

6 Further review of operation of this regulation

- (1) If this regulation continues in operation for 6 years or more after the commencement of this section, the Minister administering section 1 of the *Farm Household Support Act 2014* must cause a further review of the operation of this regulation to be undertaken.
- (2) The review must start not earlier than 6 years and not later than 8 years after the commencement of this section.
- (3) The review must take into account the matters set out in subclauses 5(3), (4) and (5).

Clause 1

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

Note: See section 4.

Part 1—Preliminary

1 Name of code

This code is the *Port Terminal Access (Bulk Wheat) Code of Conduct*.

2 Purpose of code

The purpose of this code is to regulate the conduct of port terminal service providers to ensure that exporters of bulk wheat have fair and transparent access to port terminal services.

3 Definitions

In this code:

ACCC means the Australian Competition and Consumer Commission.

access agreement means an agreement between a port terminal service provider and an exporter for the supply of a port terminal service.

Note: For requirements relating to access agreements, see Part 3 of this code.

Act means the *Competition and Consumer Act 2010*.

associated entity has the meaning given by section 50AAA of the *Corporations Act 2001*.

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.

Clause 3

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 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.

Note: For requirements relating to capacity allocation systems, see Part 4 of this code.

entity has the meaning given by section 64A of the *Corporations Act 2001*.

exempt service provider means a port terminal service provider exempted under clause 5.

exporter means an entity seeking access to, or using, port terminal services for the purpose of exporting bulk wheat.

negotiation request has the meaning given by paragraph 11(6)(b).

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.

Note: For requirements relating to port loading protocols, see Part 4 of this code.

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 means a service (within the meaning of Part IIIA of the *Competition and Consumer Act 2010*) provided by

Clause 4

means of a port terminal facility, and includes the use of a port terminal facility.

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 means the Personal Property Securities Register established under section 147 of the *Personal Property Securities Act 2009*.

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 means a specific time allocated for the loading of a ship.

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 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.

4 Application of code

Application of certain parts and clauses

- (1) Part 3 of this code applies to the following:
 - (a) an application, and matters relating to the application, made on or after 30 September 2014 by an exporter to a port terminal service provider to enter into, renew or extend an access agreement;
 - (b) an access agreement that is entered into on or after 30 September 2014;

Clause 4

- (c) an access agreement that was entered into before 30 September 2014 and that is renewed or extended on or after 30 September 2014.
- (2) Clause 31 of this code (record-keeping in relation to access agreements) applies to the following access agreements:
 - (a) an access agreement referred to in subclause (1);
 - (b) an access agreement that was entered into before 30 September 2014 that is varied on or after 30 September 2014.
- (3) Clause 32 of this code (record-keeping in relation to disputes) applies to disputes about access agreements referred to in subclause (1).
- (4) Clause 33 of this code (record-keeping in relation to port terminal services acquired by an exporter) applies to a port terminal service acquired by an exporter on or after 30 September 2014 in accordance with the terms of an access agreement referred to in subclause (1) or paragraph (2)(b).
- (5) For the purposes of applying Part 3 of this code to the renewal or extension of an access agreement, references in that Part to an application to enter into an access agreement or negotiations about the terms of an access agreement are to be read as references to an application to renew or extend an access agreement, or an application to enter into negotiations about the terms on which an access agreement is renewed or extended, as the case requires.

Port terminal service providers to which the code or parts of the code do not immediately apply

- (6) This code does not apply to a port terminal service provider in respect of port terminal services provided by means of a particular port terminal service facility until 1 October 2015 if, immediately before 30 September 2014:
 - (a) the port terminal service provider was providing, or intended to provide, those services by means of that facility; and
 - (b) there was no undertaking given by the provider, and accepted by the ACCC, in force in relation to those services provided by means of that facility.

Clause 5

- (7) To the extent that, because of the operation of subclause (6), this code starts to apply to a port terminal service provider on 1 October 2015, references in subclauses (1), (2) and (4) to 30 September 2014 are taken to be references to 1 October 2015.
- (8) If a determination under clause 5 that a port terminal service provider is an exempt service provider of port terminal services provided by means of a specified port terminal facility is in force, Parts 3 to 6 of this code do not apply to the provider in relation to the port terminal services provided by means of the specified port terminal facility.

