



21 April 2008

Senator Glenn Sterle
Chairman
Senate Rural and Regional Affairs and Transport Committee
Department of the Senate
PO Box 6100
Parliament House, Canberra. ACT. 2600.

Dear Senator Sterle

Please find attached a submission that supplements our April 4th 2008 submission to the Senate Rural and Regional Affairs and Transport Committee Inquiry into the Wheat Export Marketing Bill (2008).

Graincorp's Submission

Our earlier submission emphasised that GrainCorp believes the imposition of Section 20 of the draft Bill potentially imposes an unreasonable and unwarranted level of additional regulation on grain export port terminals.

If Section 20 becomes law, GrainCorp will have to analyse whether the proposed benefits of seeking an export permit for bulk wheat offset the significant additional compliance and reporting obligations. If this is the case, an unintended effect would be to reduce the number of Australian companies buying and exporting Australian export wheat. This is clearly contrary to the Government intention.

Both the CBH Group and ABB Grain share our concerns regarding Section 20. The potential imposition of new regulation on port terminals is discriminatory and inappropriate.

GrainCorp's Proposed Solution

We have previously stated that clarification of access arrangements for accredited bulk wheat exporters is appropriate as a component of the new system, and we offer the attached Supply Chain Code of Conduct as a *commercially realistic alternative* to Section 20 of the draft Bill.

The approach is also supported by CBH Group and ABB Grain.

The Code provides a more comprehensive access guarantee than that proposed under Section 20. The Code has the following benefits over the draft Bill;

- It covers access to ports and upcountry grain accumulation sites,
- The Code would be administered by Wheat Exports Australia as a requirement of the Section 11 Accreditation Criteria,
- It would come into force immediately, whereas Section 20 comes into force from October 2009,
- The Code is consistent with the overall direction of Government policy to reduce regulation on business, while providing for fair access to export infrastructure.

Problems with Section 20

No credible evidence exists that warrants the imposition of an access undertaking under Part IIIA of the Trade Practices Act. Additionally, no independent examination of the management of grain export port terminals has recommended additional regulation, or the imposition of such an undertaking.

We understand that the 'political' driver of the proposition to impose such access undertakings, or impose new regulation, is the fear that 'regional monopolies' will replace the AWB monopoly.

We reject these assertions and the findings in the Allen Consulting Group report¹ that conclude that regional monopolies, based around export port terminals, will develop.

The 'regional monopoly' argument is based on the *erroneous set of presumptions* that have no basis in fact. The argument doesn't reflect the reality of current market competition for grain accumulation or port terminal capacity use, points emphasised in our earlier submission.

Some have argued that the current AWB monopoly provides 'countervailing' market power, preventing 'regional monopolies' from forming. Such an assertion is not supported by the Wheat Export Authority (WEA) or any independent study.

The WEA found in its 2006 Growers Report "...that AWB(I) appears unable to use its market power to significantly influence country storage and handling costs..."². The same analysis found that AWB (International) paid the highest storage and handling fees to another AWB Limited subsidiary, AWB Grainflow.

The WEA independently negated the 'regional monopoly' argument in 2006, *using data directly sourced from AWB International not available to any other analyst*.

The WEA has, in effect, found that if regional monopolies were going to form, they would have already formed and their impact would now be apparent. The WEA has made no such finding.

GrainCorp, and other infrastructure providers, have an established history of providing open access to grain accumulation networks, rail and road freight, and export terminals, and these companies will continue to do so in the future.

As we have already stressed, ports, rail and upcountry grain accumulation infrastructure rely on tonnage throughput to generate revenue; to firstly cover the cost of providing the infrastructure (maintenance and operations), and secondly to earn a return on the approximately 3 ½ billion dollars (replacement value) currently invested in this infrastructure.

The WEA, as the independent monitor of the wheat export sector, makes a significant point in its 2006 grain handling infrastructure study. "*Storage and handling providers face the need to upgrade facilities to cope with ever increasing production and improve handling rates, which may, for example, result in lower freight rates. Such investments require capital, the source of which is the handling charge levied on the users of the system.*"³

¹ Competition in the export grain supply chain, Report to AWB Limited. The Allen Consulting Group, March 2008.

² Wheat Export Authority Growers Report 2006. Pg. 6.

³ Wheat Export Authority Growers Report 2006. Pg. 6.

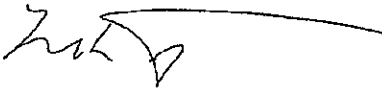
This finding validates the claim by infrastructure providers that grain handlers seek to maximise throughput and efficiency. There is no commercial, or any other kind of logic, that would drive an infrastructure owner, in light of the constant need to maximise throughput as the method of generating revenue, to act in a manner that would minimise opportunities to generate such revenue.

The WEA also found that "...Storage and handling companies generally have a policy of similar charging structures for all users of the system."⁴ This finding validates the claim by infrastructure owners that their systems are managed in an 'open' manner, to maximise tonnage throughput.

The WEA's conclusions, based on the actual commercial practice of infrastructure owners, provides conclusive evidence that regional monopolies will not develop, in the light of the earlier finding that the AWB monopoly has no countervailing marketing power.

