



Australian  
Competition &  
Consumer  
Commission

# **ACCC submission to the Productivity Commission Draft Report regarding Wheat Export Marketing Arrangements**

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Australian Competition and Consumer Commission  
23 Marcus Clarke Street, Canberra, Australian Capital Territory, 2601

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# Introduction

As recognised in the Productivity Commission's draft report regarding wheat export marketing arrangements (Draft Report), the ACCC has a number of roles in relation to the wheat export industry. These are:

- The ACCC assesses, and if accepted monitors compliance with, access undertakings from port operators AusBulk Ltd (now Viterro Operations Ltd), Co-operative Bulk Handling (CBH) Ltd and GrainCorp Operations Ltd (collectively, Port Operators). Undertakings from those parties were accepted by the ACCC pursuant to Part IIIA of the Trade Practices Act 1974 (Cth) (TPA) on 29 September 2009 (collectively, Wheat Access Undertakings);
- The ACCC has a role in relation to “notifications” of conduct involving exclusive dealing. On 11 June 2008 CBH lodged a notification with the ACCC concerning its grain storage, handling and transportation arrangements in Western Australia called “Grain Express”. For notifications involving exclusive dealing conduct other than third line forcing, like the Grain Express arrangement, the business receives immunity for the conduct automatically from the date it is validly lodged with the ACCC – that is, CBH received automatic immunity on 11 June 2008, the day it lodged the notification. The ACCC can review the Grain Express notification at any time and may revoke it under certain circumstances; and
- The ACCC enforces the general provisions applicable to all industries set out in Parts IV and V of the TPA, as they apply to the wheat export industry.

This submission provides further information about each of these roles in the context of the recommendations made in the Draft Report.

# Wheat Access Undertakings

## Incentive for submission of access undertakings

The ACCC notes that the Draft Report recommends that the access test (which includes submission of access undertakings by CBH, Viterra and GrainCorp to the ACCC pursuant to Part IIIA of the TPA) should remain in effect until 30 September 2014.

This recommendation, in conjunction with another recommendation set out in the Draft Report - that of abolishing the accreditation requirement for bulk wheat exporters from 1 October 2011 - raises a potential implementation issue.

The issue is that the development of the current robust access regimes by each of CBH, Viterra and GrainCorp appeared to be strongly aided by the requirement for these Port Operators to have a Part IIIA access undertaking in place by 1 October 2009 in order for their affiliated trading businesses to retain accreditation to export wheat in bulk.

The ACCC therefore submits that if the current mechanism were no longer in place, there would need to be an equally strong alternative mechanism and incentive in place for the Port Operators to develop appropriate access arrangements beyond 1 October 2011.

## Overview of the Wheat Access Undertakings

The Wheat Access Undertakings, accepted by the ACCC on 29 September 2009 pursuant to Part IIIA of the TPA, include:

- prohibitions against each Port Operator anti-competitively discriminating in favour of its own wheat trading business or hindering access to its port terminal services; and the ability for the ACCC to order independent audits of each Port Operator's compliance with the non-discrimination obligations;
- port loading protocols that the Port Operators are obliged to follow in managing demand for port terminal services, for example in making decisions about the allocation of shipping slots;
- obligations on the Port Operators to negotiate in good faith with eligible wheat exporters around price and non-price offers of access to port terminal services;
- if negotiation fails, the ability of wheat exporters to seek mediation or binding arbitration on price and non-price terms of access to the Port Operators' port terminal services;
- for those wheat exporters who wish to take a standard offer, a set of minimum non-price terms and conditions of access to port terminal services; and an obligation on each Port Operator to publish its

standard prices for port terminal services at least one month prior to commencement of each new wheat exporting season; and

- obligations on each Port Operator to publish certain port terminal information to provide greater transparency over its operations.

The access arrangements approved by the ACCC are not prescriptive. They recognise the need to allow the Port Operators the operational flexibility to run their grain supply chains efficiently in a rapidly evolving environment.

Further, the arrangements do not extend to 'up-country' supply chains given that the Wheat Export Marketing Act 2008 (Cth) makes it clear that the access undertakings are intended to provide for access to the ports only.

In light of the transitional state of the industry, the Wheat Access Undertakings were approved for an initial period of two years (expiring on 30 September 2011). The relatively short duration of the arrangements was intended to ensure that future regulatory arrangements can adapt to any changes in the industry environment. In the absence of legislative amendment, the Port Operators will therefore be required to have new wheat access undertakings approved by 1 October 2011 in order for their affiliated wheat trading businesses to retain accreditation to export wheat in bulk.

