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Senator Glenn Sterle
Chairman – Senate Rural and Regional Affairs and Transport Committee
Parliament House
Canberra ACT 2600

Dear Senator.

I am writing to provide additional information of relevance to the current Inquiry into the Wheat Marketing Export Bill (2008) that was not available at the time when our original submission to the Inquiry was made.

Section 20 – the 'access test'.

The members of the Grains Policy Institute support the intention of Section 20 of the draft Bill (the 'access test') which is to ensure that accredited bulk wheat exporters who also own grain export port terminals provide fair and reasonable access on commercial term to other accredited bulk wheat exporters.

As currently structured, Section 20 will apply Part III A of the Trade Practices Act to the management of grain port terminals from October 1st 2009. This is the equivalent of having grain port terminals declared as 'essential infrastructure'. There is then a possibility that ports may be subject to pricing control regulation by the ACCC.

The normal process for having infrastructure 'declared' is to apply to the ACCC; the Commission then conducts a public inquiry to establish the need for 'heavy' regulation and the possible need for pricing controls.

Section 20 effectively bypasses the normal process of having infrastructure declared 'essential'. As a result, infrastructure owners are denied the 'natural justice' of an opportunity to participate in an inquiry that would establish if declaration was *in the public interest* and if pricing controls were required.

The proposed access test in Section 20 will create a new layer of regulation and *double* the regulation in Western Australia, South Australia, Victoria and potentially Queensland. It is 'heavy handed' regulation and is;

- Counter to the spirit of the Bill, which is to lighten regulation in the wheat export sector,
- Shifts the burden of regulation from the wheat export monopoly to grain handling infrastructure,
- Counter to the Rudd Government's aim of reducing the burden of regulation on business,
- Taking regulation in the opposite direction to the regulatory reviews that have been undertaken on grain port terminal management by the SA and Victorian Governments,
- Counter to the spirit and direction of reform in the Australian grains industry that has taken place over the last quarter century.

The *focus* of Section 20 needs to be shifted from *imposing new regulations* back to;

a) The original intent of the Government's reforms, which was to develop a 'light handed' approach to regulation; and,

b) Ensuring an accredited bulk wheat exporter that owns ports and up-country storage provides *fair and reasonable access to infrastructure on commercial terms* to other bulk wheat exporters.

Unintended consequence.

We understand that the Government is seeking to ensure that port owners provide access to new bulk wheat exporters. This is a reasonable expectation.

However, there is no evidence to suggest, from past or current behaviour, that port owners would change their current open access management regimes to act in an anti-competitive or discriminatory manner.

In fact, if a port owner was to deny an exporter of *any* grain (not just wheat) access to ports, they would be contravening existing State regulation (in WA, SA and Victoria), and acting in a manner counter to relevant provisions in the Trade Practices Act 1974.

There is a very real danger that the imposition of Section 20, as it is currently drafted or in a more onerous form, would lead to significant devaluation of the effected infrastructure, in turn dramatically reducing infrastructure owners equity value.

Other unintended consequence of the proposed 'access test' may include a reduction in the number of likely applicants for bulk wheat export accreditation, which is counter to the intent of the proposed wheat marketing reforms, disincentives to infrastructure investment, a decline in efficiency and rising costs that will be passed back to growers.

Ultimately, infrastructure owners may be forced, under the burden of heavy regulation and possible price controls, to significantly rationalise both upcountry storage sites and ports.

These factors will have a significant impact on the viability and competitiveness of *all grain exports* from Australia, not just on wheat exports.

Suggested solutions.

There are several improvements to Section 20 that will guarantee infrastructure access, but remove the presumption that infrastructure owners have been, or will be, guilty of anti competitive behaviour. They include;

- a 'tiered' approach to guaranteeing port access to accredited bulk wheat exporters, where initial recognition would be given to existing state based regulation of ports and access guarantees; and,
- a proposal for a Supply Chain Code of Conduct (*covering ports, freight and up country storage*), which would become part of the bulk wheat exporter accreditation criteria.

Recognising existing State regulation.

Port terminals in Western Australia, South Australia and Victoria are currently regulated by State laws that guard against anti competitive behaviour by infrastructure owners.

The Section 20 access test should recognise where existing regulations or state based access regimes apply and not duplicate them. Wheat Exports Australia should have flexibility to consult with the relevant State authority and to apply existing access regulation to satisfy Section 20, for the purposes of meeting accreditation requirements in Section 11 of the proposed Act.

