



Australian  
Competition &  
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Commission

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23 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,

I refer to your letter of 22 April 2008 to Mr Joe Dimasi regarding your Committee's inquiry into the draft Wheat Export Marketing Bill 2008. Also attached to this letter are the ACCC's responses to questions provided by Senator Nash.

### **Exclusive dealing**

Your letter raises issues regarding exclusive dealing conduct, which may raise issues under the *Trade Practices Act 1974* (the Act). Third line forcing conduct is one type of exclusive dealing conduct is a per se breach of the Act. Other types of exclusive dealing, which may include certain "bundling" arrangements, only breach the Act where they have the purpose, effect or likely effect of substantially lessening competition in a market.

However, the Act recognises that conduct which may otherwise breach the Act may, in some circumstances, be of benefit to the public. Accordingly, the Act allows businesses that are considering engaging in anticompetitive arrangements to seek immunity from legal action.

Businesses may obtain immunity to engage in exclusive dealing conduct that may be at risk of breaching the Act by obtaining an authorisation from the ACCC or by lodging a notification with the ACCC. Parties are free to choose either of these processes, although one may be more appropriate than the other, depending on the circumstances and the type of conduct for which immunity is sought. Both of these processes are described below.

The ACCC can confirm that it has not received an application for authorisation or an exclusive dealing notification from the CBH group in relation to its Grain Express proposal.

## **Authorisation**

In order to grant authorisation the ACCC must be satisfied that the public benefits arising from the particular conduct outweigh the anti-competitive detriment. Authorisation is not granted lightly by the ACCC, given the significance of providing immunity from legal action under certain provisions of the Act.

The onus of demonstrating that conduct ought to be authorised in the net public benefit rests on the applicant, and the process is conducted in a public and consultative manner.

## **Notification**

Alternatively, the Act enables a party proposing to engage in exclusive dealing conduct to lodge a notification with the ACCC. Different processes apply for notifications of third line forcing conduct and notification for exclusive dealing other than third line forcing.

Like the authorisation process, these processes are conducted in a public and consultative manner.

### *Third line forcing*

If the ACCC does not object to the notification, protection from legal action for the notified third line forcing conduct will commence 14 days after the notification is lodged with the ACCC.

The ACCC will object to a third line forcing notification where it concludes that the public benefits likely to result from the notified conduct will not outweigh the anti-competitive detriments.

### *Exclusive dealing other than third line forcing*

For a notification concerning exclusive dealing conduct other than third line forcing, immunity from legal action begins on the date a valid notification is lodged.

The ACCC may remove the immunity provided by a notification concerning exclusive dealing conduct other than third line forcing if it is satisfied that the proposed conduct will result in a substantial lessening of competition and the public benefit that may result from the proposed conduct would not outweigh the detriment to the public caused by the lessening of competition.

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

Yours sincerely

<signed>

Brian Cassidy  
Chief Executive Officer

# Senate Rural and Regional Affairs & Transport Committee

RESPONSES TO QUESTIONS ON NOTICE: WEDNESDAY, 23 April 2008

## 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 Senator Fisher has referred to free markets, do you have a free market if the market is dominated by a monopolies (sic) or do you have a market failure?**

Although not defined in the Trade Practices Act, a monopoly is generally regarded as a market that has only one firm. In some circumstances of a particular market, a monopoly may be economically efficient. However, the conduct of such a monopolist may have consequences for competition in (and therefore the efficient functioning of) related markets. The Trade Practices Act (through Part IIIA) seeks to address this issue through providing for an access regime. The objects of Part IIIA<sup>1</sup> include to '...promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets'.

**Q2. Senator Heffernan has referred to the issue of misuse of market power, has the ACCC taken any s 46 cases to court since the Boral High Court decision? Would you agree that the threshold for bringing s 46 cases to Court is too high? Should farmers be concerned that the ACCC has been unable to take s 46 cases to court?**

The ACCC has commenced one proceeding under section 46 since the Boral decision. On 5 February 2007 the ACCC took action against two cardiothoracic surgeons who operate in the Adelaide metropolitan area (ACCC v Knight [2007] FCA 1011). The proceedings were settled by consent on 5 July 2007 with the ACCC discontinuing its claim under section 46.

