

Wheat Export Marketing Amendment Bill 2012

Supplementary Submission to Rural and Regional
Affairs and transport Committee May 2012



Following on from CBH's appearance before the inquiry there are several matters raised by the Committee that are concerning to CBH. These matters include:

- The process for creating an industry code of conduct regarding Port Terminals and successful codes of conduct
- Unsubstantiated inferences as to the reasoning for the CBH Group's investment in Asian Flour Mills
- Unsubstantiated allegations as to the operation of CBH's port capacity allocation auctions
- Potentially misleading comments in relation to information provision

Port Terminal Code of Conduct

During the course of CBH's appearance before the Committee, Senator Edwards asked questions in relation to what successful code of conduct from the agriculture industry was being used as a guide to the drafting of the Port Terminal Code of Conduct.

As explained during the hearing the short answer is no particular code of conduct was chosen as a template. Each industry and situation is different, in particular the use of a code of conduct to replace compulsory access undertakings where they would not have ordinarily been required to be given is unique and an example of the ongoing innovation in the Australian grains industry.

This innovation should not be criticised by the Committee, the intent is for industry to reach a consensus view on standards of conduct in a manner which increases the flexibility of each code signatory to respond to rapidly changing market conditions whilst reducing the cost of regulatory compliance.

The drafting guidelines published by the ACCC in order to assist industries to endeavour to codify certain behaviour without requiring the intervention of the Australian parliament is attached. Following such a process is designed to achieve an outcome that balances the interests of all parties.

CBH has and continues to participate in the development of a code of conduct with the aim of developing a more appropriate regulatory environment which will reduce compliance costs whilst ensuring that all participants in the grains industry have a better understanding of the expected behaviour. The recent media release of Grain Trade Australia in relation to the development of the Code can be found at: http://www.graintrade.org.au/sites/default/files/Media_Releases/Port%20Access%20-%20Voluntary%20Code%20of%20Conduct%203%20April%202012_0.pdf

CBH Group's investment in Asian Flour Mills

CBH was also surprised by questions relating to withholding tax and transfer pricing arrangements around CBH's investment in Asian Flour Mills. There seemed to be a clear inference from those questions that CBH undertook the investment with a view to manipulating profits in relation to grain trading activities in Australia. CBH considers such an inference improper and without any substantiation and is surprised that such an inference was raised in the context of an inquiry into Australian wheat export marketing arrangements, let alone raised at all.

The issue of taxation of overseas domiciled subsidiaries and joint ventures is a complicated arrangement in international tax law governed by the existence of double taxation treaties at a national level. Some of the legislation and treaties on this matter can be found at: http://archive.treasury.gov.au/documents/625/XLS/120313_Australian_Tax_Treaty_Table.xls

These taxation arrangements have been built up over many years of treaties on a bilateral basis and are not easily summarised on demand. CBH does not see how it relates in any way to the matter on which CBH was appearing. In this case, Wheat Exports Australia has not, to the best of CBH's knowledge, investigated transfer pricing or withholding tax matters and should not as these are rightly the remit of the Australian Taxation Office.

Whilst CBH cannot see any reasonable basis for a question in relation to withholding tax in the current inquiry, in the case of CBH, its grain marketing division CBH Grain Pty Ltd, sells grain at an arms length basis to both the Asian Flour mills joint venture and other customers. Profits from those grain sales are taxed in Australia either at the CBH Grain level or that of the growers who are participants of its grain pools. To the extent that profit from the operation of its Asian Flour Mills joint venture is returned to Australia, it will be less any tax deducted in the country in which it was earned. CBH's purpose under its Rules and the Bulk Handling Act is to promote the development of agricultural resources in Western Australia which encompasses maximising the value returned to growers and any inference to the contrary offends the very purpose of CBH.

Operation of CBH's port capacity allocation auctions

Another area of concern on which questions were asked was the suggestion that CBH's port capacity allocation auctions have been manipulated and that the continuation of Wheat Exports Australia is required to oversee them. Concerns were also raised that the manipulation evidenced itself in very high premiums for shipping slots¹. This question and concern, again without any factual basis highlights the very risks of continuing with the WEA and now unnecessary regulation entailed in the Wheat Export Marketing Act.

The operation of the port capacity allocation auctions is within the remit of the ACCC as a result of both the access undertakings and general competition law. CBH has provided information to the ACCC on request in relation to the port capacity allocation auctions. CBH understands that the ACCC is not proposing to investigate the matter any further. Wheat Exports Australia is not concerned in the operation of those auctions and these unsubstantiated allegations by WEA highlight the regulatory duplication that exists today. The removal of that duplication can assist in returning additional value to Australian growers in the form of the Wheat Export Charge of 22 cents for every tonne of wheat exported and lowering unnecessary compliance costs for CBH in dealing with that duplication.