## **Arbitrations arising under the Wheat Access Undertakings**

The Wheat Access Undertakings envisage an ongoing role for the ACCC in relation to arbitrations between access seekers and Port Operators pursuant to the Wheat Access Undertakings. In summary, the regime provides that:

- when a dispute is referred to arbitration, it is referred to the ACCC in the first instance;
- the ACCC may consider whether or not it wishes to arbitrate the dispute; and
- the dispute is to be arbitrated by the ACCC if it so chooses, or by a private arbitrator if the ACCC chooses that option.

Generally, the existence of a dispute resolution process and an arbitration power of itself tends to encourage parties, including those who would otherwise have market power, to negotiate commercial arrangements. The ACCC has been informally advised of at least one potential arbitration; however, the commencement of the dispute resolution process appeared to result in commercial agreement.

To date, the ACCC has not been formally notified of any access disputes referred to arbitration arising under any of the Wheat Access Undertakings.

The ACCC notes that the Draft Report details submissions made to the Productivity Commission concerning dissatisfaction with the fees charged by CBH for its port terminal services. The ACCC notes that access seekers have recourse to binding arbitration pursuant to the CBH Wheat Access Undertaking regarding these fees.

## **Monitoring of the Wheat Access Undertakings**

After acceptance of the Wheat Access Undertakings the ACCC engaged with the wheat export industry to educate the industry about the operation of the Wheat Access Undertakings and explain the ACCC's on-going monitoring role.

To date one instance of non-compliance with one of the Wheat Access Undertakings has been made public. This was in relation to Viterra's non-compliance with its Wheat Access Undertaking in late 2009. This breach consisted of failure by Viterra to provide its customers with adequate notice and consultation in relation to proposed changes to its port loading protocols. Details of this breach are set out in a letter from the ACCC to Viterra dated 15 April 2010, available on the ACCC's website by following the "For regulated industries" and "Wheat export" links.

The ACCC is unable to disclose the number or nature of confidential complaints it has received about compliance with the Wheat Access Undertakings. The ACCC maintains the confidentiality of complaints made about non-compliance with undertakings until such time as public action is taken for any finding of non-compliance.

## **CBH auction system**

The ACCC notes that the Draft Report seeks further information and feedback about the CBH capacity allocation (auction) system. The ACCC is aware that the Productivity Commission, during its consultation on the wheat export arrangements, found dissatisfaction with some elements of the auction process put in place by CBH.

The ACCC notes that CBH's submission to the Productivity Commission dated 23 April 2010 states that CBH is currently undertaking preliminary discussions with its customers regarding possible changes to its auction system. It is possible that these changes, if implemented, could resolve a number of the complaints raised during the inquiry (ie. of difficulties of trading in the secondary market and the need to nominate use of Grain Express well in advance of the ship arrival). Any other deficiencies with the auction system identified by the Productivity Commission in its final report may be able to be addressed in the ACCC's assessment of revised wheat access undertakings in 2011.

# **The Grain Express Notification**

## **Overview of the notification process**

The TPA prohibits exclusive dealing conduct, which broadly involves one trader imposing restrictions on another's freedom to choose with whom, in what or where it deals. The kind of exclusive dealing conduct within the Grain Express arrangements will only breach the TPA if it substantially lessens competition.

However, businesses can gain immunity from legal action for exclusive dealing conduct by lodging a 'notification' with the ACCC. For notifications referred to as exclusive dealing conduct other than third line forcing like the Grain Express arrangement, the business receives immunity for the conduct automatically from the date it is validly lodged with the ACCC.

The TPA allows the ACCC to remove the immunity provided by a notification involving exclusive dealing conduct other than third line forcing if it is satisfied that the conduct has the purpose or effect of substantially lessening competition and in all the circumstances:

- the conduct has not resulted or is not likely to result in a benefit to the public; or
- any benefit to the public that has resulted or is likely to result from the conduct would not outweigh the detriment to the public constituted by any lessening of competition resulting from the conduct.

The ACCC can review, and possibly revoke, the immunity provided by a notification at any time. As discussed below, in light of ongoing concerns about the Grain Express arrangements and that Grain Express has operated for a second season, the ACCC considers it is timely to now commence a review of the Grain Express notification.

