GrainCorp Operations Limited

Submission to the Productivity Commission

Response to the Draft Report on Wheat Export Marketing Arrangements

28 April 2010

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Summary

GrainCorp supports the terms of reference prescribed for the Commission's Inquiry into Wheat Export Arrangements. The Inquiry was an appropriate measure, given the significant change made to the industry in July 2008 with the removal of the bulk wheat export monopoly.

- GrainCorp believes that the scope of consultation undertaken by the Commission was appropriate and comprehensive.
- The opinions given to the Commission adequately represent the breadth of opinion within the industry on the matter of regulated wheat marketing.

GrainCorp supports the recommendations by the Commission to deregulate the sector. However, GrainCorp believes that -

a) The 30 September 2011 deregulation date should be moved back to 30 September 2012.

b) *All* aspects of the regulation of bulk wheat exports should cease from that date.

c) GrainCorp *does not* support the conclusion of the Commission that regulation of access to grain export elevators should be 'de-coupled' from the regulation of bulk wheat exports.

The Draft report highlights the contradictions created by the current wheat export regulations, with particular reference to the access test provision in the Wheat Export Marketing Act 2008 (Act) and the manner in which this provision forces three companies to compulsorily enter into a 'voluntary' access Undertakings with the Australian Competition and Consumer Commission (ACCC).

In recommending that regulation of export elevator access continue beyond the point at which bulk wheat export regulation ceases, the Commission has created a number of contradictions within its findings. In particular, the finding that continued Government intervention in the wheat export market would have "*…virtually no benefit and would continue to impose costs on the industry."*

The Commission has not provided clarity about how the proposed extension of the access test beyond the cessation of bulk wheat export accreditation would be applied to new entrants to the export elevation market.

GrainCorp believes that provisions under the Trade Practices Act 1974 (TPA) provide adequate protection against predatory and anti-competitive business practices, a position supported by findings of the Commission.

GrainCorp also believes that the TPA offers effective protection against misuse of market power in the grains industry. Competition laws applying to the rest of the Australian economy, in the form of the TPA, should be applied in the same manner to the grains industry. No justification exists to treat the grains industry as a regulatory 'special case'.

Multiple layers of regulation are not required to achieve the development of satisfactory commercial relationships between elevation service providers and exporter. This position is supported by the fact that GrainCorp has signed multi-year export elevation service agreements with exporter customers.

GrainCorp believes that continuing regulation of any aspect of the grains industry will hinder the development and maturation of the sector, impose a barrier to investment in infrastructure, both existing and new, and will retard the flexible delivery of efficient services at all points of the supply chain.

Recommended Alternative Deregulation Timetable

GrainCorp believes that any changes to the current regulations controlling the bulk wheat export sector must be applied *evenly and fairly* across all industry participants.

To ensure that the current market transition is completed in a manner that does not disadvantage *any* industry participant, GrainCorp proposes the following timetable to deregulation.

1. **Between 30 September 2010 and 30 September 2012 -**
    a) To avoid potentially controversial and difficult to implement legislative amendments, Wheat Exports Australia should instead take the initiative to *reform the manner* in which the current accreditation scheme is applied, to achieve outcomes that align with Recommendations made by the Commission, namely to -
        i. decrease the cost and complexity of accreditation,
        ii. increase the transparency of the manner in which the scheme is applied, and
        iii. focus on accreditation *outcomes* rather than accreditation *processes*.
    b) Any grain export elevator owned, part owned, controlled or operated by an accredited bulk wheat exporter, or by a party that is an associated entity of an accredited bulk wheat exporter, be subject to the full provisions of the access test and be required to have in place an ACCC approved access Undertaking.
    c) The National Competition Council (NCC) conduct a formal review of the status of and / or need for regulation of grain export elevators, by applying the criteria defined in the Declaration pathway[1] under Part IIIA of the TPA. The Review would be completed by the end of December 2010.
2. **On 30 September 2012, the following regulatory changes apply -**
    a) Repeal of Regulation 9AAA of the Customs (Prohibited Exports) Regulations 1958.
    b) Repeal of the Wheat Export Marketing Act 2008 and removal of the bulk wheat export accreditation scheme, including removal of the access test requiring any owner of a grain export elevator to have in place an ACCC access Undertaking.
    c) Cessation of any ACCC access Undertaking applying to a grain export elevator.
    d) Wheat Exports Australia is abolished and the Wheat Export Charge removed.
3. **Effective from 1 October 2012 -**
    a) All grain export elevator operators to be party to an Access Provision Code that would be a component of any commercial port elevation services contract.
    b) The Access Provision Code would provide for -
        i. The weekly publication of a shipping stem
        ii. The monthly publication of grain stocks at port
        iii. Public publication of service prices and a set of protocols covering the booking and use of excess export elevation capacity.