The premiums raised in the auction are only one side of the story and the failure to highlight the substantial rebates that are paid to all parties who ultimately ship grain from Western Australia using capacity purchased at auction is misleading. Under the auction process the premiums paid are aggregated and then averaged out over all auction capacity utilised for the respective Harvest Shipping Period and Annual Shipping Period. This substantially reduces the overall premium paid and this information is all available in the public domain at www.portcapacity.com so CBH does not understand how this misconception can persist.

In addition, it is critical to note that CBH does not profit from the payment of premiums and does not set premiums. Instead the auction premiums are determined and paid by and repaid to marketers. The auction exists as a transparent playing field with the same rules for all participants, clear price signals and a method for non-discriminatory allocation of capacity.

It is important to note that CBH introduced its port capacity auctions voluntarily in order to provide a clear non-discriminatory process for capacity allocation. The introduction of the system was clear evidence of innovation and CBH continues to seek improvements to the allocation system to increase the potential value return to WA growers. Ultimately, innovation such as this is becoming harder to introduce due to increasing regulatory inertia.

Information provision

CBH is reviewing the release of information on grain stocks held in our system in conjunction with industry. As a co-operative with a sole focus on our growers' interests, we continue to have serious concerns about the release to the broader world of detailed information on grower stocks held in our system. At this point, we

¹ See for instance p 5 , Transcript of Senate Rural and Regional Affairs and Transport Legislation Committee, Monday 14 May 2012.

are not convinced that providing detailed information on stock levels will provide better returns for Western Australian growers.

CBH is not opposed to the release of reasonable information and has demonstrated this by amongst other things participating in information provision to the Australian Bureau of Statistics for many years and releasing weekly harvest reports. In addition, CBH has invested in and supported the development of grower price discovery tools like Daily Grain in order to provide better price discovery and transparency than before.

However, for any improved information flow to increase the efficiency of a market it must be two way and nothing has been proposed or can be proposed in the legislation to require the members of the global marketplace in which Western Australian growers operate to provide overseas stock information back to them. It is possible if growers had all that information as well that they might be in a better position to make a decision on the timing and price of the sale of their grain. However, without that, there is a high risk of an information asymmetry tilted against Western Australian growers. If individual growers choose to reveal their stock information that is their right and they can do that now.

CBH's storage and handling operation does not provide unequal access to information on the stocks of grain held by growers or marketers to our own grain marketing division, CBH Grain. CBH has its procedures on the management of this information and systems containing this information independently reviewed each year. CBH has provided a number of reports to the ACCC on this matter, without any significant issues being raised.

Further to the matters raised above, and whilst CBH prefers not to comment on the actions or motives of others CBH notes that submissions by the ASX and WEA have made certain comments regarding an information asymmetry for which they have offered no evidence to the contrary. These statements have been made many times without any substantiation and despite CBH offering evidence to the contrary.

The Committee should be careful in placing any or any significant weight on these submissions for a number of reasons, although the lack of evidence is the prime example. However, CBH does note that ASX has a level of self interest in seeking to expand the grain futures market and its comments do not necessarily reflect accurately the actual trading and accumulation market in existence in Australia which is incredibly competitive.

Examination of the pricing offered to growers in Western Australia over the most recent harvest shows that at certain points the price being paid to growers was above the global price. Given that at least 90% of grain in Western Australia is exported CBH considers that this demonstrates the significant level of competition between acquirers and that the market has not been hampered by a lack of information.

During the hearing, it was raised that an unnamed major exporter doesn't want to do business in WA because they are dissatisfied with the performance of the supply chain. Such a claim should be afforded little weight as it is impossible to substantiate or disprove. In fact the CBH ports are currently forecast to export more grain than in any other year in CBH's history. In a year of transitioning between rail providers and with fewer rail resources than ever, CBH is currently forecasting record shipments.

Lastly, CBH notes that the development of information and stock systems by CBH and other handlers has been done at the expense of the respective bulk handling companies. The WEA and ASX are essentially proposing that bulk handling companies should bear additional costs to provide more information to support the expansion of ASX's business. Yet the ASX charges others to access the information contained in its systems in relation to the share market. The information and the systems generating the information is proprietary and forcing the disclosure of such information amounts to a compulsory acquisition of the rights of the various bulk handling companies.