5 Exempt service providers

- (1) The Minister administering section 1 of the *Farm Household Support Act 2014* (the **relevant Minister**) may, in writing, determine that a port terminal service provider is an exempt service provider of port terminal services provided by means of a specified port terminal facility if the relevant Minister is satisfied that the provider is a cooperative that has:
 - (a) grain-producer members who represent at least a two-thirds majority of grain-producers within the grain catchment area for the port concerned; and
 - (b) sound governance arrangements that ensure the business functions efficiently and that allow its members to influence the management decisions of the cooperative.
- (2) The ACCC may, in writing, determine that a port terminal service provider is an exempt service provider of port terminal services provided by means of a specified port terminal facility.

Note: The ACCC may, at a particular time, make a determination in respect of a port terminal service provider even if the code does not apply to the provider at that time because of the operation of subclause 4(6).
- (3) In making a determination under subclause (2), the ACCC must have regard to the following matters:
 - (a) the legitimate business interests of the port terminal service provider;
 - (b) the public interest, including the public interest in having competition in markets;

- (c) the interests of exporters who may require access to port terminal services;
 - (d) the likelihood that exporters of bulk wheat will have fair and transparent access to port terminal services;
 - (e) the promotion of the economically efficient operation and use of the port terminal facility;
 - (f) the promotion of efficient investment in port terminal facilities;
 - (g) the promotion of competition in upstream and downstream markets;
 - (h) whether the port terminal service provider is an exporter or an associated entity of an exporter;
 - (i) whether there is already an exempt service provider within the grain catchment area for the port concerned;
 - (j) any other matters the ACCC considers relevant.
- (4) If the relevant Minister receives statements from one or more groups of grain producers that they are disadvantaged by a determination made under subclause (1), the relevant Minister may undertake a period of public consultation to consider whether or not the continuation in force of the determination would be in the interests of the grain producers within the grain catchment area for the port concerned.
- (5) The relevant Minister may revoke a determination made under subclause (1) if:
- (a) the relevant Minister is no longer satisfied of a matter mentioned in paragraph (1)(a) or (b); or
 - (b) the relevant Minister is satisfied, based on a public consultation undertaken under subclause (4), that the continuation in force of the determination would not be in the interests of the grain producers within the grain catchment area for the port concerned.
- (6) The ACCC may revoke a determination made under subclause (2) if, after having regard to the matters mentioned in paragraphs (3)(a) to (j), the ACCC is satisfied that the reasons for granting the exemption no longer apply.

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

6 Obligation to deal in good faith

A port terminal service provider and an exporter must at all times deal with each other in good faith.

7 Port terminal service provider to publish and make available loading statement

- (1) A port terminal service provider must on each business day make available to the public on its website a statement (a *port loading statement*) that lists a unique slot reference number for each ship scheduled to load grain using a port terminal service provided at a port terminal facility owned or operated by the port terminal service provider.
- (2) The port loading statement must include the following information for each listed ship:
 - (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;

Clause 8

- (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.
- (3) A port terminal service provider must provide the ACCC with the most current port loading statement for each business day.
 - (4) The port loading statement must be provided to the ACCC in the form and manner required by the ACCC.

8 Port terminal service providers to publish policies and procedures for managing demand for port terminal services

- (1) A port terminal service provider must publish on its website a statement setting out the provider's policies and procedures for managing demand for the provider's port terminal services at each port terminal facility that the provider owns or operates.
- (2) The statement must include the port terminal service provider's policies and procedures relating to the nomination and acceptance of ships to be loaded using those port terminal services.

9 Port terminal service providers to have standard terms and reference prices

- (1) A port terminal service provider must make available to the public on its website its current standard terms and reference prices for each port terminal facility that it owns or operates.
- (2) A port terminal service provider's standard terms and reference prices for a port terminal facility may include different standard terms and reference prices for different seasons or periods of time.

Note: For additional requirements relating to standard terms and reference prices for a port terminal service providers who are not an exempt service provider, see Division 3 of Part 3.

Part 3—Access to port terminal services provided by a port terminal service provider

Division 1—General matters

10 Port terminal service provider not to discriminate or hinder exporter's access to port terminal services

- (1) In providing a port terminal service to an exporter (the *first exporter*), a port terminal service provider must not discriminate in favour of itself, or an exporter of which it is an associated entity, except to the extent that the cost of providing the same port terminal service to the first exporter is higher.
- (2) A port terminal service provider must not engage in conduct for the purpose of preventing or hindering an exporter's access to port terminal services.
- (3) For the purposes of subclause (2), the withdrawal or suspension of services by a port terminal service provider in accordance with the terms of an access agreement with an exporter is not regarded as hindering that exporter's access to port terminal services.

