

Peter Ottesen
Crops Policy, M.4.135
Department of Agriculture
GPO Box 858
Canberra City ACT 2601

Dear Mr Ottesen,

RE Mandatory Code of Conduct Port Terminal Access (Bulk Wheat) Regulation 2014

In December 2012, the Wheat Export Marketing Amendment Act 2012 made a number of changes to the Wheat Export Marketing Act 2008 (WEMA) including the potential introduction of a mandatory code of conduct to govern access to bulk wheat ports, in place of the current access test arrangements. The Productivity Commission has also made calls to the government to intervene and remove the existing access arrangements at ports, and harmonise the export of bulk wheat with other export industries over time.

This submission is in response to the draft mandatory code of conduct released by the government in June 2014; GrainGrowers provides support for Option 3 presented within the Regulatory Impact Statement which accompanied the draft code of conduct.

Option 3 provides for the introduction of a mandatory code that can adjust to competition levels and vertical integration with a pathway to full deregulation within a five-year time frame. GrainGrowers notes that Option 3 reflects the majority of the CDAC¹ principles, but will constrict regulation to where it is most needed. Subject to review, the code would be a transitional measure and operate for a period of five years, at which time it is envisaged that bulk wheat exports would be fully deregulated, relying only on the provisions of Part IIIA of the *Competition and Consumer Act (2010)* (CCA).

Further, under Option 3 all port terminal service providers (PTSPs), must comply with the continuous disclosure rules, however, PTSPs with an incentive to engage in uncompetitive conduct due to vertical integration and lack of competition (referred to as 'Tier 1' port terminal operators) would also be required to comply with additional provisions.

The Code would also provide the opportunity for regulation to be reduced for a PTSP, classified as Tier 1, that face competitive constraint due to the operating environment at a port. In providing support for Option 3 GrainGrowers has considered the following three key factors which have the potential to impact on the grain industry:

1. Competitiveness of the Supply Chain

Large Operators

There are currently three bulk handling services in Australia with access agreements with the ACCC. GrainCorp itself has noted, under current regulation, it has 'flexibility to enter into a range of contractual arrangements, and by way of protocols has had 'day-to-day flexibility in managing elevation capacity with customers'.² Bulk handlers have also been able to offer long-term capacity arrangements to its customers. However this process is undertaken once

¹ Code Development Advisory Committee (CDAC)

² GrainCorp, (2013) Application to vary 2011 access undertaking – submission to ACCC, accessed at <http://www.accc.gov.au/>, on 23 June 2014.

every three years. As a result of the regulation under Option 3 it is acknowledged that vertically integrated bulk handling companies' sacrifice a degree of commercial flexibility, and a reduced level of commercial confidence, under the draft mandatory code of conduct arrangements.³

Small to medium sized bulk wheat exporters

The Australian Grain Exporters Association (AGEA) membership is comprised of a range of exporters, including small to medium sized players: Bunge, Cargill, Emerald, Gaviion, Glencore, Goodman Fielder, Louis Dreyfus, Mitsui, Noble Resources Australia, PentAg NIDERA, Plum Grove, Riverina, Toepfer International, Touton, Quadra Commodities, Queensland Cotton/Olam, Viterra.

GrainGrowers on behalf of the production sector has an interest in ensuring that smaller exporters are able to access essential infrastructure as they ensure that the major operators, with a high degree of market power, cannot use their position to influence the market.⁴ AGEA on behalf of its members provide the following priority considerations in the development of a code:

- allocation and transferability of shipping slots
- transparency of the stem
- accountability for performance including appropriate commercial consequences of all parties (exporters and PTOs)
- information transparency and governance of the allocation process
- the system should also operate to provide the incentive for investment by port terminal operators and exporters to promote improved operation of the supply chain

GrainGrowers therefore supports Option 3, in its ability to support a competitive grain industry with a range of market operators. GrainGrowers note that the factors listed as a key priority for AGEA are captured by the regulatory requirements under Option 3.

Option 3 also provides the ability for tapered regulatory burden. That is, although all PTSPs must adhere to the Code of Conduct it enables the possibility for significantly reduced regulation on a tier 1 exempt PTSP, and thereby significantly reduced regulation on ports where the ACCC determines there is sufficient competition.

2. Cost of Compliance

Grain producers have limited power to influence the price received for grain. The cost of moving grain to port is one of the major economic, and external, influences on the price received by a grower for grain. GrainGrowers provided analysis of this code on the same basis as government – that is with a view to creating minimal regulation and encouraging investment and innovation in the grain industry. Although the cost-benefit analysis of regulation is still in draft form, it appears under draft estimations that there is a possibility for no financial cost to non-vertically integrated businesses which must adhere to the Code. (See Table 1)

³ GrainCorp, (2013) Application to vary 2011 access undertaking – submission to ACCC, accessed at <http://www.accc.gov.au/>, on 23 June 2014.

⁴ Hanson, P. and Simmons, P. (1995), 'Measures of buyer concentration in the Australian wool market', Review of Marketing and Agricultural Economics 63(2), 304-310.

	Vertically-integrated businesses	Non-vertically integrated businesses
(A) Compliance with current arrangements	\$2.8m	\$0
(B) Likely cost of compliance under Option 3	To be determined	To be determined
Difference between (A) and (B)	To be determined	To be determined

Table 1: Option 3 Compliance Cost Table – Estimations by Department of Agriculture within the Regulatory Impact Statement (RIS) June 2014

GrainGrowers support Option 3 where all PTSPs will be required to subscribe to the code under a level playing field, yet, the cost of regulation is minimised (or removed) for operators who do not hold substantial market power, or are not vertically integrated.

3. Investment in Infrastructure

The impact of access regulation on investment in essential infrastructure is an important consideration for GrainGrowers in the development of an appropriate code for industry. Once access regulation is applied it is impossible to know the counterfactual—how investment would have differed in the absence of access regulation. However, it is widely acknowledged that potential exposure to access regulation can impede investment in essential facilities in two ways:

- increase the risk and cost of investments. The scale of investment in essential infrastructure, and the fact that, once in place, assets are sunk, mean that regulatory risk is likely to be a more pervasive influence on decisions to invest than in many other areas.⁵
- investments in essential infrastructure will also be deterred if prospective terms and conditions under regulated access are not seen as providing a sufficient return to infrastructure owners. Or, if regulated access potentially reduces the ‘expected return’ on investments.⁶

Some investment impacts are unavoidable if efficient access to essential infrastructure services are to be provided. However, if access regulation is overly onerous its impact may outweigh the benefits that appropriately applied access regulation can deliver.

GrainGrowers supports Option 3 in light of the above considerations; Option 3 has struck the right balance in terms of incentivising investment in in ports operated by Tier 1 exempt port

terminal service providers (PTSPs), through a reduced level of regulation applied on these PTSPs.

Based on the above, GrainGrowers would encourage the government to move forward with the introduction of a mandatory code of conduct as presented within Option 3 of the Regulatory Impact Statement. Please do not hesitate to contact me if I can provide any further information.

⁵ Wheat Export Marketing Arrangements, (1 July 2010) Productivity Commission Inquiry Report, No 51, p187

⁶ Wheat Export Marketing Arrangements, (1 July 2010) Productivity Commission Inquiry Report, No 51, p187

Sincerely,



General Manager, Grower Engagement
Michael Southan