Quality Issues

Another issue that received significant attention in the Senate Hearing on 14 May is the issue of quality loaded onto vessels and varietal integrity. CBH considers that there is little evidence to support any of the claims made that this is a major issue or even an issue at all.

CBH has not received any claims that it has failed to load wheat onto vessels in accordance with the instructions of the marketer exporting wheat. The ultimate decision as to grain placed onto a vessel is that of the marketer.

Co-operative Exemption

CBH notes that there may be a case for exemption of grower owned cooperative from the impact of additional regulation where that regulation is being considered to be imposed for the benefit of growers. This does not mean that CBH considers that such additional regulation is necessary but is a recognition that grower owned cooperatives already have a control mechanism that is more powerful and responsive than any regulatory lever. That mechanism is the ultimate control and oversight that growers exert by being able to remove the Board (and thus management) if the cooperative is taken in a direction that members consider ultimately damages their interests.

An example of this is noted in the United States where co-operatives are exempt from certain legislation because of the recognition that growers have a control mechanism to avoid anticompetitive behaviour and that without the support of the growers the cooperative cannot continue to act in that way.

Drafting points on the WEM Amendment Bill

Section of WEM Amendment Bill	Comment
8(1)(b)	<p>CBH is not sure that the inclusion of the words “or another person” in the first and second line of the subsection provides certainty or necessary clarification to the expression of the test.</p> <p>As an example – if we substitute CBH Grain for the exporter.</p> <p>A person {say CBH Grain} (the exporter) must not export wheat using a port terminal service if:</p> <ul style="list-style-type: none"> (a) either: <ul style="list-style-type: none"> (i) the exporter {CBH Grain} is the provider of the port terminal service; or {criteria not met} (ii) an associated entity of the exporter {CBH} is the provider of the port terminal service; and {criteria met} (b) a person {say Cargill} (whether the exporter, the associated entity or another person) was required by section 7 to pass the access test in relation to the port terminal service at a time during the 12 month period ending on the day of the export; (c) the person mentioned in paragraph (b) did not pass the access test at that time. <p>In this instance if CBH had acquired a port terminal from a person who did not meet access test then CBH Grain may be barred from exporting grain. The test should only apply to those port terminals which were within the control of CBH and should not be extended to a independent third party.</p>
9(4)(c)(i)	This is a new requirement and not necessary for the understanding of ordering of the queue.
9(4)(c)(iv)	Being required to put a time rather than a date is overly onerous, unnecessary and without any benefit.
9(4)(c)(v)	Being required to put a time rather than a date is overly onerous, unnecessary and without any benefit.
9(4)(c)(vi)	Being required to put a time rather than a date is overly onerous, unnecessary and without any benefit.
9(4)(c)(ix)	CBH does not consider that there is any benefit to gained by providing additional details of grain being loaded than either wheat or other grains.
9(4)(c)(x)	It is overly onerous and serves no practical purpose to continuously update the loading statement (what is commonly called the shipping stem) in order to detail that a ship has commenced loading but has not finished loading.
9(4)(c)(xi)	Being required to put a time rather than a date is overly onerous, unnecessary and without any benefit.
9(4)(e)(i)	The additional requirement to provide a copy of the loading statement to the ACCC every business day adds compliance costs.
9(4)(e)(ii)	The requirement to provide the information in the manner and form required by the ACCC adds further potential compliance costs and is unknown at this point in time.

Drafting points on the WEM Amendment Bill

	CBH does not understand why the publication of the loading statement is not sufficient.
12(2)(c)	<p>CBH has concerns over the meaning of the phrase “that supports the competitiveness of all sectors through the supply chain”. CBH does not consider that a code of conduct relating to the fair and efficient operation of port terminal facilities should be endeavouring to focus on other areas of the supply chain.</p> <p>It is unclear what areas are to be considered and what weighting would be given to activities in other areas. In particular, the Productivity Commission did not find a need for further regulation in other areas of the supply chain and any port terminal code dealing with other matters would not have a consistent and even application across other industry participants.</p> <p>CBH is of the view that the port terminal code of conduct is not the appropriate place to address issues affecting other areas of the supply chain. CBH considers that the subsection should be repealed.</p>
34	<p>The substitute section 25(1) does not appear to retain any of the protections in relation to confidentiality that existed in the old section 73 and 74 of the WEM Act.</p> <p>Further the granting of the power to compel information in relation to any function or power of the current WEM Act is too broad and unnecessary for the purposes of the amended Act. In particular, unlike the previous Act, this new section 25(1) effectively allows the Secretary to compel any person (not just an accredited exporter) to provide information that the Secretary believes relevant with penalties if the person does not comply.</p>