Commodities

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THE FUTURE OF AUSTRALIA'S WHEAT EXPORT MARKET

THE IMPACT OF THE WHEAT EXPORT MARKETING AMENDMENT BILL 2012

On 21 March 2012, the Australian Government published the long awaited explanatory memorandum for the Wheat Export Marketing Amendment Bill 2012 (the "Bill"). The Bill is the second phase of Australia's efforts to deregulate the bulk wheat export market. The continuing aim is to ensure transparent access to port terminal facilities and competition within the industry. The origins of the first phase can be traced back to 2008 with the publication of the *Wheat Export Marketing Act 2008* (Cth), the establishment of Wheat Exports Australia ("WEA"), as administrators of the regime and of the Wheat Export Accreditation Scheme ("Scheme") giving traders a means to export wheat when gaining accreditation.

The Scheme is still heavily regulated, and was always seen as an arrangement which would be revisited once wheat export marketing was sufficiently established, robust and contestable. Amid uncertainty as to what new arrangements would take the place of the Scheme, Australia's Productivity Commission (the "Commission") launched an inquiry into the operation and effectiveness of Australia's bulk wheat export marketing arrangements. Their findings were published in October 2010. The Bill now implements the Commission's key recommendations in respect of wheat export marketing arrangements and underscores a bright future for Australia's bulk wheat export market. (For further information on the Commission's recommendations please see our December 2010 bulletin "Australian Wheat - New Directions from the Productivity Commission's Report").

Summary of key provisions

The Bill will implement some of the Commission's recommendations by stages, to transition the wheat export industry to full deregulation. The key changes to note are:

1. The abolition of the Scheme on 30 September 2012. Once abolished, there will be no new or existing accreditations, subject to a continued requirement for

providers of grain port terminal services to pass the"access test" as a condition for exporting wheat until 30 September 2014.

2. The removal of the Wheat Export Charge on 30 September 2012.

3. The abolition of the "access test" after 30 September 2014 provided that a voluntary code of conduct is established as an alternative. The code of conduct is required to be consistent with key Australian Competition & Consumer Commission ("ACCC") guidelines for developing codes of conduct. The code is likely to have similar disclosure rules to those in the current system.

4. Repeal of the Wheat Exports Marketing Act 2008 on 1 October 2014, conditional on the approval of a voluntary code of conduct by the Minister before this date.

The regime in transition

Access tests

From 1 October 2012, port terminal operators (and any associated entity of the provider of port terminal services) must satisfy an "access test". The Bill introduces a continuous obligation to comply with the "access test" during a period of 12 months "beginning on the day of the export of the wheat." See section 7(3) of the Bill. The drafting of this section is unclear and may be tightened before the Bill is passed. It is probably intended to mean a period of 12 months beginning on the day of the first occurrence of export by that entity after 1 October 2012.

To meet the "access test" exporters must:

1. Comply with the continuous disclosure rules which require a port terminal service provider to publish details of their policies and procedures for managing the port terminal service on their website and provide a loading statement to the ACCC on a daily basis.

2. Have in place a formal access undertaking pursuant to Part IIIA of the *Competition and Consumer Act 2010* (Cth) (previously the *Trade Practices Act 1974* (Cth)). Exporters who have access undertakings in place with the ACCC under the current framework will continue to do so.

The obligation for continuous compliance with the access test will be waived if there is a period of more than 12 months between any relevant exports of bulk wheat. Notwithstanding the above exception, from 1 October 2012, those providers required to pass the test must do so continuously from the time of their first export until the abolition of the access test on 30 September 2014. A failure to do so is a contravention of section 8(1) carrying a civil penalty. There is a defence of "special circumstances". The continuous compliance obligation is also intended to reduce the opportunity for port terminal service providers, or associated entities to change their legal entities to avoid the access test applying at successive ports.

Notably from 1 October 2012, decisions regarding exemptions from the access test for special circumstances will be made by the Department of Agriculture, Fisheries and Forestry.

Reporting requirements

The final date for exporters who are accredited under the Scheme to submit transitional reports and compliance reports previously required under the regime is 30 October 2012.

Impact of changes

The second phase of deregulation will bring to an end the special treatment of wheat as a protected export commodity, assuming that a voluntary code of conduct for port access can be achieved.

It is intended to promote further competition in the industry and reduce compliance costs.

The Bill is intended to have a positive impact on trading, favouring increased competition between buyers, diversity of products and further empowering growers in respect of sale of their product. At the same time, an industry without a special regime for port access may carry greater execution risk and uncertainty.

The successful implementation of the second phase of deregulation is however still heavily contingent upon an Industry Code of Conduct in regard to port terminal access.

Conclusion

Port terminal access will continue to be a critical issue for the wheat export industry in Australia.

A workable industry code of practice may turn out to be the ultimate test of the success of the second stage of deregulation.

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