

AUSTRALIAN GRAIN EXPORTERS ASSOCIATION

(A B N 08 080 034 135)

P O BOX 352

RED HILL

VICTORIA 3937

Phone/Fax : (03) 5989 2711

15 May 2009

Mr Anthony Wing
General Manager
Prices Oversight & Monitoring Branch
Australian Competition & Consumer Commission
GPO Box 520
Melbourne Victoria, 3000

Dear Anthony,

Wheat export marketing access undertakings

A key objective of the Wheat Export Marketing Act 2008 ("the Act") is to ensure that bulk handlers who control essential wheat export infrastructure at port do not limit the ability of accredited exporters to compete in the wheat export market. The Act's Explanatory Memorandum confirms that Parliament intended the Act's access provisions would "ensure that accredited exporters that own, operate or control port terminal facilities provide fair and transparent access to their facilities to other accredited exporters".

Following recent discussions with the ACCC, Wheat Exports Australia and the Federal Government about the development of access undertakings under the Act, AGEA would like to outline our preliminary views on how the access undertakings process can be used to address current problems and improve competition in the wheat export market.

Competition principles

COAG's Competition and Infrastructure Reform Agreement principles are intended to ensure that essential infrastructure is regulated so as to:

- improve price transparency;
- promote competition in upstream and downstream markets; and
- establish access prices that:
 - generate sufficient revenue to meet efficient costs of providing access to services, including a reasonable return on investment;
 - allow multi-part pricing and price discrimination when it aids efficiency;
 - do not allow a vertically integrated access provider to set terms and conditions discriminating in favour of its downstream operations, unless the cost of providing access to other operators is higher; and
 - provide incentives to reduce costs or otherwise improve productivity.

Accordingly, AGEA hopes that the ACCC's evaluation of the terms and conditions associated with proposed access undertakings reflect the following elements:

AUSTRALIAN GRAIN EXPORTERS ASSOCIATION

- the actual cost to bulk handlers of providing these services;
- whether any proposed price discrimination is likely to aid efficiency;
- whether any proposed terms and conditions would discriminate in favour of up or downstream operations of bulk handlers who control port facilities;
- the impact of proposed terms and conditions on competition in the wheat export market; and
- whether the proposed undertakings provide an incentive to improve productivity.

These goals are achievable through access undertakings that don't unfairly impact on bulk handlers and promote an efficient Australian grains export industry.

Access undertakings

The access undertakings to be submitted to ACCC as part of the wheat export accreditation process should ensure that other market participants have access to export facilities and information on the same basis as the bulk handlers who control the ports.

The access undertakings do not provide clear definitions of "port terminal services". Instead, they include very narrow and imprecise descriptions as to what "may" or "may not", in their view, fall within the definition.

At the same time, in their undertakings, the bulk handlers reserve the right to rely upon matters and services that are clearly outside of their definitions as a basis to exclude access to "port terminal services".

AGEA believes it is essential for there to be a clear definition as to the meaning of "port terminal services". Further, bulk handlers must not have the discretion to pick and choose what may or may not be incorporated in that definition for the purpose of excusing proper performance.

Bulk handlers' terms and conditions of access to essential port infrastructure (including fees) should:

- promote competition in the bulk wheat export market; and
- be equally applied to:
 - third party access seekers; and
 - related companies of access providers.

These terms should not discriminate unfairly to prioritise interests of the marketing arm of a bulk handler over the interests of bulk wheat exporters who do not control port facilities. To do so would inhibit competition in the bulk wheat export market.

Current obstacles to fair and transparent access in the supply chain

Relevant to the access undertaking process, there are a number of supply chain issues currently reducing competition in the grains export supply chain:

1. **Accountability** – Bulk handlers should provide fair compensation if they fail to provide the services that they are paid to provide. The terms and conditions of most bulk handlers who control port facilities cap their liability to access seekers at extraordinarily low levels. The grain cargoes involved in bulk shipments are worth large sums of money and if bulk handlers fail to properly provide port-related services, they can cause exporters to suffer losses well above these caps.

AUSTRALIAN GRAIN EXPORTERS ASSOCIATION

For example, if a bulk handler negligently fails to load uncontaminated cargo within an allocated shipment time, a wheat exporter is exposed to potentially enormous losses including costs such as replacing a contaminated cargo and paying for sea freight to transport the replacement cargo to an export customer. Wheat exporters have to pay all these costs even if they arise solely due to bulk handler negligence. These liability caps should be removed so that bulk handlers are fully accountable if they fail to provide services.

Example issue: If a bulk handler loaded a vessel bound for the European Union with wheat contaminated by chemical residues due to mishandling by the bulk handler, 'worst case scenario' costs for a quality claim arising out of a CFR contract could be in the vicinity of \$3.435m, comprised as follows:

- Sale of wheat to an alternate market with less stringent chemical residue regulations. Distressed cargo sale, discount of approximately \$50/MT required on cargo of 50,000 tonnes = loss of \$2.5m
- Demurrage for 3 weeks at original discharge port @USD15,000 per day = USD315,00 i.e. approx AUD445,000
- Cost of sea freight to customer in alternate destination (incorporating 20% premium charged by shipowner) = \$100,000
- Cost of replacement sea freight to European Union = \$140,000
- Discount of \$5/MT on original sale contract to ensure that original customer would not avoid sale contract = \$250,000
- Total loss caused by bulk handler's negligence: \$3.435m

A further example of the extent to which exporters are exposed to substantial damages by the actions of bulk handlers, is the failure of the bulk handlers to commit to loading wheat on board vessels at a set, reasonable load rate. By failing to take on this most basic of responsibility, bulk handlers expose exporters to substantial demurrage costs and compensation payments under their sale contracts.