[1] http://www.ncc.gov.au/index.php/making-an-application/declaration

Responses to Draft Recommendations

In this section, GrainCorp addresses Draft Recommendations and requests for further feedback in the order in which they appear in the Commission's Draft Report.

Chapter 4 – Accreditation of Exporters

Draft Recommendation 4.1

GrainCorp agrees that regulation of bulk wheat exports under the bulk wheat export accreditation scheme should be abolished, **but that the date of abolition be delayed until 30 September 2012.**

At that date, *all* aspects of the current scheme should be deregulated in a coordinated manner.

The Commission correctly notes that there is no *"…persistent market failure…"* that requires government intervention in the wheat export sector (pp. 119) and that there is no evidence to suggest that the successful deregulation of the domestic wheat market 20 years ago will not be repeated when the bulk wheat sector is deregulated (pp. 119).

Draft Recommendation 4.2

GrainCorp agrees that Regulation 9AAA of the Customs (Prohibited Exports) Regulations 1958 should be repealed.

Draft Recommendation 4.3

GrainCorp believes that, prior to being abolished, the current scheme should be applied in a manner that would reflect the recommendation of the Commission. The current scheme does not need amendment to achieve such an outcome.

The Board of Wheat Exports Australia has within its powers the ability to 'interpret' the manner in which the scheme is implemented. They should consider the Commission's findings that the lack of transparency in the way the accreditation scheme is applied (pp. 114) *"…creates uncertainty and imposes a barrier to entry for some potential exporters."*

GrainCorp believes that the Board of Wheat Exports Australia should, of its own volition, implement reforms to the manner in which the current scheme is applied to achieve a more 'light handed' outcome, rather than the current *process* focused regulatory regime.

In doing so, the Wheat Exports Australia Board would be contributing to the transition of the industry to deregulation of bulk wheat exports by 30 September 2012.

Draft Recommendation 4.4

GrainCorp believes that Wheat Exports Australia should be abolished at the completion of deregulation. Prior to being abolished, Wheat Exports Australia should lessen the impost of the current scheme in line with our response to Draft Recommendation 4.3.

Draft Recommendation 4.5

GrainCorp believes that the Wheat Export Charge (WEC) should be abolished at the time the regulatory regime ceases.

GrainCorp does not support proposals to use the WEC for purposes other than funding the current regulatory process.

Request for Further Feedback

Quality control in containerised wheat exports

Following the removal of the single desk, there has been discussion and media coverage of 'quality' problems with containerised and bulk wheat exports. This discussion has not been supported by any empirical evidence.

GrainCorp believes that commercial drivers will very quickly sort out any quality problems experienced by wheat buyers. GrainCorp contends that the existence of multiple Australian wheat suppliers, and the commercial promotion activities of exporters, will combine to ensure that, in instances where an individual supplier of wheat proves to be incapable of meeting specific customer quality requirements, alternative sources of supply are available.

GrainCorp does not accept the notion that a commercial dispute over the quality of a commercial consignment of wheat, or the failure by an individual exporter to meet a customer's quality expectations, has the capacity to 'erode the reputation' of Australian wheat.

When a supplier of sub-standard quality wheat becomes known to both buyers and competitors, competitive pressure will become such that it will be difficult for such a supplier to operate. It is in this way that the normal commercial drivers of the market will work to solve problems associated with those exporters that do not meet customer's quality requirements.

Both the Commission's finding (pp. 108) that it was *"…not clear that there are systemic or widespread quality problems…"*, and the statement by AWB General Manager of Commodities Mr Mitch Morrison that quality problems are *"…largely anecdotal…"*[2] support GrainCorp's position.

On the matter of the 'reputation' of Australian wheat, GrainCorp believes the argument is significantly overstated in two ways.

Firstly, claiming that Australian wheat sells on its 'reputation' is not correct. Australian wheat does have a range of desirable milling and baking qualities, but these qualities are not unique. Sales of wheat from Australia are subject to 'sale by sale' competition. The commercial ability of an exporter to meet a customer's expectations over time is far more important.

