National Access Regime

CBH submission to Productivity Commission

Contents

1. Compliance Costs

As a result of the CBH being forced into the National Access Regime by the Wheat Export Marketing Act (**WEMA**) requirement to have an undertaking pursuant to Part IIIA of the Competition and Consumer Act 2010 (Cth) (**Competition Act**) CBH has incurred additional costs to its business. These costs are ultimately borne by the grower, Western Australia growers in CBH's case and growers in other States who benefit from facilities operated by other bulk handlers regulated by WEMA.

Compliance and implementation costs come in a number of guises:

- Direct incurred external costs - solicitors, valuers, economists, travel etc.
- Direct internal costs – time occupied by internal staff in dealing with the matter when they could be doing other work or in increased internal resourcing to meet the demand. This is particularly the case for internal legal and compliance staff, together with training of affected staff to ensure an understanding of and compliance with the new regulations.
- Indirect costs – these are costs incurred by all of industry as a result of increased requirement for consultations and submissions as well continuing to operate systems that may not be the optimal system but the benefit from changing does not exceed the process based costs or does not accrue to the port terminal operator. In this case, inefficiencies may remain in the industry as there can be little or no incentive to undergo the change process.
- Indirect costs – lost opportunity. These costs are incurred when there is a desire for change yet the inflexibility of the process inhibits change. For example, under the Competition Act, access undertakings applications (new undertakings, variations or replacements) provide that the ACCC has a 180 day time limit (not including requests which stop the clock). The ACCC is entitled to take that amount of time to assess any application a port terminal operator may make. Therefore CBH has to commence applications very early in order to attempt to ensure changes get through before the next harvest or it has to decide not to make the application. In practice applications need to be made in about October or November to ensure that they can be in place for the harvest beginning in the following September. This makes responding to events in the current harvest very difficult. This inaction then becomes an opportunity cost for CBH and industry sometime referred to as "regulatory chill".

Direct Costs incurred by CBH

Year	Tasks	Low ($ '000's)	High ($ '000's)
2009	Introduction and consultation on access undertaking	1250	1250
2010	Changes to Port Terminal Rules and compliance	250	350
2011	New access undertaking, consultation and compliance	600	700
2012	Changes to port terminal rules and access undertaking	200	350
2013E	Changes to port terminal rules and access undertaking and compliance matters	200	300
2014E	Introduction of new access undertaking (if required), consultation (if required) and compliance	100	700
Totals		**2600**	**3650**

2. Commercial outcomes prevented

In 2009, CBH's initial access undertaking application provided a standard set of terms under which CBH would provide access to port terminal capacity and proposed a 3 year term. In the interests of standardisation CBH was restricted to a 2 year term. This required CBH to commence work on a follow up undertaking after less than 12 months of operation under the first access undertaking. Essentially this had the effect of accelerating several hundred thousand dollars of expenditure in formulating and consulting on a new access undertaking.

In 2011 CBH could not change to a system to allow it to sign up longer term agreements with customers despite there being a willingness amongst major exporters to progress to a system that gave them longer term certainty in return for more efficient conduct.

In 2012 CBH could not change its Port Terminal Services Agreement to permit auction specific rebates in time for auctions despite all customers agreeing to the change and the change being applied across the board to all customers (so no discrimination issues).

CBH is not permitted to change its capacity allocation process away from auctions without the permission of the ACCC notwithstanding that it would continue to be bound by non-discrimination and no hindering clauses in the undertaking. CBH has seen its port terminal operations, which were always subject to an obligation to provide access under the Bulk Handling Act 1967 (WA), become subject to significantly more regulation as a result of the opening up of the bulk wheat export market. This increase in regulation has occurred notwithstanding the provision of access to all parties willing to export grain on commercial grounds. This is examined in further detail in section 6 below.

3. Competition in the grain market

Competition in the grain markets in Australia developed as a consequence of the opening up of the ability to export bulk wheat in 2008 to a broader cross section of exporters than was previously possible.

It would be too strong a contention to say that access regulation of wheat export terminals has facilitated the efficient use of and investment in wheat export terminals[1] and there has been no causal evidence shown to support that statement.

