

EXECUTIVE OFFICE



**Australian  
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29 April 2008

Senator Glenn Sterle  
Chair  
Standing Committee on Rural and  
Regional Affairs and Transport

c/- Ms Jeanette Radcliffe  
Committee Secretary

By email: [jeanette.radcliffe@aph.gov.au](mailto:jeanette.radcliffe@aph.gov.au)

Dear Senator,

Please find attached responses to three questions taken on notice when ACCC staff appeared at your Committee's inquiry into the draft *Wheat Export Marketing Bill 2008* on Tuesday, 22 April 2008.

If you wish to discuss any aspect of this matter, please do not hesitate to contact me on (02) 6243 1124.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Brian Cassidy'.

Brian Cassidy  
Chief Executive Officer

# Senate Rural and Regional Affairs & Transport Committee

## RESPONSES TO QUESTIONS ON NOTICE

### SENATE INQUIRY - WHEAT EXPORT MARKETING

#### Inquiry into the Wheat Export Marketing Bill 2008 and the Wheat Export Marketing (Repeal and Consequential Amendments) Bill 2008

**Q1** (p.25) Senator Joyce: how many legal challenges has Telstra made to access pricing decisions by the ACCC?

As of 23 April 2008, Telstra was seeking judicial review in the Federal Court of 15 arbitration determinations. All of these applications are still active.

During 2006, Telstra separately sought merits review in the Australian Competition Tribunal of ACCC decisions to reject ordinary access undertakings on the Line Sharing Service (LSS) and Unconditioned Local Loop Service (ULLS). (It was not successful in either of these applications.)

**Q2.** (p.25) Senator Joyce: have you had any success pursuing unconscionable conduct cases for horticultural producers in their dealings with Coles and Woolworths under 51AC?

The ACCC has not taken any legal proceedings under section 51AC in relation to dealings between horticulture producers and Coles or Woolworths.

**Q3.** (p.30) Senator Cormann: Do you have a view on how this industry code's proposition could be improved, say, in terms of your involvement? ...Please provide us with some advice on notice as to how you think that could be better addressed.

At the hearing, reference was made to a submission by GrainCorp that included a draft Bulk Wheat Supply Chain Code of Conduct.

A threshold issue is whether a code of conduct is an appropriate regulatory tool for this industry. The ACCC understands that the current drafting of the Bill, which applies an access test as a condition of accreditation on bulk handling companies with port facilities, reflects a view that those bulk handling companies are likely to possess a degree of market power under the new export marketing regime.

As the ACCC understands it, the draft Code of Conduct would introduce a mechanism akin to a commercial dispute resolution model such as is commonly found in contracts. It is a simple bilateral mechanism that does not provide for issues of competition policy or public interest to be considered.

In contrast, when the Commission is required to arbitrate under Part IIIA it is required, amongst other things, to take into account:

- the legitimate interests of the provider and the provider's investment in the facility;
- the public interest in having competition in markets
- the interest of all persons who have a right to use the service
- economic efficiency; and
- pricing principles that allow multi-part pricing but prevent a vertically integrated access provider from setting terms and conditions that discriminate in favour of its own downstream operations.

These are complex public interest and competition issues that are not well suited to resolution using a private bilateral model. It is also unlikely that a commercial arbitrator would have the power or resources to take into account the public interest or the interests of other parties.

The ACCC considers that a dispute resolution mechanism that is effective in facilitating the provision of access to facilities is likely to also provide for the following:

- joint arbitrations – this allows the timely resolution of disputes between a number of different parties that involve the same issues and possibly the same facilities;
- interim determinations – this limits the prospect that an arbitration process can delay or frustrate access; and
- an appropriate level of transparency – the availability of information to both access seekers and providers will enhance the likelihood of successful negotiations and thereby facilitates effective access. See for example section 44ZNB of the TPA which requires the ACCC to publish reports on arbitration determinations.

As a general matter, the ACCC believes that a code is more likely to be successful if a full range of industry participants are involved in its development. Industry collaboration will make it more likely that the code will have wide acceptance and will include workable solutions that fairly balance the interests of all parties.