Commodities

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BULK WHEAT EXPORTS – WILL THE NEW REGIME BE A TOOTHLESS TIGER?

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The abolition of the WEA and the wheat export accreditation scheme from October 2012, along with the removal from October 2014 of the requirement for port terminal operators to have in place an access undertaking, will bring about a significant change in the way bulk wheat is exported from Australia.

The removal of the access undertaking requirement will be dependent upon the terminal operators committing to a voluntary Code of Conduct (the Code) for port access arrangements. The Code is said by the Government to be designed to improve transparency within the industry and to provide security and certainty.

But will it? Will the industry have the ability to self-regulate without government control? Will general competition law prove adequate to protect the industry against anti-competitive behaviour by the port terminal operators? The terminal operators say yes it will and welcome the forthcoming changes. The accredited wheat exporters have reservations over the effectiveness of a voluntary code. Who will be right?

The current regime

The Wheat Export Marketing Arrangement Act 2008 (WEMA 2008) currently requires all bulk wheat exporters to be accredited by Wheat Exports Australia (WEA). In addition, where a bulk wheat exporter operates a port terminal facility they have to pass the "access test". To do so the port terminal facility operator has to provide an "access undertaking" to the ACCC allowing other bulk wheat exporters to use their port terminal facilities to load and export bulk wheat.

The Productivity Commission[1] believe the "access test" has served its purpose in assisting the bulk wheat export market make the change from the monopoly export arrangements and if maintained, they consider the costs of the "access test" will significantly exceed its benefits.

1. Wheat Export Marketing Arrangements – Productivity Commission Inquiry Report July 2010.

The position after 30 September 2014

After 30 September 2014 port terminal operators will no longer have to pass the access test and so will not have to seek ACCC approval and provide an access undertaking. Instead access to port terminal facilities will be governed by the Code with the port terminal facilities being subject to Part IIIA of the Competition and Consumer Act 2010 (formerly the Trade Practices Act 1974) (the Act). Consequently, from 1 October 2014 the market will be fully deregulated and access issues will be governed by the Code and general competition law, administered by the ACCC.

The Government says its decision to accept the recommendation of the Productivity Commission and to abolish the Wheat Export Accreditation Scheme, WEA and Wheat Export Charge as well as the removal of the access test requirements for grain port terminal operators shows that the industry has demonstrated its ability to self-regulate without the burden of unnecessary government legislation and cost.

For the Bulk Handlers they see the transition to a fully deregulated market for bulk wheat export as bringing an improvement to wheat marketing arrangements and likely to reduce costs to growers and exporters as the port operators will no longer have the cost of having the access undertakings in place. They also believe the provision of port terminal services and the cost for those services should be a matter of commercial negotiation between the Bulk Handlers and the consumers of the port services with no regulatory intervention, where that intervention is said to have come at a cost without providing the flexibility that operating under a voluntary code of conduct will allow.

The voluntary Code of Conduct

The Code is going to be non-prescribed and voluntary with the Government having an expectation that port terminal operators will commit to operate under the Code. If they do not do so then the access undertakings will subsist even after 1 October 2014.

The Code is still at an embryonic stage. It is said that the Code will have regard to the needs of growers and exporters as well as allowing the Bulk Handlers the ability to ensure a return on their port investment. The Code is intended to include key elements from the existing access undertakings although the only term that has been referred to has been the continuous disclosure rules (e.g. the publication of daily shipping stems and protocols for port access).

If the Government template is followed the Code will set out specific standards of conduct for the industry and will be voluntarily agreed to by its signatories. Although the ACCC may provide guidance and even participate as an observer on any Code administration committee that is established, the ACCC will have no formal role in enforcing the Code. It is therefore, only where self regulation has not succeeded and a legislative solution is not the answer, that the Government will then consider prescription of an industry code of conduct. No voluntary industry codes have ever been prescribed.

Enforcement of the Code - will it have teeth?

A breach of a prescribed industry code is a breach of the Act[2], which can lead to the ACCC instituting legal proceedings for breach of that code. However, no similar power exists in relation to any breach of a voluntary code of conduct. By comparison, a breach of a prescribed code allows an industry participant to also initiate their own action for breach with a range of remedies being available to the affected party where a court finds that a breach of the Act has occurred. That can include declarations that particular conduct amounts to a breach of the code; injunctions to stop prohibited conduct or requiring particular action to be taken; damages; recission, setting aside or the variation of contracts; and other remedies.

A breach of a voluntary code gives none of those remedies or relief. The Government's own publication[3] provides under the heading of *"sanctions"* that commercially significant sanctions have to be included in any code "to achieve credibility with and compliance by participants" and that these should include: censures and warnings; expulsion as a signatory to the code; corrective advertising; fines or expulsion from the industry association. On any view these are not quite the same remedies as provided under a prescribed code.

Part IIIA of the Act - will that help?

After September 2014 the port terminal facilities will be subject to Part IIIA of the Act as now amended[4]. That allows a third party to gain access to a service and to apply to

2. Section.51AD.
3. "Guidelines for developing effective voluntary industry codes of conduct" July 2011 (ACCC).
4. The Trade Practices Amendment (Infrastructure Access) Act 2010 (Cth).

have the Minister *"declare"* a service provided by an infrastructure facility. History has shown that having a service declared has proved a long and hard road to follow, which was one of the drivers for the amendment to the Act giving parties certainty around timelines for decisions and to minimise delays by introducing *"expected periods"* for decisions to be reached.

The port terminal operators believe that Part IIIA of the Competition and Consumer Act 2010 will provide adequate protection against unfair or discriminatory behaviour by infrastructure owners suggesting that regulatory intervention in the Australian grain industry continues to hamper investment and *"non-commercial behaviour on the part of industry participants"*.

What the Productivity Commission recommended, was that once the access test was abolished grain port terminals should be subject to the generic provisions of Part IIIA of the Act and would only be declared if they were assessed by the National Competition Council (NCC) to have met the declaration criteria. That process, which has a high evidentiary burden, requires an applicant to show, amongst other things, that the port facility is of national significance, that access would promote competition, and that it would be uneconomical to develop another facility.

While the Bulk Handlers feel that there are sufficient constraints on their market power to make any regulation beyond Part IIIA unnecessary there has been anxiety on the part of the exporters about the ability of the Bulk Handlers to discriminate against rival exporters or for changes in the supply chain to impede access. That, together with the fact that Part IIIA, even if it can be invoked, will only provide access to excess capacity with there being nothing to prevent a vertically integrated port terminal operator using all of the port capacity for its own needs and even if its service has been declared, persuaded the Commission to agree that a voluntary code should be introduced leaving only the threat of a declaration under Part IIIA to prevent the Bulk Handlers from discriminating against rival exporters.

In reality exporters know there is no guarantee that port terminal operators will continue to provide access to the competition after 30 September 2014 and where providing access would prevent a Bulk Handler from meeting its own *"reasonably anticipated requirements"*[5].

Will the Code be a toothless tiger? It is probably too early to tell. But a majority appear to be in favour of self regulation, which means that it will be up to the market to make it work.

There is still a long way to go and whether the Code will adequately address and provide for access to port terminal services and meet the industry needs will depend upon what the parties can agree it should contain and how it will be administered. Because an access dispute under Part IIIA may not lead to a satisfactory alternative solution.

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5. Section 44W of the Act.

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