Secondly, the debate about the 'reputation' of Australian wheat is influenced by groups seeking to reinstate the single desk monopoly. They wrongly claim that the 'reputation' of Australian wheat is its main selling characteristic, and that only centralised (monopoly) control of exports can 'protect' this reputation.

Neither of these arguments are supported by the commercial reality of the business drivers operating within the international wheat market.

The Australian wheat export sector, supported by the existing domestic grain standard setting mechanism managed by Grain Trade Australia (GTA), is capable of commercially managing isolated instances of non-commercially sustainable behaviour by exporters.

As such, GrainCorp believes there is no justification for Government intervention at any level.

[2] Transcript of interview, ABC North West WA (Karratha) WA Country Hour - 16/04/2010 - 12:17 PM

Chapter 5 – Access to Grain Export Elevators

Draft Recommendation 5.1

GrainCorp does not support this recommendation, or the rationale proposed by the Commission to support the 2014 timeline for removal of the access test requirements.

Prior to the passage of the Act, GrainCorp submitted that there was no credible evidence to support the contention that operators of export elevators would seek to exclude new or existing exporters from using export elevation infrastructure.

Experience from Victoria[3] shows that regulation of both export grain port elevator access and pricing was / is unnecessary.

Recommending removal of accreditation in October 2011, but requiring continuation of the access test requirements for at least a further three years, de-couples the linkage between the regulation of bulk wheat exports and port elevator access regulation.

This is inconsistent with the Commission's findings in Chapter 5 of the Draft Report.

Of particular note is the observation by the Commission (pp. 139) that *"…were the (access) test to be maintained in the long term, the Commission considers the costs associated with it would almost certainly outweigh the benefits. Therefore, the Commission is of the view that the (access) test should be abolished."*

The Commission notes (pp. 144) that "*…it would be preferable from a level playing field perspective if the periods of accreditation and access undertakings were brought into alignment."* This position directly contradicts the position expressed by the Commission earlier in the Draft Report, but supports GrainCorp's proposition that deregulation should be aligned.

An additional inconsistency is found on page 152 *"…grain port terminals should be subject to the generic provisions of Part IIIA of the Trade Practices Act so that port terminals would only be declared[4] if they are deemed by the NCC to have met the declaration criteria."*

The Commission found that the bulk wheat export regulations have increased costs, primarily for the companies that provide port elevation services and that "*…Part IIIA of the Trade Practices Act is better placed in the long run to balance …costs and benefits, and using Part IIIA to regulate access will bring the wheat industry into line with the general competition law applying to other industries."*

The recommendation to de-couple the access test from the accreditation scheme proposed by the Commission unfairly discriminates against the commercial organisations that have to carry the cost of maintaining and operating export elevators.

This contention is supported by the Commission's own observations (pp. 146) *"…The ACCC and the port terminal operators were effectively entering uncharted territory when negotiating the 'involuntary' undertakings. It is not clear that the process adequately provided for the protections that should normally apply to facility owners and operators."*

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[3] The GrainCorp elevators at Portland and Geelong were regulated by the Essential Services Commission of Victoria. During the time that regulation was in place, there were no access or pricing disputes. At the time the Commission recommended removal of the regulatory regime, the relevant review found that regulation of both pricing and access could not be justified.

[4] (and thus subject to the need for a formal access Undertaking regulated by the ACCC)

In stating (pp. 156) that *"…to ensure infrastructure is adequately provided and maintained, the Commission considers it is better to err on the side of infrastructure operators…"* the Commission again presents a confusing and contradictory position.

If the current access regulations do not afford an infrastructure owner the same protections that are afforded the owner of infrastructure that is declared 'essential' following a full assessment by the NCC, then surely, the current system regulating export grain elevators is both faulty and iniquitous?

The owners of export grain elevators are being regulated in a manner in excess of any other comparable regime in Australia. Continuation of the access test, and therefore the access Undertakings, beyond the date on which the accreditation scheme is abolished, compounds the discrimination against infrastructure owners.

The Commission is also unclear about how access regulation would apply to new providers of grain export port elevation services. (Refer to Application of Grain Export Elevator Access Regulation to New Market Entrants– page 10).

It is regrettable that the NCC has never been given the opportunity to formally consider the need for regulation of export elevator regulation.

To address this inconsistency, GrainCorp has recommended (see page 4, Recommendation 1 (c)) that the NCC be asked to undertake a formal assessment of the current access Undertakings and associated regulation.