In fact, access to services provided by port terminals had been granted by all port terminal providers before the wheat handling aspects were placed into the National Access Regime. There is no demonstrated need for access regulation and the requirement of a private profitability test would have demonstrated that there is no need for access regulation to increase competition in the export grain handling market. Evidence of this can be seen that new terminals are being proposed and commenced in a number of states including Queensland, New South Wales and Western Australia[2].

4. ACCC submission on the CBH's undertakings

With respect to the ACCC, CBH has a different view of the circumstances surrounding the 2009 access undertaking process. Under that process, CBH submitted an access undertaking following consultation with the ACCC as to standardising the content of the undertakings to make it easier for the ACCC to consider within the hard time limits imposed by the access test provisions of WEMA.

[1] See p6 ACCC submission to issues paper – Productivity Commission Review of National Access Regime

[2] See "Bunge gets nod to ship grain from Bunbury", The West Australian, 28 March 2013

CBH considers that the access undertaking proposed by it contained not only port protocols[3] and standard access terms[4] but also robust non-discrimination clauses, no hindering clauses and information ring fencing principles[5].

The undertaking also proposed a mechanism to guide the transition of the undertaking from one to next so that the access test did not snap into effect against CBH if the ACCC refused to approve a replacement undertaking. To a large degree CBH has been forced to accept ACCC positions on inclusions in the undertakings because there is a huge detrimental impact on CBH if an undertaking is not accepted.

In the 2011 undertaking process CBH endeavoured to change the capacity allocation process in order to provide a better capacity allocation system that met the needs of all stakeholders including CBH. CBH notes that its interests as the owner and operator of a facility appear to be paid little weight and the interests of the biggest user of the facilities is likewise ignored. Ultimately the summary placed by the ACCC about the process does not reveal what actually occurred. CBH submitted a revised undertaking in August 2011 after being advised that the ACCC would be unable to come to a decision about the baseload capacity allocation system prior to the September 30 deadline imposed by the WEMA access test. Under the circumstances, CBH considered that it was prudent to submit a revised draft that essentially continued the then current 2009 undertaking. Subsequently a draft decision was handed down indicating that the ACCC would not accept the CBH undertaking.

As part of the final amendments to the proposed 2011 undertaking the ACCC required that CBH include a provision forbidding CBH to alter its capacity allocation system away from an auction without running through an undertaking amendment process that has a 180 day statutory time limit. In this regard, CBH is concerned that departure from the current system is now subject to regulatory chilling effect. It also notes that GrainCorp has been permitted to implement a long term agreement system with very similar attributes to CBH's system including eligibility criterion that the ACCC called discriminatory in CBH's 2011 Draft decision.

5. Appeal against decisions associated with the National Access Regime

CBH is strongly of the view that appeal rights for infrastructure owners should continue to be incorporated into the National Access Regime given their substantial investment in infrastructure covered and that the benefits of appeals (including merit based appeals) far outweighs the regulatory costs.

In addition, where infrastructure owners are forced into elements of the National Access Regime great care should be taken that the appeal rights contained within the regime are not effectively abrogated by the legislation that constitutes a de facto declaration.

For instance, under WEMA, some port terminal owners were forced into the National Access Regime without regard to the factors normally taken into account under the declaration process. That was the first removal of checks and balances for port terminal owners. Effectively a port terminal owner could not balance off the cost of submitting a voluntary access undertaking against the risk of declaration and loss of control over facility.[6]

[3] See attachment 1 – Draft Port Terminal Rules – CBH Access Undertaking submission 14 April 2009 http://transition.accc.gov.au/content/item.phtml?itemId=869781&nodeId=362e34967e725b7cc5587343856ae8b3&fn=Supporting%20submission%E2%80%94attachment%201%E2%80%94CBH%E2%80%9414%20April%202009.pdf

[4] See attachment 4 – Draft Standard Terms – CBH Access Undertaking submission 14 April 2009 http://transition.accc.gov.au/content/item.phtml?itemId=869783&nodeId=cf59b3e07bbecb279bdb368574f86e51&fn=Supporting%20submission%E2%80%94attachment%204%E2%80%94CBH%E2%80%9414%20April%202009.pdf

[5] See Draft undertaking at clauses 6.4, 9.3 and Schedule 2 - http://transition.accc.gov.au/content/item.phtml?itemId=869779&nodeId=c19e422fae07db9a96bc30fc051ff80a&fn=Access%20undertaking%E2%80%94CBH%E2%80%9414%20April%202009.pdf

[6] This is consistent with the conclusions found in the ACIL Tasman Report entitled "Access Regulation and the Wheat Export Marketing Act 2008" (2009) at page 58.

