

**Submission to
Australian Competition and Consumer
Commission**

**~ Issues Paper - Port Terminal Services Access
Undertakings ~**

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1 Introduction

The NSW Farmers' Association (the 'Association') is Australia's largest State farming organisation representing the interests of the majority of commercial farm operations throughout the farming community in NSW. Through its commercial, policy and apolitical lobbying activities it provides a powerful and positive link between farmers, the Government and the general public. The Association welcomes the opportunity to respond to the Australian Competition and Consumer Commission's Port Terminal Services Access Undertakings issues paper.

The Association is concerned that since the introduction of the Wheat Export Marketing Act on 1 July 2008, the commercial arrangements amongst participants in the wheat export system restrict the logistics system's ability to reward innovation and encourage diverse modes of delivery onto ship, because of the market power of a few existing operators..

The Association expressed these concerns in a media release dated 9 March 2009, titled 'Grey area for grain: Farmers voice concerns over grains delivery', which referred to reports that grain growers were experiencing difficulties in delivering their grain straight from the farm to the port. Based on these reports the Association believes that some port operators may have the power to manipulate the Port Access Agreements to the detriment of industry and in response the Association called for the removal of these new obstructions to the delivery of all grains direct from farm to port.

2 Discussion with Wheat Exports Australia

The Association has raised this issue with Wheat Exports Australia ('WEA'), and was advised that bulk handlers' policies do not preclude direct deliveries to port ex-farm for cargo accumulation. However, recently the Association has been advised by WEA that within the bulk handling system the bulk handlers have informed exporters that *" subject to terms and conditions contained within the Storage and Handling Agreement (a contract to which all exporters voluntarily agree to be bound), the company retains the right to negotiate with an exporter over the method of cargo accumulation, and to refuse particular methods of cargo accumulation, should such a method impact or potentially impact negatively on the efficient management of a port terminal. These caveats are contained in our vessel nomination protocols and in our Storage and Handling Agreement."*

The Association has been further advised by WEA, that bulk handlers have had a long standing policy of preventing the delivery of ex-farm loads direct to port, other than during harvest. WEA were advised that this is not a new restriction and this policy has been in place for a number of years, prior to recent changes in bulk wheat marketing arrangements. The Association is aware of this situation although we consider the new multi accredited wheat exporting system would deem this long standing policy as antiquated and potentially anti competitive.

While WEA cannot comment on such commercial considerations, they have informed the Association that accredited bulk exporters that are also the providers of one or more port terminal services, must fulfil all the requirements specified in accordance to Part 2, Section 24, Access test – port terminal service, of the Wheat Export Marketing Act 2008 (the Act). WEA has informed the Association that under these guidelines they are satisfied.

3. Key Points

The Association feels obligated to bring to the attention of the Australian Competition and Consumer Commission ('ACCC') prior to the port access undertaking by the 1 October 2009, the following points.

1. The legislation states; that bulk handling companies can satisfy Section 24 of the access test by complying with the continuous disclosure rules in relation to the port terminal service. The Association is concerned that many of the terms and conditions presented in relation to the port terminal service may not be in the best interest of competition between the accredited exporters.
2. The existing ownership base of grain loading port facility in Australia is extremely concentrated and there is little ability to move grain economically from one port zone into another to access an alternative port operator. Therefore if an accredited wheat exporter is not satisfied with terms and conditions of the existing port operator vessel nomination protocols, and/or storage and handling agreement. Their potential options are limited to the non bulk system (Containers and bags) or to move grain into a different port zone. This almost certainly results in a commercial disadvantage due to the sheer distances, cost of freight and lack of available infrastructure such as rail links. The few options available to those in the industry who do not own ports means there is point in objecting.
3. There are concerns that many of the fees and charges set by bulk handlers who are port operators, at their port facilities are not a fair representation of the usual commercial rates. For example interest on overdue accounts is outlined as follows in 'the bulk handler's' Storage and Handling Agreement Clause 3.9. *"the interest rate applicable under this Clause 3.9 is the rate which is 6% above the bank bill buying rate for bills with a tender of 90 days quoted from time to time by National Australia Bank."* The Association understands that in most industries the commercially accepted rate is 2% above the 90 day bank bill. The Association feels that many of the fees set by the port operators and for that matter the upcountry grain storage and handling facilitators (as they often represent an extension of the port facilities business model), are not representative of a truly competitive market place nor is the environment conducive to the introduction of competition. For competitor to survive it would seem necessary to closely monitor the fees set by port operators until such time as adequate competition is available to regulate this situation in the market place. Furthermore policy makers should give serious consideration toward how the industry is to achieve improved competition within regional areas of the nation in particular within the natural geographic and infrastructure created monopolies surrounding ports and port zones.
4. Another example of substantial market power relates to the storage and handling terms and conditions of a port operator which limits their liability in relation to a claim, which is recognised by 'the bulk handler' to be valid and 'the bulk handler' agrees to compensate the Client or, in other event, where 'the bulk handler' is liable to compensate or indemnify the Client, then 'the bulk handler's' maximum liability in respect of a claim shall not exceed \$500,000 for grain out loaded onto any shipping vessel, and \$10,000 for grain out loaded onto rail or road truck on any one day for a site. In the situation where a ship haul can be worth in excess of \$25 million and the entire value of its contents can be placed in jeopardy if the ship fails to leave the port, it would seem to the Association that 'the bulk handler's' liability is unusually conservative.