Entry of new bulk wheat exporters

GrainCorp does not accept that the access test and the requirement for an access Undertaking "*…facilitated the entry of players into the industry…"*

New exporters entered the sector because of the introduction of the Act and the scheme, not the presence of access Undertakings. For the first time since 1939 organisations other than the Australian Wheat Board and AWB International were allowed to legally export bulk wheat in their own right. If the non-existence of an access Undertaking were an impediment to market entry, we would not have seen more than 20 bulk wheat exporters accredited in the first year (2008/09) of the scheme.

It must be remembered that the current access Undertakings only 'guarantee' access for the export of bulk wheat and do not regulate the provision of elevation capacity for the export of oilseeds, pulses, sorghum and barley. This has not restricted the export of these grains and export was not restricted prior to the introduction of the access Undertakings in October 2009.

Grain Export Elevator Access Experience

The Commission has found that access to grain export elevators has not been a problem, both during the year the access Undertakings were not in place (2008/09), and the first year of their implementation (2009/10).

Despite continued claims by exporters of 'unfair' practices, no evidence to support the application of sanctions under either the TPA or the current Undertakings by the ACCC has been presented.

It is regrettable that the policy debate within the industry continues to be driven by rhetoric and unsubstantiated allegations. Parties making such allegations have a clear commercial imperative to have their competition (the current owners of elevator infrastructure) bound by costly regulation.

Extending the regulation of export elevators will negatively influence Australia's ability to compete in the global grain market over the medium to long term. The current export elevator regulation reduces commercial certainty and the likelihood of investment in existing or new port facilities, impedes freedom to develop new products and services, and creates a barrier to entry for new service providers.

Draft Recommendation 5.2

GrainCorp supports this recommendation.

Draft Recommendation 5.3

GrainCorp does not support the recommendation that the requirements under the access test be de-coupled from the existence of the accreditation scheme.

GrainCorp supports the replacement of the access Undertakings with an **Access Provision Code** that would become effective from 30 September 2012.

In early 2008, with the support of CBH and ABB/Viterra, GrainCorp proposed the adoption of a similar Code, effective from July 2008. Had this recommendation been accepted and incorporated into the current accreditation scheme, as was proposed, up to $5 million dollars of costs associated with the imposition of the access Undertakings would have been saved. There would also now not be a need to develop a 'post Undertaking' access regime.

Should an Access Provision Code be adopted, GrainCorp would not envisage substantially altering the manner in which elevation capacity is currently managed, as the current elevation capacity management system used by GrainCorp is transparent and fair.

The Access Provision Code would provide for -

- The weekly publication of a shipping stem
- The monthly publication of grain stocks at port
- Public publication of service prices
- A set of protocols covering the booking and use of excess export elevation capacity.

Draft Recommendation 5.4

GrainCorp does not support the Commission's recommendation that a legislative instrument continue after the abolition of the bulk wheat export accreditation scheme. The link between accreditation and the access Undertaking *should not* be broken.

GrainCorp rejects the recommendation that regulation of grain export elevator access should continue up to or beyond 2014 on the grounds that –

- The only reason export elevators are regulated is the existence of the access test within the Act.
- Had the access test not been included in the Act, the export elevators would not be regulated, as no need for regulation has been independently and credibly established.
- The review of access regulation and pricing conducted by the Essential Services Commission of Victoria found that access and pricing regulation was not needed, as grain export elevators are not 'essential infrastructure'. No evidence of anti-competitive behaviour on the part of the relevant elevator operator (GrainCorp) was found.

- In its submission to the Commission, the NCC (pp. 132) stated that no evidence had been provided to establish the need to regulate port elevator access and that the access regimes imposed "*…unnecessary costs and regulatory burdens (that are) likely to be imposed on wheat export marketers and other participants in wheat markets…*".
- The NCC also states (pp. 140) that, under the current access Undertakings, the *effective declaration* of all grain export elevators (excepting Melbourne Port Terminal) is counter to what is contemplated by Part IIIA of the TPA.
- As the current Undertakings apply to the total elevator capacity, not just excess capacity, the NCC states *"…That's not contemplated by Part IIIA. It shouldn't be permissible under the access undertakings..."*

Draft Finding 5.2

GrainCorp does not support Draft Finding 5.2 and believes that provisions under the TPA, including those that relate to misuse of market power, provide adequate protection for users of grain export elevators.

The Commission itself has found that Part IIIA of the TPA *"…is better placed in the long run to balance …costs and benefits, and using Part IIIA to regulate access will bring the wheat industry into line with the general competition law applying to other industries*."