As advised above, GrainCorp submits that Section 20 be replaced by a provision requiring accredited bulk wheat exporters submit to a supply chain Code of Conduct, and that the WEA and not the ACCC be the body appointed to regulate such a code. We hope that a GrainCorp representative will have the opportunity to present this Code of Conduct to your Committee for consideration prior to making your recommendations to the Minister.

Yours sincerely



Mark Irwin
Managing Director

⁴ Wheat Export Authority Growers Report 2006. Pg. 6.



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18 April 2008

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

Dear Senator Sterle

On behalf of the CBH Group, I write to inform you of our strong support for the proposed Bulk Wheat Supply Chain Code of Conduct that has been put forward by GrainCorp Pty Ltd.

As a co-operative that has invested close to \$1 billion in bulk grain handling facilities in the past 10 years on behalf our Western Australian grain grower shareholders, we hold a keen interest in ensuring that we have the ability to demonstrate our commitment to providing fair and reasonable access to bulk handling infrastructure in a proactive manner.

The CBH Group therefore strongly supports the adoption of the proposed Bulk Wheat Supply Chain Code of Conduct over Section 20 in the proposed Wheat Export Marketing Act 2008 and we urge the Senate Rural and Regional Affairs and Transport Committee to give this due consideration.

The Code of Conduct allays concerns of access restrictions without posing a regulatory burden on the commercial activities of the CBH Group. I note that these concerns regarding access have to date been based on rumour and speculation and that the CBH Group's behaviour in the supply chain has demonstrated its willingness to provide access to its infrastructure. We are, after all, a volume dependent business.

While Section 20 places requirement for an access undertaking in relation to port facilities, the Code of Conduct will ensure that all bulk grain terminal providers are bound to provide fair and reasonable access to both port and up-country facilities. It provides bulk handlers with the ability to demonstrate the appropriate behaviour in the supply chain, rather than regulate behaviour before it has been demonstrated as necessary and appropriate.

I trust that you will give the Bulk Wheat Supply Chain Code of Conduct due consideration as an alternative that delivers the desired outcome in terms of ensuring access to infrastructure without the need for burdensome regulation. I would be happy to discuss this matter further at any time.

Yours faithfully

For: Co-operative Bulk Handling Limited

Neil Wandel
Chairman

Background - Draft Supply Chain Code of Conduct.

GrainCorp, the CBH Group and ABB Grain agree with the principal of providing a 'guarantee' of port access to bulk wheat exporters and of including this guarantee as component of bulk wheat exporter accreditation conditions.

The draft Code has been prepared to provide a commercially based solution to guaranteeing new bulk wheat exporters access to ports and promises a more comprehensive access guarantee than that proposed in the draft Bill.

The Code guarantees;

- access to port terminals by accredited bulk wheat exporters,
- extends the access undertaking to cover upcountry grain accumulation facilities,
- includes an undertaking to make surplus grain haulage capacity available to other accredited bulk wheat exporter on a non discriminatory basis; and,
- contains a binding dispute resolution process.

The Code would be overseen by the regulator of the Wheat Export Marketing Act, Wheat Exports Australia, and would become an integral part of the Section 11 bulk wheat exporter accreditation system.

The Code would come into effect at the time infrastructure owners are accredited as bulk wheat exporters, rather than in October 2009.

The Code would be subject to Ministerial oversight, to allow for reference back to the Parliament.

While Wheat Exports Australia would administer the Code, variations to it could only be enacted with the agreement of all signatories and final approval of the Minister.

The Code will be in force for the duration of the Act and will be subject to the same reviews as the Act.

Key Elements.

- The Code would apply to all accredited bulk wheat exporters that own port terminals and / or upcountry grain accumulation and storage sites with more than 10 000 T aggregate capacity.
- The Code provides a more effective access guarantee than the Draft Bill, as it covers port terminals *and* upcountry accumulation sites.
- The Code contains a commitment to make available surplus grain haulage capacity to accredited bulk wheat exporters.
- It contains a binding resolution dispute arbitration process.
- The Code is based on sound commercial principles and practice.

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 subject to paragraph 2(b) will operate in relation to an Accredited Bulk Wheat Exporter for the period that the *Wheat Export Marketing Act 2008 (Cth)* (“**the Act**”) requires the provision of access to Port Terminals as a condition of accreditation for bulk wheat exporters or their related bodies corporate who also provide Port Terminal Services.
 - b) This Code will cease to apply to a Bulk Grain Facility Provider from the time that it ceases to be accredited under the Act.
 - c) The term of this Code does not limit the term of any contract entered into by a Bulk Grain Facility Provider during the currency of this Code.
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3 Purpose 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 Act, a code of conduct which will:

- a) ensure non-discriminatory access to services by Bulk Grain Facility Providers at both up-country Grain Receiving and Accumulation Sites, Port Terminals and Grain Haulage Services for all Accredited Bulk Wheat Exporters;
 - b) commit Bulk Grain Facility Providers to publish Port Terminal charges and Port Terminal use terms and conditions; and
 - c) provide a reasonable and equitable dispute resolution procedure for resolving disputes arising under this Code.
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4 Port Terminal Services