11 Exporters to have access to port terminal services provided by a port terminal service provider

Access to port terminal services to be provided under an access agreement

- (1) A port terminal service provider must enter into an access agreement or enter into negotiations about the terms of an access agreement with an exporter if:
 - (a) the exporter has applied to the port terminal service provider to enter into an access agreement; and
 - (b) the port terminal service provider is satisfied on reasonable grounds that the exporter's application is complete (see clause 12); and

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Part 3 Access to port terminal services provided by a port terminal service provider

Division 1 General matters

Clause 11

- (c) the port terminal service provider is satisfied on reasonable grounds that:
 - (i) the exporter is solvent; and
 - (ii) the exporter has established the identity of its legal owners; and
 - (iii) the exporter is able to meet actual or potential liabilities under an access agreement with the port terminal service provider; and
 - (iv) the exporter is not currently in breach of an access agreement with the port terminal service provider because of financial problems; and
 - (v) the exporter has not been in breach of an access agreement with the port terminal service provider because of financial problems during the 2 years immediately before the exporter applied under paragraph (a).
- (2) In satisfying itself for the purposes of paragraph (1)(c), the port terminal service provider may:
 - (a) have regard to the exporter's previous credit history with the provider; and
 - (b) request the exporter to consent to the provider engaging a credit reporting agency to undertake a credit review of the exporter, including a search of the PPS Register; and
 - (c) request the exporter to provide:
 - (i) details of the exporter's credit rating; and
 - (ii) the exporter's most recent financial statements; and
 - (iii) references from commercial trade referees.

When port terminal service provider is not satisfied of matters mentioned in paragraph (1)(c)

- (3) If a port terminal service provider is not satisfied on reasonable grounds of the matters mentioned in paragraph (1)(c), the provider must:
 - (a) notify the exporter, in writing, of the reasons within 5 business days of:

-
- (i) if clause 12 applied to the exporter's application—the day the exporter was notified by the port terminal service provider that the information provided was sufficient; or
 - (ii) in all other cases—the day the exporter applied to the port terminal service provider to enter into an access agreement; and
 - (b) give the exporter an opportunity to provide additional information.
- (4) An exporter that is given an opportunity to provide additional information under paragraph (3)(b), must provide the information within:
- (a) 7 business days after the exporter is notified; or
 - (b) such greater number of days as is agreed by the port terminal service provider.
- (5) If:
- (a) an exporter is given an opportunity to provide additional information under paragraph (3)(b); and
 - (b) the exporter provides the information within the period required under subclause (4);
- the port terminal service provider must make a decision as to whether the provider is satisfied on reasonable grounds of the matters mentioned in paragraph (1)(c) within 5 business days of the information being provided.

Note: A dispute about a decision under this subclause may be dealt with under clause 14.

When port terminal service provider is satisfied of matters mentioned in paragraph (1)(c)

- (6) A port terminal service provider satisfied on reasonable grounds of the matters mentioned in paragraph (1)(c) must:
- (a) offer to enter into an access agreement with the exporter on the standard terms and reference prices; and
 - (b) if, after the offer is made, the exporter makes a request (a **negotiation request**) in writing—enter into negotiations with the exporter about the terms of an access agreement.

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Part 3 Access to port terminal services provided by a port terminal service provider

Division 1 General matters

Clause 12

- (7) The offer mentioned in paragraph (6)(a) must be made by the port terminal service provider:
- (a) if the port terminal service provider made a decision under subclause (5) (additional information)—on the day the decision was made; or
 - (b) in all other cases—within 5 business days of:
 - (i) if clause 12 (incomplete applications) applied to the exporter’s application—the day the exporter was notified by the port terminal service provider that the information provided was sufficient; or
 - (ii) otherwise—the day the exporter applied to the port terminal service provider to enter into an access agreement.
- (8) The day on which negotiations must be entered with the exporter under paragraph (6)(b) is the day the negotiation request is received by the port terminal service provider.

12 Dealing with an incomplete application

If an exporter has applied to a port terminal service provider under paragraph 11(1)(a) and the port terminal service provider is not satisfied on reasonable grounds that the exporter’s application is complete, the provider must:

- (a) within 5 business days after receipt of the application, notify the exporter, in writing, of the additional information required to be provided by the exporter; and
- (b) if additional information is provided by the exporter—within 3 business days after receipt of the additional information, notify the exporter, in writing, whether the information provided is sufficient.