The National Competition Council (NCC) in its submission to the Commission's inquiry supports GrainCorp's position.

Application of Grain Export Elevator Access Regulation to New Market Entrants

A significant matter not addressed by the Commission is the application of export elevator regulation to new market entrants.

The current regulations, and the possibility of regulation being imposed on new entrants to the export elevation market, are a significant disincentive to investment, by both current service providers and potential new market entrants.

We are aware of feasibility studies currently being undertaken to build or commission new export elevator infrastructure in Brisbane, at Port Waratah, in Geelong and Albany.

Does the Commission propose that ACCC access Undertakings be imposed on the operators of these facilities, to create a 'level' regulatory playing field?

Alternatively, does the Commission propose that only GrainCorp, CBH, and Viterra be regulated, while competing infrastructure is not regulated?

The Commission has also not successfully addressed the inequity created by the Wheat Exports Australia decision to not require the imposition of an ACCC access Undertaking on the operations of the Melbourne Port Terminal. This infrastructure is now controlled by Sumitomo, an accredited bulk wheat exporter with a 50% ownership of a second accredited exporter, and yet it remains free from the access test.

Chapter 6 – Transport, Storage and Handling

Draft Finding 6.1

GrainCorp supports this finding.

Draft Finding 6.2

GrainCorp supports this finding.

Draft Finding 6.3

GrainCorp supports this finding.

Chapter 7 – Information Provision

Draft Finding 7.1

GrainCorp supports this finding.

Draft Finding 7.2

GrainCorp supports this finding.

Draft Recommendation 7.1

GrainCorp supports the view that industry should contribute to the cost of producing grain stocks information.

If this type of information is of true commercial value and significance, funds will be forthcoming from industry for its collection. If industry does not value this information significantly enough to fund its collection, this will not be an example of 'market failure', it will be an indication that the information was not commercially significant.

Any findings on this matter should also take into account the activities of, and services provided by, the current commercial service providers. The Government should not be funding activities that displace these commercial providers.

Transparency of Stocks Within the Bulk Handling Networks

Much has been made of the 'need' to increase the transparency of stock information since the removal of the single desk, principally by those associated closely with grain traders. GrainCorp opposes any moves to force bulk handling companies to publish disaggregated stock on hand information.

Should regulation force the disclosure of stock positions with bulk handling networks, growers will seek to avoid having to disclose their physical positions, and move to store grain outside the bulk handling network(s), particularly on-farm.

Were this to be the case, the regulation is likely to create significant unintended consequences that may adversely affect the efficient operation of the supply chain, while ultimately failing to capture the intended information.

Other Industry Information

On 12th April 2010, GrainCorp released a harvest grain quality report that provides baking, milling, malting and oil extraction data for wheat, barley, and canola out-turned from the GrainCorp storage network following the 2009/10 harvest.

GrainCorp intends to continue to produce and release this harvest report on an annual basis, as it is both an essential commercial selling tool for eastern Australian grain exports, and a valuable source of information for the R&D sector.

Chapter 8 - Wheat Quality Standards and Market Segmentation

Draft Finding 8.1

GrainCorp supports this finding.

Chapter 9 – Other Industry Good Functions

Draft Finding 9.1

GrainCorp supports Draft Finding 9.1, and does not support moves to form an independent organisation to undertake 'common good' functions, such as generic promotion of Australian wheat.

The 2004 Grains Industry Strategic Plan identified 'fragmentation' as one of the most significant factors hindering the development and maturation of the Australian grain sector. The formation of a 'new' organisation to 'oversee' common good services will increase fragmentation, not contribute to its elimination.

The current debate over 'common good' functions is clouded by a lack of understanding by many in the industry of what they actually are.

Many in the industry continue to see all of the activities undertaken by AWB to support bulk wheat export sales as 'common good'. In fact, they were normal commercial activities that supported wheat sales.

Aside from activities related to varietal classification, the so-called 'common good' activities carried out by AWB are now largely being replicated by commercial bulk wheat exporters to support their own commercial marketing activities.

GrainCorp supports the placement of wheat variety classification processes under the administration of Grain Trade Australia.

Grain Trade Australia has a broad cross industry representation and is successfully managing the process for setting grain receival standards. Varietal classification and receival standard setting are a natural technical and administrative 'fit', placing both functions within GTA achieves the objective of reducing industry fragmentation.