Secondly, the appeal rights against a decision by the ACCC to reject a voluntary undertaking provided pursuant to the National Access Regime could not, in practice, be exercised. The very structure of the access test meant that a choice to exercise an appeal right by a port terminal owner would result in it failing the access test and potentially be unable to export hundreds of millions of dollars of wheat. This was the second removal of checks and balances that existed under the National Access Regime. This meant that port terminal owners could not effectively negotiate a balanced voluntary undertaking with the ACCC.[7]

CBH does not see that requiring a party to provide a voluntary access undertaking was intended by the Hilmer committee to be an appropriate method of access provision. It would be surprising as if a compulsory voluntary undertaking was appropriate why create a declaration process with checks and balances in to determine access pathways. The voluntary access undertaking was intended to be a manner for an access provider to proactively gain certainty about how a facility potentially capable of being declared could be operated and to gain protection from a declaration application whilst that voluntary undertaking was being considered.

6. Competition and Infrastructure Reform Agreement 2006

The removal of the checks and balances constitutes an encumbrance on those port terminal owners required to submit to National Access Regime without consideration for the original intent of the regime. This intent was demonstrated in the 2006 Competition and Infrastructure Reform Agreement (CIRA) between the Commonwealth Government and State and Territory governments.

Firstly in clause 2.2 which states that:

2.2 The Parties agree that, in the first instance, terms and conditions for third party access to services provided by means of significant infrastructure facilities should be on the basis of terms and conditions commercially agreed between the access seeker and the operator of the infrastructure.

Then in clause 4.1(a) CIRA states that:

...ports should only be subject to economic regulation where a clear need for it exists in the promotion of competition

Neither of these principles were followed when forcing some wheat port terminal operators into the National Access Regime and these principle are not something that the ACCC is required to consider when assessing voluntary undertakings. CBH therefore considers that the effectiveness of the CIRA reforms has been undone by a failure to effectively implement them.

In all cases throughout Australia, access to port terminal facilities was being provided to the deregulation of bulk wheat exports and after the deregulation of bulk wheat exports and therefore it is difficult to claim that it was not possible to reach agreement on commercial conditions of access.

CBH is of the view that this is consistent with the requirement contained in section 44G(2)(b) that it would be uneconomic for anyone to develop another facility to provide the service. That is, one of the tests as to whether access regulation should be applied is that it could not be privately profitable for anyone else to develop a competing facility.

In addition, as mentioned in CBH's prior submission dated 8 February 2013, the WA Rail Access Regime does not comply with the obligations contained in CIRA. In particular, the obligations contained in clause 2.4(b)

b. Regulated access prices should be set so as to:

ii. Generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services…

[7] This is consistent with the conclusions found in the ACIL Tasman Report entitled "Access Regulation and the Wheat Export Marketing Act 2008" (2009) at page 62.

…

iii. Allow multi part pricing and price discrimination when it aids efficiency;

iv. *Provide incentives to reduce costs or otherwise improve productivity.*

And the obligations contained in clauses 3.1 and 3.2:

3.1 The Parties agree to implement a simpler and more consistent national system of rail access regulation, using the Australian Rail Track Corporation access undertaking to the Australian Competition and Consumer Commission as a model, to apply to the following agreed nationally significant railways:

a. Interstate rail track from Perth to Brisbane, currently managed by the Australian Rail Track Corporation and other parties, subject to the outcome of commercial negotiations; and

b. Major intra-state freight corridors on an agreed case by case basis depending on the costs and benefits of inclusion under a national regime.

3.2 The Parties agree to develop an agreed approach to the application of the Australian Rail Track Corporation access undertaking model including pricing and access mechanisms…

To date CBH does not see evidence, in the fields in which it is concerned, that CIRA has been effective in guiding the actions of the signatories to it. As noted above, regulation of ports has been implemented and continued without evidence of any market failure in a situation where new entrants have demonstrated that entry to the market is possible. In addition, regulation of rail access in Western Australia has failed to create consistency with the rail access regimes in other states and has not followed the pricing principles outlines in the ARTC access undertaking.