13 Terms of an access agreement

- (1) The terms of an access agreement between a port terminal service provider and an exporter (the *parties*) must:
- (a) be either:
 - (i) the standard terms and reference prices or the terms negotiated and agreed by the parties; or

- (ii) the terms determined by an arbitrator under clause 15;
and
 - (b) provide that the access agreement incorporates the provider's port loading protocols as in force from time to time (see Part 4 of this code).
- (2) The terms of an access agreement must not purport to restrict a party from disclosing information to the ACCC.
- (3) An access agreement may require a party to the agreement to retain records in addition to those mentioned in Part 6 of this code.

14 Dealing with disputes during negotiations

- (1) A party negotiating an access agreement may request, in writing, the other party to resolve a dispute about one or more of the following:
- (a) a decision made under subclause 11(5);
 - (b) a decision made under clause 12;
 - (c) the proposed terms of the access agreement.
- (2) The request must be made before the negotiations end under clause 17.
- (3) Within 5 business days after receiving the request, senior representatives from each party must meet and use reasonable endeavours to resolve the dispute.
- (4) If the dispute is not resolved, the parties may mutually agree to undertake mediation.
- (5) If mediation is required under subclause (4), the party that requested resolution of the dispute under subclause (1) (the **first party**) must tell the other party in writing:
- (a) the nature of the dispute; and
 - (b) what outcome the first party wants; and
 - (c) what action the first party thinks will settle the dispute.
- (6) Either party may ask the Institute of Arbitrators & Mediators Australia to appoint a mediator. Any mediation is subject to Division 2 of this Part.

Clause 15

- (7) In conducting mediation, the mediator must take into account written representations made by a person, if the mediator considers that the person has a sufficient interest in the terms of the access agreement concerned.

15 Arbitration of terms of agreements

- (1) A party negotiating an access agreement may, by notice in writing to the other party, refer the terms of the agreement to be determined by an independent arbitrator appointed by the parties.
- (2) If a notice is given to the other party under subclause (1), the party that gave the notice (the *first party*) must notify the ACCC, in writing, of the following matters when the notice is given:
- (a) the first party's intention to proceed to arbitration;
 - (b) the nature of any dispute between the parties;
 - (c) whether the parties have agreed on the appointment of an arbitrator.
- (3) If the parties fail to agree on the appointment of an arbitrator within 15 business days after the notice is given, the first party must request the Institute of Arbitrators & Mediators Australia to appoint an independent arbitrator.
- (4) The arbitrator must determine the terms of the access agreement and notify the parties of the terms. The port terminal service provider concerned must offer to enter into an access agreement with the exporter concerned on the terms determined by the arbitrator within 3 business days of being notified of the terms.
- (5) In determining the terms of the access agreement, the arbitrator must take into account written representations made by a person, if the arbitrator considers that the person has a sufficient interest in the terms of the agreement.
- (6) The parties to arbitration under this clause:
- (a) must bear their own costs of attending the arbitration; and
 - (b) are equally liable for the following costs of arbitration unless they agree otherwise:
 - (i) the cost of the arbitrator;

- (ii) the cost of room hire;
- (iii) the cost of any additional input (including expert reports) agreed by both parties to be necessary to the conduct of the arbitration; and
- (c) are liable for any other costs determined by the arbitrator.

16 Exporter may request information to be provided during negotiations

- (1) An exporter may request a port terminal service provider to provide information held by the provider for the purpose of negotiating the terms of an access agreement.
- (2) The port terminal service provider must comply with a request mentioned in subclause (1), within 20 business days of receiving the request, if:
 - (a) the information requested is not confidential or commercially sensitive, as determined by the provider; and
 - (b) the information does not relate to another exporter; and
 - (c) providing the information would not be unduly onerous for the provider having regard to the following:
 - (i) the operational, commercial and logistical information that an exporter may require to use a port terminal facility;
 - (ii) whether the provider has access to and control of the information and whether a third party would need to be engaged to gather, collate or present the information;
 - (iii) the staffing, technical and financial capability of the provider to obtain and provide the information;
 - (iv) the volume of information and time-frame within which it is requested.