A further issue has arisen in relation to the compliance and access to port costs associated with exporters who do not use a port operators 'upcountry storage and handling facilities. According to the Department of Agriculture, Fisheries and Forestry ('DAFF') website it was determined during the Senate Inquiry that; 'up-country storage and handling facilities would not create bottlenecks in the supply chain. Access

requirements would impose a significant regulatory burden, with the increased compliance costs, that would be passed back to growers.¹

The Association appreciates the principles behind this determination, however there are concerns that a lack of regulation has possibly led to the deterioration of competition, and therefore higher fees and charges which are inevitably passed on to the industry.

4. Supply Chain Costs and Barriers to Entry

The intake cost of delivering grain to a particular a port terminal facility was reported to the Association to be \$13 from a related upcountry storage and handling facility and \$19.50 if the grain has been stored in a farmer's storage facility. Therefore if a business believes it can carry out these procedures at a more competitive rate by using a more direct transport system, they are charged more upon entry to port because the grain has not come from a related upcountry storage facility. Furthermore they may face restricted access at the discretion of the port operator under their Storage and Handling Agreement.

There appears to be a growing potential for dominant vertically integrated business models to create a lack of incentive for investment in alternative bulk storage and logistic paths to port for both themselves or others who are forced to use 'their loading facilities and therefore 'voluntary' meet ' their access conditions.

5. Grain Supply Information Transparency

Market dominance has another adverse affect of restricting the timely flow of market supply and demand information required by the industry and currently formulated and released by the Australian Bureau of Statistics ('ABS'). This information can take the ABS up to three months to collect and publish to the industry. Meanwhile, the United States Department of Agriculture can publish their statistics inside one month. While this may reflect poorly on the ABS, it would also appear quite unreasonable that the industry should have to rely on the legislative powers of the ABS to gather and report on information which is comparatively freely available to farmers in competitor producing countries.

It is widely known within the industry that Australian storage and handlers have information readily available to them relating to stocks on hand, which can be updated on a daily basis. In fact WEA may be within its rights to request this information, if it believes this is appropriate. Therefore if WEA were directed it might provide an additional and useful service to the wider industry in receiving and publishing the relevant information.

The ABS has advised the Association that they cannot obtain or publish this information partly because of the breach of commercial in confidence laws. That is, if the ABS were to publish stocks on hand per port zone per week or month, this would be highlighting stocks held on hand within a particular bulk handler's system, and is therefore a breach of commercial confidence in the grains industry (although the same principle is apparently not a breach in the wool industry where export information is made available). This situation further highlights the apparent significant market power held by bulk handlers to control the information flow to the market place. It may be feasible that the publication of this information would encourage commercial innovation to particular sectors of the industry simply by exposing opportunities currently vigorously protected by the existing participants.

¹ <http://www.daff.gov.au/agriculture-food/wheat-sugar-crops/wheat-marketing/faq/answers#patss>

6. Conclusion

The Association feels that at present some port operators exercise very substantial market power within the industry to the detriment of the efficient operation of the sector. This dominance has led to a historic under investment in both regional and port infrastructure, as well as in alternative modes of transport which leaves little incentive for future investment.

While the existing market structure remains with one organisation having a clear and dominant market power in each port zone- from upcountry receival sites, and in some cases long term contracts with the major rail freight operator (and the possibility of controlling the grain branch lines), the full control of a majority of the port facilities, and the significant barriers to entry this poses for any potential new entrant - the market place appears well suited to any potential abuse of market power and in turn market inefficiencies.

The Association believes part of the solution to this problem is to carefully develop bulk port access agreements and port operator undertakings which balance the existing market dominance with the needs of the Australian grains industry to be internationally competitive in all segments of its value chain. There is also a clear need for added transparency in the market place through both price and fee legitimacy, and better more timely information flows which will not only better inform buyers and sellers of grain but will also allow increased coordination of the accumulation and shipping of cargoes.