4.1 Commitment to publish charges and terms and conditions

- a) Bulk Grain Facility Providers are to publish all maximum charges and standard-offer terms and conditions for services provided by each Port Terminal on their website.
- b) Bulk Grain Facility Providers commit to:
 - i. publish updated maximum charges for services provided at Port Terminals on the provider’s website by no later than 31 August of each year to apply throughout the following 12 month period commencing on 1 September of the same year and ending on 31 August of the following year; and;
 - ii. publish updated standard-offer terms and conditions for services provided at Port Terminals on the provider’s website by no later than 31 August of each year for the following 12 month period commencing on 1 September of the same year and ending on 31 August of the following year;
- c) The charges and terms and conditions may be varied from time to time by the provider in accordance with this Code. By mutual agreement, contractual arrangements may be

entered into with Accredited Bulk Wheat Exporters at lower charges or on different terms and conditions to those published.

4.2 Commitment to non-discriminatory access

- a) Bulk Grain Facility Providers will commit to not unreasonably discriminate between different Accredited Bulk 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 receipt or outturn; 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 unreasonable if the relative terms reasonably reflect normal commercial considerations, 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 Bulk 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 Bulk 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 Bulk Wheat Exporters.

5 Grain receipt and Accumulation Sites

5.1 Commitment to provide non-discriminatory access to Grain Receipt and Accumulation Sites

- a) Bulk Grain Facility Providers commit to not unreasonably discriminate between different Accredited Bulk Wheat Exporters as to access to Grain Receipt and Accumulation Sites.
- b) Access arrangements 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 receipt; and
 - vi. different credit risk of the access seeker or access user.

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- c) Without limiting the above, discrimination as to access is not to be taken as unreasonable if the relative terms reasonably reflect normal commercial considerations, 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 Bulk Wheat Exporters, but not others, including security of grain integrity, testing of grain or grain classification;
 - iii. available site 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 Bulk Wheat Exporters;
 - iv. protecting the site 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 Bulk Wheat Exporters.
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6 Grain haulage services

6.1 Commitment to provide access to spare capacity

To the extent that a Bulk Grain Facility Provider or a related body corporate has spare capacity to grain haulage services, that Bulk Grain Facility Provider will commit to:

- a) make that spare capacity available to Accredited Bulk Wheat Exporters, if and when, that capacity becomes available;
 - b) provide notice in writing, as soon as practicable, to Accredited Bulk Wheat Exporters of the available capacity; and
 - c) provide the available spare capacity to Accredited Bulk Wheat Exporters on a non discriminatory basis, subject to clause 4.2 (c).
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7 Dispute resolution

7.1 Commitment to a binding dispute resolution process

In the event of a dispute between a Bulk Grain Facility Provider and an Accredited Bulk Wheat Exporter over the charges or terms and conditions to Bulk Grain Facilities the following dispute resolution process will apply and be followed by the Bulk Grain Facility Provider and the Accredited Bulk Wheat Exporter:

- a) the parties are obliged to notify WEA within 7 days of any dispute that is referred to dispute resolution under paragraph 7.1(c);
 - b) the parties are obliged to negotiate in good faith and will endeavour to resolve any dispute concerning access to the bulk grain terminal between themselves, including where necessary escalating the dispute for negotiation between both parties' Chief Executives;
 - c) if the parties cannot resolve the dispute themselves within 30 days of one party giving notice of the dispute (with particulars sufficient 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, notify WEA of the failure to agree on an arbitrator following which the WEA will, following consultation with
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the parties, appoint a suitably qualified independent arbitrator in the State/Territory where the Bulk Grain Facility is located.

- d) 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.
- e) The decision of the arbitrator is final and binding on all parties.
- f) 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.

8 Variation of the Code

- a) This Code cannot be varied without the consent of WEA or affected Bulk Grain Facility Providers.
- b) If a Bulk Grain Facility Provider requests a variation to the Code, WEA must consider that variation within a reasonable time and provide reasons if it does not consent to the variation.
- c) In considering a request to vary the Code, WEA must consult with Accredited Bulk Wheat Exporters and Bulk Grain Facility Providers and have regard to the following criteria:
 - i. the purpose of the Code;
 - ii. the legitimate business interests of Bulk Grain Facility Providers;
 - iii. the material impact any variations to the Code may have on the business interests of Bulk Grain Facility Providers; and
 - iv. the operational and technical requirements of Bulk Grain Facilities.
- d) WEA must conduct a review of the Code on the fifth anniversary of its commencement and every five years thereafter.

9 Definitions

Accredited Bulk Wheat Exporter means a company that is accredited under the *Wheat Export Marketing Act 2008 (Cth)*.

Bulk Grain Facilities means facilities that include Port Terminals or Grain Receival and Accumulation Sites.

Bulk Grain Facility Provider means a person or company which operates, manages or provides access to Bulk Grain Facilities.

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 and Accumulation 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 of a port terminal.