17 When negotiations are taken to end

- (1) Negotiations between an exporter and a port terminal service provider end on the earliest of the following days:
 - (a) the day the exporter and provider enter into an access agreement;

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Division 1 General matters

Clause 17

- (b) the day the exporter provides written notification to the provider that it no longer wishes to enter into an access agreement;
 - (c) the day that is 60 business days after the negotiation request concerned was made, or such later day as is agreed by the exporter and the provider.
- (2) For the purpose of calculating the number of days for paragraph (1)(c), the following days are to be disregarded:
 - (a) each day the exporter and port terminal service provider are involved in resolving a dispute in accordance with clause 14;
 - (b) the days during the period commencing on the day a notice is given under subclause 15(1) and ending on the day the exporter and provider enter into an agreement on the terms determined by the arbitrator under subclause 15(4).
- (3) If negotiations between an exporter and a port terminal service provider end without the exporter and provider entering an access agreement, the exporter may make a new application under clause 11 to the provider to enter into an access agreement.

Note: If a new application is made, the provisions of this Part apply to the new application (for example, the time period referred to in paragraph (1)(c) runs from the date of a negotiation request in respect of the new application).

Division 2—Mediation

18 General rules applicable to mediation

- (1) The rules in this clause apply to mediation:
 - (a) conducted under clause 14; or
 - (b) provided for in an access agreement entered into on a port terminal service provider's standard terms.
- (2) The mediator may decide the time and place (which must be in Australia) for mediation.
- (3) The parties must attend the mediation and try to resolve the dispute.
- (4) For subclause (3), a party is taken to attend mediation if the party is represented at the mediation by a person who has the authority to enter into an agreement to settle the dispute on behalf of the party.
- (5) For subclause (3), a party will be taken to be trying to resolve a dispute if the party does all of the following:
 - (a) attends and participates in meetings at reasonable times;
 - (b) at the beginning of the mediation process, makes the party's intention clear as to what the party is trying to achieve through the mediation process;
 - (c) observes any obligations relating to confidentiality that apply during or after the mediation process;
 - (d) does not take any action during the dispute that has the effect of damaging the reputation of the system of providing access to port terminal services;
 - (e) takes action during the dispute, if refusal to act would have the effect of damaging the reputation of the system of providing access to port terminal services.

19 Termination of mediation

- (1) This clause applies if:
 - (a) at least 20 business days have elapsed after the start of mediation of a dispute; and

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Division 2 Mediation

Clause 20

- (b) the dispute has not been resolved.
- (2) If either party asks the mediator to terminate the mediation, the mediator must do so.
- (3) Subject to subclause (2), the mediator may terminate the mediation at any time unless satisfied that a resolution of the dispute is imminent.
- (4) If the mediator terminates the mediation of a dispute under this clause, the mediator must issue a certificate to each party stating:
 - (a) the names of the parties; and
 - (b) the nature of the dispute; and
 - (c) that the mediation has finished; and
 - (d) that the dispute has not been resolved.
- (5) If the mediation was in relation to a dispute mentioned in subclause 14(1) and the mediation is terminated, the party that requested resolution of the dispute under subclause 14(1) must notify the ACCC that the mediation has been terminated.

20 Costs of mediation

The parties to mediation under this code:

- (a) must bear their own costs of attending mediation; and
- (b) are equally liable for the following costs of mediation unless they agree otherwise:
 - (i) the cost of the mediator;
 - (ii) the cost of room hire;
 - (iii) the cost of any additional input (including expert reports) agreed by both parties to be necessary to the conduct of the mediation; and
- (c) are liable for any other costs determined by the arbitrator.

21 Right to take legal proceedings not affected

Nothing in this Part affects the right of a party to an access agreement to institute legal proceedings under the agreement.

Division 3—Standard terms and reference prices

22 Standard terms to include dispute resolution mechanism

- (1) A port terminal service provider's standard terms must include a dispute resolution mechanism to deal with disputes between the parties to an access agreement to which the provider is a party.
- (2) The dispute resolution mechanism must include a mechanism for mediation of disputes and allow parties to request mediation of a dispute.
- (3) The mechanism for mediation of disputes must provide:
 - (a) that if the parties cannot agree within a time specified in the agreement, either party may refer the matter to a mediator; and
 - (b) that if the parties cannot agree about who should be the mediator, either party may ask the Institute of Arbitrators & Mediators Australia to appoint a mediator; and
 - (c) that Division 2 of this Part applies to mediation conducted under the mechanism.