## **The 'Grain Express Notification'**

As noted above, elements of the Grain Express system developed by CBH potentially raise concerns under the exclusive dealing conduct other than third line forcing provisions of the TPA.

Prior to implementing the Grain Express system, CBH lodged an exclusive dealing notification with the ACCC for the Grain Express arrangements on 11 June 2008. CBH received automatic immunity from the exclusive dealing provisions of the TPA on the date that the notification was lodged.

The notified conduct involves CBH offering to supply storage and handling services on the condition that growers and marketers acquire:

- supply chain coordination services from CBH; and



- to the extent that the grain remains in CBH’s custody, that they only acquire transport services from CBH (through its nominated carriers).

In essence, the notified conduct means that while grain is in CBH’s custody, its movement will be arranged and coordinated by CBH. CBH uses road and rail freight services to move grain in its system.

## **The ACCC’s Grain Express decision**

Upon receipt of the Grain Express notification, the ACCC conducted a public consultation process – inviting submissions from around 130 potentially interested parties, including government, grain marketers, grower groups and transport providers.

The majority of submissions received by the ACCC at that time supported Grain Express, particularly submissions from grain marketers.

The ACCC decided not to revoke the immunity provided by the Grain Express notification at that time because it was not satisfied that the notified conduct had the purpose or effect of substantially lessening competition. The ACCC reached this conclusion for the following reasons:

- Grain Express did not appear to foreclose potential competitors to CBH from entering the market for grain receipt, storage and handling;
- growers and traders of grain are free to make their own arrangements for the transportation of grain from the farm gate to end user point (including direct to port), or from a “destination site” to end user point;
- Grain Express may stimulate competition in the market for the CBH transport contracts by providing greater certainty in respect of transport volumes acquirers and marketers of grain will continue to be able to take advantage of niche marketing opportunities; and
- CBH’s amended “Ring Fencing Policy” provides an adequate framework to limit the potential for information obtained by CBH to be transferred to and used anti-competitively by CBH’s trading subsidiaries.

The ACCC also considered the central coordination of grain storage, handling and transportation under the Grain Express system was likely to provide significant efficiency benefits.

## **Consultation subsequent to the first grain harvest season under Grain Express**

The ACCC wrote to CBH in April 2009 requesting information about the operation of Grain Express since the ACCC’s decision. In particular, the ACCC noted congestion problems and consequent delays in loading grain vessels at CBH export terminals. The

ACCC sought information from CBH about the factors that had caused these congestion problems including the contribution of Grain Express to the congestion.

CBH cited teething problems in the first year of the implementation of the new arrangements, and the following factors as being responsible for the congestion, noting that the 2008/09 harvest was the first season of liberalisation of wheat exports from Australia:

- an increase in the number of exporters due to removal of the single desk;
- a larger than normal grain harvest;
- a later than usual grain harvest;
- underperformance of rail infrastructure; and
- a flood of shipping nominations for the same shipment period.

CBH stated that it considered that Grain Express had reduced the effect of these factors by enabling the movement of grain from up-country storage to port to occur in a coordinated fashion. CBH argued that but for Grain Express congestion may have been endemic throughout the supply chain.

CBH also provided details of its response to the congestion problems - in particular, the introduction of the 'auction system' for allocating shipping slots and 'accelerated accumulation charges' also referred to as 'surge' charges. CBH sought contributions from all marketers to cover the cost of increasing accumulation of capacity above normal levels at its four ports in order to deal with congested shipping lines.

## **Further consideration by the ACCC of the Grain Express arrangements**

Following the 2008/09 season and prior to the 2009/10 season the ACCC continued to receive complaints similar to those referred to above. However the ACCC considered it would be in a better position to assess the performance of Grain Express after the completion of a second season. The ACCC considered that allowing the completion of a second season would enable the ACCC to assess whether the problems that occurred in the first season, such as teething problems, harvest size and timing were significant factors impacting on the operation of Grain Express as claimed by CBH.

The ACCC notes the submissions made to the Productivity Commission during its consultation on the wheat export arrangements which raise concerns about the Grain Express arrangements. Effectively these concerns appear to stem from real or perceived difficulties for participants wishing to by-pass the Grain Express system. In particular, the ACCC notes the Productivity Commission's query about whether there have been any market developments since the ACCC's decision not to revoke the Grain Express notification.

As the peak period for wheat exporting has finished, the ACCC will review the notification and also take into account the issues raised in submissions to the Productivity Commission's Inquiry.