2. **Reasonable fees** – Certain bulk handling fees appear to be greatly disproportionate to the actual cost incurred by the bulk handler in providing the relevant service. In line with the competition principles outlined above, these fees should reflect the actual cost to the bulk handler of providing the services, plus a reasonable commercial margin.

Example issue: Bulk handlers charge fees 'per tonne' to perform administrative tasks. Given the substantial tonnages in question, this means that customers are forced to pay very large fees to have even simple administrative tasks performed, such as substituting the name of a vessel or an owner of grain on paper or electronic records. These fees should be based on the actual cost of providing these services, plus a reasonable commercial margin.

Bulk handlers generally refuse to negotiate standardised terms and conditions, and there have been many instances in the past where they have simply published standard terms on the internet *after* the contract period commences.

Bulk handlers also require marketers to pre-pay for some bulk handling services that are to be provided many months later. This has a detrimental impact on the cash flow of wheat exporters, particularly smaller traders. Bulk

AUSTRALIAN GRAIN EXPORTERS ASSOCIATION

handlers already require exporters using these port services to sign storage and handling agreements imposing liability on exporters who request, but do not use, such services. If pre-payments are required, they should only be required a reasonable time in advance of service provision (e.g. one month ahead).

These fee structures are not conducive to competition in the bulk wheat export market.

- 3. Transparent terms:** Bulk handlers should provide third party wheat exporters with more visibility about stock accumulation and movement of stock to and from port. It is unclear to what extent bulk handlers currently provide this information to their related marketing companies.

Example issue: Bulk handlers currently offer third party grain marketers very little information about the movement of grain to port. Exporters need detailed and accurate information about stock movement and entitlement, particularly an easily understood program showing how much grain is moving and when and where it is available, so that they can program their trades and shipments accordingly.

- 4. Clear and certain commercial terms –** Bulk handling terms and conditions are presented to wheat exporters on a "take it or leave it" basis. The bulk handlers usually do not provide their terms until at least 30 September, the day before that are stated to come into force. It is not uncommon for some bulk handlers to provide or change their terms after the contract period has already started. There is practically no opportunity to negotiate on the terms, including services provided and prices charged. The contract terms are expressed to be imposed by bulk handlers regardless of whether the customer actually signs the contract. On occasions, bulk handlers have refused to provide any services to exporters who resist signing these standard terms and attempt to negotiate contractual terms and prices.

Bulk handling fee structures are also convoluted and contain elements that are subject to change without notice. If fee structures cannot be relied on because the bulk handler changes them without notice after exporters price their wheat export program, this causes wheat exporters to incur costs which cannot be recovered from customers. The lack of available alternative port facilities, combined with bulk handlers' refusal to negotiate, mean that exporters have little choice but to pay these increased fees. Noting that these contracts are only 12 months in duration, bulk handlers should be required to negotiate reasonable terms and conditions with grain marketers, then stick to them during the contract period. This would allow marketers to price their grain sales with certainty about bulk handlers' costs and level of service, without the risk that they will be exposed to unexpected financial losses or denial of port facilities, thereby reducing their competitiveness.

Example issue: It is a crucial element of any export sales program that exporters are offered reliable access to shipping slots. This year mid-way through the contract period, one bulk handler required that customers pay additional "surge" fees per tonne in order to remain 'in contention for' shipping slots, although payment of this fee did not guarantee access to these slots. Put another way, once a shipping slot had been allocated the exporter was required to pay a "surge" fee if they were to remain in contention however there is no guarantee that the vessel will be loaded in that shipping slot. The allocation of the slots became convoluted and unclear. Many wheat export contracts have already been agreed with customers which means that exporters are unable to structure their sales to take this additional bulk

AUSTRALIAN GRAIN EXPORTERS ASSOCIATION

handling cost into account. Exporters are exposed to possible denial of port services if they do not pay this fee, even though paying this fee does not provide any guarantee that exporters will actually get the shipping slots in question. This is not conducive to competition in the wheat export market.

- 5. Fair and open access** – Bulk handlers should apply the same terms and fees to their own marketing arms or business partners, and not discriminate in their favour when they supply port-related services.

Example issue: At the moment, the processes and charges associated with allocating positions in the shipping stem to customers are not clear. These processes and charges need to be robust and fair.

The above is a non-exhaustive outline of current obstacles to fair competition in the bulk wheat export market.

Conclusion

Despite controlling the upcountry operations, transport to port and capacity allocation, bulk handlers currently do not stand behind their performance and do not offer any certainty of service provision. With control of the port-related supply chain must come an obligation for bulk handlers to reliably provide the services that we pay them to provide. They need to offer reliable load rates and they should agree to participate in demurrage/despatch. Demurrage currently has a major adverse impact on the financial performance of wheat exporters and the opportunity to share in despatch earnings would actually provide bulk handlers with a financial incentive to operate more efficiently.

AGEA believes that the ACCC currently has the chance to dramatically improve competition in the wheat export market by ensuring that proposed access undertakings, particularly terms and conditions that relate to at-port and related supply chain services, promote greater transparency and fair access.

AGEA would welcome the opportunity to discuss these concerns further with ACCC in the context of industry consultation about the access undertakings proposed under the Act.

Yours sincerely



Robert Green
President