23 Variation of standard terms and reference prices

- (1) A port terminal service provider may vary its standard terms and reference prices by making details of the variation available to the public on its website.
- (2) The details of the variation must be available on its website at least 20 business days before the variation is due to commence.
- (3) A variation to the standard terms and reference prices does not apply to an access agreement entered into before the variation commences unless the access agreement clearly and unambiguously allows for variations to apply.

Part 4—Port loading protocols of port terminal service providers

Division 1—General requirements

24 Port terminal service provider to have a port loading protocol

- (1) A port terminal service provider must have a port loading protocol for each port terminal facility that it owns or operates.

Note: A service provider may have one port loading protocol which applies to multiple port terminal facilities that it owns or operates.

- (2) The port terminal service provider must make available its port loading protocol to the public on its website.

25 Port loading protocol to include capacity allocation system

- (1) A port loading protocol must include the port terminal service provider's capacity allocation system for the port terminal facility.
- (2) A capacity allocation system must not allocate capacity in respect of a day that is more than 6 months after the day on which the capacity is allocated unless the capacity allocation system:
 - (a) has been approved by the ACCC in accordance with subclause (3); or
 - (b) is taken to be approved by the ACCC under subclause (5).
- (3) In deciding whether or not to approve a port terminal service provider's capacity allocation system, the ACCC must have regard to:
 - (a) whether the capacity allocation system will operate efficiently fairly and consistently with clause 10 (non-discrimination); and
 - (b) whether the capacity allocation system will operate efficiently and provide sufficient information to exporters about the capacity of port terminal facilities owned or operated by the port terminal service provider to help

- exporters plan export activities and acquire required port terminal services; and
- (c) whether the capacity allocation system will operate efficiently and provide flexibility and transferability of shipping slots, including the ability to move allocated capacity of port terminal facilities owned or operated by the port terminal service provider across times or ports where appropriate; and
 - (d) whether the capacity allocation system will operate efficiently and contains mechanisms to ensure that the provider takes all reasonable steps to ensure that capacity of port terminal facilities owned or operated by the port terminal service provider is not unused during times of peak use; and
 - (e) the potential effects that the capacity allocation system has on upstream and downstream markets; and
 - (f) the business interests of the port terminal service provider; and
 - (g) the public interest, including the public interest in having competition in markets; and
 - (h) the interest of exporters wanting access to port terminal services; and
 - (i) the economically efficient operation and use of, and investment in port terminal facilities; and
 - (j) any other matters that the ACCC considers relevant.
- (4) If the ACCC approves a port terminal service provider's capacity allocation system under subclause (3), the port terminal service provider must make available the ACCC's decision on its website no later than 10 business days after the approval is given.
- (5) If, immediately before 30 September 2014:
- (a) a port terminal service provider was providing port terminal services by means of a particular port terminal facility; and
 - (b) an undertaking given by the provider and accepted by the ACCC was in force in relation to those services at that facility; and
 - (c) the undertaking included a capacity allocation system;

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Part 4 Port loading protocols of port terminal service providers

Division 1 General requirements

Clause 26

that capacity allocation system is taken to have been approved by the ACCC on 30 September 2014.

- (6) The ACCC must, as soon as practicable after the commencement of this code, publish on its website guidelines relating to the process for approving a capacity allocation system under this section.

26 Complying with port loading protocols and capacity management system

A port terminal service provider must manage demand for port terminal services provided by means of a port terminal facility owned or operated by the provider in accordance with the port loading protocol for that facility.

Division 2—Varying a port loading protocol

27 Varying a port loading protocol

- (1) A port terminal service provider may vary its port loading protocol.

Variations to an approved capacity allocation system

- (2) If the proposed variation is to a capacity allocation system that has been approved by the ACCC in accordance with subclause 25(3) or that is taken to be approved by the ACCC under subclause 25(5), the capacity allocation system as varied must be approved by the ACCC.
- (3) Before approving the varied capacity allocation system, the ACCC must have regard to the matters mentioned in subclause 25(3) in relation to the varied capacity allocation system.