Supply Chain Code of Conduct.

The proposed Code of Conduct would be administered by Wheat Exports Australia and includes an access guarantee for port terminals *and* upcountry storage and handling infrastructure.

A copy of the draft Code is attached. Please note that additional work is being done to this Code in consultation with relevant parties to ensure its applicability.

The draft Code is based on the negotiate / arbitrate model adopted successfully by the Essential Services Commission of Victoria and contains a binding dispute resolution mechanism to ensure that signatories to the Code fulfil their obligations.

The draft Code differs from the Section 20 access test, in that it extends the 'access guarantee' beyond ports, up the logistics chain, to include upcountry grain accumulation sites.

As currently drafted, the Code also attempts to address the *most pressing grain logistical bottleneck*, transport of grain to ports from upcountry grain accumulation sites.

The Code proposes that signatories with 'spare capacity in grain haulage services' would make that capacity available to other accredited bulk wheat exporters on a non discriminatory basis.

Any company with more than 10,000 T of upcountry storage that applies for bulk wheat export accreditation would be compelled, as part of the Section 11 accreditation criteria, to become a signatory to and abide by the Code.

The sanctions that would be applied by the regulator, should signatories to the Code not fulfil their obligations, include;

1. Denial of bulk wheat export accreditation,
2. Removal of bulk wheat accreditation,
3. Imposition of a Part IIIA access undertaking and possible ACCC managed pricing controls.

As currently proposed, the draft Code provides a more effective 'access guarantee' than the draft Bill, while not requiring infrastructure owners to enter into the process of having the ACCC determine an access regime under Part IIIA of the Trade Practices Act.

The draft Code will also apply to companies other than the three major bulk handlers, further increasing the 'access guarantee' and providing fairer application of the Government's proposed regulatory changes.

If you require any additional information about these suggestions, or you wish related evidence to be presented before the Committee, please contact me at any time.

Yours sincerely

David Ginns

CEO

Monday, 14 April 2008

Bulk Wheat Supply Chain Code of Conduct

1 Name of code

This Code is the Bulk Wheat Supply Chain Code of Conduct.

2 Term

(a) This Code will commence on [ ] and will be for a period of [ ] years.

(b) The term of this Code does not limit the term of any contract entered into by a bulk grain terminal provider during the currency of this Code.

3 Purposes of Code

The purpose of this Code is to provide to Wheat Exports Australia (**"WEA"**), as the administrator of the wheat export accreditation scheme under the *Wheat Export Marketing Act 2008 (Cth)*, a code of conduct which will:

(c) ensure non-discriminatory access to services by bulk grain terminal providers at both up-country grain receival sites, port terminals and grain haulage services for all accredited wheat exporters;

(d) ensure provision of access and services provided to all accredited wheat exporters who use bulk grain terminals is on fair and reasonable commercial terms;

(e) commit bulk grain terminals to publish port terminal charges; and

(f) provide a fair and equitable dispute resolution procedure for resolving disputes arising under this Code.

4 Port terminal services

4.1 Commitment to publish charges and terms and conditions

(a) Bulk grain terminal providers are to publish all maximum charges and standard-offer terms and conditions for prescribed services provided by each port terminal on their website.

(b) Bulk grain terminal providers commit to:

(i) publish updated maximum charges for prescribed services provided by all port terminals on the provider's website by no later than 30 September of each year to apply throughout the proceeding 12 month period commencing on 1 October of the same year;

(ii) publish updated standard-offer terms and conditions for prescribed services provided by the port terminals on the provider's website by no later than 30 September of each year for the proceeding 12 month period ending on 30 September of the following year;

(iii) the charges and terms and conditions may be varied from time to time by the provider in accordance this Code. By mutual agreement contractual arrangements may be entered into with accredited wheat exporters at lower charges or on different terms and conditions.

4.2 Commitment to non-discriminatory access

(a) Bulk grain terminal providers will commit to not unfairly discriminate between different accredited wheat exporters as to the prices and terms and conditions for services provided.

(b) Charges and terms and conditions can be different for:

(i) different commodities;

(ii) different volumes of commodities;

(iii) different periods of time during which access is required;

(iv) different levels of demand;

(v) different modes of receival; and

(vi) different credit risk of the access seeker or access user.