The Full Federal Court in *Safeway* (ACCC v Australian Safeway Stores Pty Ltd [2003] FCAFC 149) found breaches of section 46 after the *Boral* decision. Also after the *Boral* case, the Federal Court made consent orders under section 46 in the *Eurong Beach* case (ACCC v Eurong Beach Resort Ltd [2005] FCA 1900). In the *Fila* case (ACCC v Fila Sport Oceania Pty Ltd [2004] FCA 376) a finding of breach of section 46 was made (also after the *Boral* decision) but it should be noted that no defence was offered in that matter.

The ACCC notes that amendments were made to section 46 in September 2007 (these have not yet been tested before the court) and that the current Government has indicated an intention to introduce further reforms of the section.

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<sup>1</sup> S.44AA

**Q3. Senator Hurley has referred to arbitration under access regimes? How long are arbitrations taking? Would you say that arbitrations are slow and time consuming?**

The ACCC has conducted arbitrations under access regimes that are set out in Part IIIA and in Part XIC of the Trade Practices Act.

Part IIIA

Under Part IIIA of the Trade Practices Act, the ACCC is required to use its best endeavours to make a determination of an arbitration within six months.

To date, the ACCC has conducted two arbitrations under Part IIIA.

*(1) Domestic air services:* Virgin Blue notified the ACCC of an access dispute with Sydney Airport Corporation Limited (SACL) on 29 January 2007, and an arbitration related to access to the declared Airside Service commenced in February 2007. Virgin Blue lodged a written notice to end the arbitration with the ACCC on Tuesday 22 May 2007 following negotiated commercial settlement of the dispute. The period from the commencement of the arbitration to the notification of the settlement was therefore about four months.

*(2) Water:* Certain services provided by Sydney Water are declared under Part IIIA of the Trade Practices Act. In November 2006 Services Sydney notified the ACCC of a dispute in relation to the methodology of pricing access to Sydney Water's declared sewage transportation services. The ACCC made its final determination in June 2007. The period of the arbitration process was therefore about seven to eight months.

Part XIC

Arbitrations under Part XIC of the Trade Practices Act on access disputes for regulated telecommunications services involve a number of procedural steps. Recent arbitrations have taken on average approximately 350 days to resolve. When exercising its powers to resolve access disputes, the ACCC must have regard to the desirability of resolving disputes in a timely manner. The ACCC also has the option under Part XIC of issuing interim determinations, setting the terms and conditions under which access will continue to be provided while arbitrating the dispute.

**Q4. Would you say there are high barriers to entry in storage, handling and ports? Doesn't that strengthen the market power of vertically integrated bulk handlers?**

The ACCC has not conducted an analysis of the barriers to entry in all of the areas of interest to the Committee. The ACCC has however been required to consider barriers to entry in a few specific cases. For example, in considering the proposed acquisition of AusBulk and United Grower Holdings by ABB Ltd in 2004, the ACCC found that in South Australia barriers to entry into storage and handling were relatively high for new entrants or for parties who did not enjoy single desk rights. Whether there are high

barriers to entry in storage, handling and ports facilities in all areas of interest to the Committee is a matter that the ACCC does not have sufficient information to answer.

The ACCC understands that the proposed legislation would allow for the vertical integration of bulk handling companies into wheat export marketing. If control of bulk handling facilities is a source of market power then it may be the case that the bulk handlers are in an advantageous position to compete in wheat export marketing. However, whether the bulk handling companies have the ability and incentive to act anti-competitively in the area of wheat export marketing would need to be considered on a case-specific basis.

**Q5. Hasn't the ACCC had concerns about lack of competition in ports? What is the ACCC doing to fix this?**

The ACCC has a role in monitoring the costs, prices and profits of container stevedoring companies at the largest Australian container ports. In reporting the results of that monitoring, the ACCC has raised questions over the degree of competition in the market for stevedoring services and the incentives of the existing stevedores to compete through lower prices. The monitoring role given to the ACCC does not however extend to regulating the prices or terms of access that levied by the stevedores or the ports at which they operate.