All other variations

- (4) For a proposed variation other than a variation mentioned in subclause (2), a port terminal service provider must, at least 20 business days before the commencement of a proposed variation:
- (a) make available to the public on its website:
- (i) the proposed variation and the date the proposed variation is to take effect; and
- (ii) an explanation of the proposed variation; and
- (iii) an invitation inviting submissions to be provided to the provider on the proposed variation within a specified period (being no less than 10 business days); and
- (b) notify exporters that have an access agreement with the provider about the proposed variation and the availability of the matters mentioned in paragraph (a) on its website.
- (5) A port terminal service provider must publish on its website submissions received on a proposed variation unless:
- (a) the submission made by a person consists wholly or partly of material that is claimed by the person to be confidential or commercially sensitive; and

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Division 2 Varying a port loading protocol

Clause 27

- (b) the person has requested the provider not to publish the material.
- (6) A port terminal service provider must consider in good faith all submissions received within the specified period.
- (7) If the port terminal service provider decides to change the proposed variation in response to such submissions, the provider must, at least 3 business days before the commencement of the proposed variation, notify the public of the changes on its website, but is not required to consult further.

Part 5—Port terminal service provider to publish certain information

28 Port terminal service provider to publish expected capacity

- (1) A port terminal service provider must make available to the public on its website the total capacity that it reasonably expects will be available, at each port at which the provider owns or operates a port terminal facility, for:
 - (a) the period beginning on 8 October 2014 and ending on 30 September 2015; and
 - (b) the period of 12 months beginning on 1 October 2015 and each subsequent 12 month period.
- (2) The information required to be made available by the port terminal service provider, for the period mentioned in paragraph (1)(a) must be made available on the provider's website before 8 October 2014.
- (3) The information required to be made available by the port terminal service provider for a 12 month period mentioned in paragraph (1)(b) must be made available on the provider's website before 1 August immediately preceding the beginning of the 12 month period.
- (4) A port terminal service provider that makes information available in respect of a port for a period must also make available to the public on its website, and update on at least a weekly basis for the remainder of the period, the amount of capacity that is available to be acquired for the export of grain for each shipping window in relation to the port.

29 Port terminal service provider to publish performance indicators

- (1) A port terminal service provider must, no later than 2 weeks after the beginning of each calendar month, make available to the public on its website the following information:

Clause 30

- (a) the capacity allocated for loading grain by shipping window (the *allocated amount*) for the previous calendar month;
 - (b) the amount of grain loaded per shipping window (the *loaded amount*) for the previous calendar month;
 - (c) if the loaded amount varies more than 20% from the allocated amount—an explanation of the reason for the variation;
 - (d) the number of ships that failed survey for the previous calendar month, as determined by the Department of Agriculture or its representative;
 - (e) the number of demurrage days incurred for each ship for the previous calendar month, including the name of the ship's charter party and an explanation for why the demurrage occurred;
 - (f) if the order for loading ships changes for the previous calendar month—an explanation of the reason the order changed.
- (2) Despite subsection (1), the requirement for a port terminal service provider to make available the information referred to in paragraphs (1)(c), (e) and (f) for a calendar month applies to December 2014 and each later calendar month, but not to an earlier calendar month.

30 Port terminal service provider to publish stock information

A port terminal service provider must, as soon as practicable after the beginning of each week, make available to the public on its website the following information:

- (a) the total amount of bulk wheat held at each port terminal at the end of the previous week and the names of the top 3 grades;
- (b) the total amount of bulk barley held at each port terminal at the end of the previous week;
- (c) the total amount of bulk canola held at each port terminal at the end of the previous week;
- (d) the total amount of any other bulk grains held at each port terminal at the end of the previous week.

Part 6—Record keeping

31 Port terminal service providers to retain access agreements and variations to those agreements

- (1) A port terminal service provider must retain the following documents in accordance with this clause:
 - (a) access agreements entered into by the provider;
 - (b) documents evidencing variations made to access agreements mentioned in paragraph (a).
- (2) An access agreement entered into by a port terminal service provider that has not been varied since the agreement was entered into must be retained by the provider for at least 6 years after the agreement was entered into.
- (3) An access agreement entered into by a port terminal service provider that has been varied since the agreement was entered into must be retained with the documents evidencing the variations to the agreement for at least 6 years after the variations to the agreement commenced.

32 Records about disputes in relation to an access agreement

- (1) A port terminal service provider and an exporter involved in a dispute about a decision made under subclause 11(5), clause 12 or the proposed terms of an access agreement must both retain records relating to the dispute for at least 6 years after the dispute is concluded.
- (2) The obligation to retain records mentioned in subclause (1) applies regardless of how the dispute concluded.

33 Records on port terminal services acquired by an exporter

- (1) A port terminal service provider must record the following information in relation to the provider's port terminal service