(c) Without limiting the above, discrimination as to charges and terms and conditions is not to be taken as unfair or unreasonable if the relative terms reasonably reflect normal commercial considerations where it aids efficiency, including:

(i) relative costs of providing access and services having regard to commodity type, grade and quantity:

(ii) the reasonable cost of providing quality related services reasonably required by the provider in respect of some accredited wheat exporters, but not others, including security of grain integrity, testing of grain or grain classification;

(iii) available port capacity in terms of available grain segregations and tonnage and the need for the provider to handle and store commodities efficiently on behalf of itself and multiple accredited wheat exporters;

(iv) protecting the port terminal provider against liability for events reasonably beyond the control of the provider, including industrial strikes, boycotts or blockades;

(v) ability to commingle grain and relative risk related to storing and handling different grain segregations and commodities for accredited wheat exporters.

4.3 Commitment to a binding dispute resolution process

In the event of a dispute between the bulk grain terminal provider and an accredited wheat exporter over the charges or terms and conditions to bulk grain terminal services the following dispute resolution process will apply and be followed by the bulk grain terminal provider:

(g) the parties are obliged to negotiate in good faith and will endeavour to resolve any dispute concerning access to the port terminal between themselves, including where necessary escalating the dispute for negotiation between both parties' Chief Executives;

(h) if the parties cannot resolve the dispute themselves within 30 days of one party giving notice of the dispute (with particulars sufficiently to identify the issue or issues in dispute) to the other they will immediately:

(i) appoint within the following 15 day period an arbitrator to determine the dispute; or

(ii) if the parties are unable to agree upon an arbitrator, either party may refer the dispute for arbitration by an arbitrator nominated by the then President of the Law Society of the State/Territory that the bulk grain port terminal is located.

(i) Any arbitration will be conducted in the relevant state in accordance with the *Commercial Arbitration Act* of that jurisdiction except that:

(i) the arbitrator must observe the rules of natural justice but is not required to observe the rules of evidence;

(ii) a party may have legal representation;

(iii) the arbitrator must apportion costs of the arbitration and each party's costs of and incidental to the arbitration as the arbitrator sees fit; and

(iv) the dispute resolution process shall be completed as soon as practicable, and if possible within no longer than 20 business days.

(j) During any dispute resolution process, the pre-dispute status quo will continue. Accordingly:

(i) each party will comply with its obligations under this Code; and

(ii) the fact that a party ceases to do anything in dispute will not be taken to be an admission by that party that it had breached, or had been in breach of this Code.

5 Grain receival sites

5.1 Commitment to provide non-discriminatory access to grain receival sites

(a) Bulk grain terminal providers commit to:

(i) provide non discriminatory and open access to grain receival sites; and

(ii) negotiate fairly and reasonably with the accredited wheat exporter in relation to the export plan, shipping program, nominations and site assembly plan for that accredited wheat exporter.

(b) Without limiting the above, discrimination as to access, and refusal to negotiate, is not to be taken as unfair or unreasonable if the grain delivered to the grain receival site does not meet the pre-set receival standards, is contaminated or is under fumigation.

6 [Grain haulage services

6.1 Commitment to provide access to spare capacity

To the extent that a bulk grain terminal provider or a related body corporate has spare capacity to grain haulage services, that bulk grain terminal provider will commit to:

(a) make that spare capacity available to accredited wheat exporters, if and when that capacity becomes available;

(b) provide notice in writing, as soon as practicable, to accredited wheat exporters of the available capacity; and

(c) provide the available spare capacity on a non discriminatory first come, first serve basis.]

7 Definitions

accredited wheat exporter means a company that is accredited under the *Wheat Export Marketing Act 2008 (Cth)*

bulk grain terminal means facilities that include grain receival sites and port terminals used for the offshore export of wheat.

bulk grain terminal provider means a person or company or operates or manages or provides access to a bulk grain terminal.

grain haulage services means a service provided to transport grain from a grain receival site to a port terminal via the track network by the use of rolling stock.

grain receival sites means an up-country receival facility where grain is accumulated and stored before transport to a port terminal.

port terminal means a ship loader that is

(a) at a port; and

(b) capable of handling wheat in bulk;

and includes any of the following facilities:

(c) an intake receival facility;

(d) a grain storage facility;

(e) a weighing facility; or

(f) a shipping belt.

port terminal service means a service (within the meaning of Part IIIA of the *Trade Practices Act 1974 (Cth)*) provided by means of a port terminal facility and includes the use a port terminal.