## **Requirements to revoke the Grain Express notification**

As noted above, the Grain Express notification involves exclusive dealing conduct other than third line forcing. In order for the ACCC to revoke the notification under section 93(3) of the TPA, the ACCC must be satisfied that the conduct has the purpose, effect or likely effect of substantially lessening competition in a relevant market. Specifically, the ACCC would need to be satisfied that the notified conduct has the purpose or effect of substantially lessening competition in one or more markets, for example: the market for grain receipt, storage and handling in Western Australia; the market for grain transport in Western Australia; and/or the market for grain trading in Western Australia.

The ACCC must also be satisfied that, in all the circumstances, the likely benefit to the public will not outweigh the detriment to the public from the lessening of competition.

# **Enforcement of Parts IV and V of the TPA**

## **Background**

The ACCC notes that a number of submissions to the Productivity Commission refer to complaints made to the ACCC pursuant to the general enforcement provisions of the TPA.

The ACCC does not ordinarily comment on individual complaints that it may or may not be investigating and tends to not refer to outcomes that are not in the public arena.

Set out below, by way of background, is further detail regarding the ACCC's role of enforcing the general provisions applicable to all industries set out in Parts IV and V of the TPA, as they apply to the wheat export industry.

## **Overview of Part IV and V**

Most of the ACCC's enforcement work is conducted under the provisions of Parts IV, IVA and V of the TPA. The purpose of the TPA is to enhance the welfare of Australians by promoting competition among business, promoting fair trading by business and providing for the protection of consumers in their dealings with business.

Part IV prohibits a variety of anti-competitive conduct including arrangements that have the purpose or effect of substantially lessening competition in a market. The provisions specifically prohibit price fixing, market sharing, bid-rigging, primary boycotts, misuse of market power, third line forcing, resale price maintenance, and anti-competitive mergers.

The TPA is generally concerned with protecting the competitive process and the level of competition in the market rather than protecting individual competitors. Thus if the position in the market of an individual trader is being adversely affected by the conduct of a competitor, it is unlikely that there will be a contravention of the TPA unless the conduct substantially lessens competition in the market as a whole.

In relation to the range of conduct raised by wheat industry participants the most relevant provisions would appear to be section 46 which deals with misuse of market power and section 47 which deals with exclusive dealing. Exclusive dealing conduct has been addressed through the notification process. Conduct which might constitute misuse of market power is however significantly more difficult to characterise and establish.

## **Misuse of Market Power**

Section 46 of the TPA prohibits a company with a substantial degree of market power from taking advantage of that power for a proscribed purpose. The proscribed purposes are:

- eliminating or damaging a competitor in that market or another market;
- preventing entry to that or another market;
- deterring or preventing competitive conduct in that or another market.

When considering allegations of breaches of section 46, a threshold question is whether the corporation in question in fact enjoys a substantial degree of power in a market. Key to establishing a contravention of section 46 is being able to demonstrate that the corporation **used** its market power and that it did so for one of the three proscribed **purposes**. The method of establishing proscribed purpose varies. On some occasions the proscribed purpose may be established by direct evidence, on other occasions it may be inferred from all the surrounding circumstances.

For example, in the wheat industry to prove a breach of the misuse of market power provision it would be necessary to establish that any particular fee, charge or logistical arrangements in the supply chain was imposed or implemented for one of the proscribed purposes described above and not for a legitimate commercial purpose.

## Exclusive Dealing

As previously mentioned section 47 of the TPA prohibits exclusive dealing which broadly involves one trader imposing restrictions on another's freedom to choose with whom, in what or where it deals. In some cases, exclusive dealing is prohibited outright (for example third line forcing); in other cases, only where it substantially lessens competition.

Other forms of exclusive dealing conduct prohibited include the supply of goods or services, or the supply of goods or services at a discount, on condition that the buyer:

- will not acquire, or will limit the acquisition of, goods or services from a competitor of the supplier;
- will not resupply, or will resupply only to a limited extent, goods or services acquired from a competitor of the supplier;
- will not resupply the goods or services to others, or will resupply only to a limited extent, the goods or services to particular persons, classes of persons or in particular places.

Similarly, a supplier may not refuse to supply goods or services because the intending buyer will not comply with these conditions.

These forms of exclusive dealing conduct will only raise concerns under the TPA if they substantially lessen competition.

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Callers who are deaf or have a hearing or speech impairment can contact the ACCC through the National Relay Service [www.relayservice.com.au](http://www.relayservice.com.au)

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