



WHEAT EXPORT REGULATION: THE END IS NIGH!

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It was a long-time coming, but the Government has finally accepted the recommendations of the Productivity Commission in its July 2010 Report on Wheat Export Marketing Arrangements. While the Government's response is not surprising, it does bring into focus key questions relating to port access which cannot be ignored.

Currently, under the *Wheat Export Marketing Arrangement Act 2008*, all wheat exporters must be accredited by Wheat Exports Australia (WEA). Further, wheat exporters who operate a port terminal facility must pass the "access test". This has been by so-called "access undertakings" to the ACCC allowing other wheat exporters the opportunity to use port terminal facilities to load vessels and export bulk wheat.

Accreditation to end

The Productivity Commission recommended that current accreditation requirements be abolished in time for the 2011-2012 season,

but the Government's lengthy consideration of the report made that impossible. Instead, accreditation will end on 30 September 2012. WEA will also no longer exist after 30 September 2012 and the Wheat Export Charge, which covers the cost of regulation and is currently set at 22c per tonne, will also be abolished on that date. The Government has indicated that a "lighter-approach" will be adopted to accreditation from 1 October 2011 to 30 September 2012. What form that takes, and how it will be achieved (whether by amendment to the *Wheat Export Marketing Scheme 2008* Regulations or by a change in policy and enforcement by WEA) has not been detailed. Until Regulations or guidelines are announced and come into effect, exporters should be aware that the accreditation regime continues in its current form.

No more access test after 2014

Wheat exporters who operate port terminals will no longer have to pass the access test after 30 September 2014. This means that



port terminal operators will not have to seek the ACCC's approval for access undertaking regimes. This particular aspect of wheat export regulation has been criticised by some as being overly costly and cumbersome for port terminal operators. At the same time, others have come to its defence arguing that it is a necessary protection against regional monopolies resulting from the end of single-desk marketing. Overall, the Minister for Agriculture, Fisheries and Forestry, Senator Joe Ludwig, characterised the move to deregulation in the following terms: *"This will reduce the level of administrative red tape for exporters, including accredited port terminal operators, and allow growers more time to adapt to the new environment."*

The ACCC has just finalised the terms of the access undertaking regimes which will run until 30 September 2014. After that date, access to port terminal facilities will be governed by a voluntary code of conduct which will be developed and general competition law. In particular, port terminal facilities will be subject to Part IIIA of the *Competition and Consumer Act 2010* (which was formerly called the *Trade Practices Act 1974*).

Moving to the general competition law environment

Generally, an owner of infrastructure (such as a railway or port) does not have to provide access to another person. Usually, the access-seeker is a competitor who wants access to the infrastructure to deliver products or services to its customers. A good example is an internet service provider who wants access to the

"last-mile" copper network to link up its own cables to a customer's home.

Under Part IIIA, a person can apply to have the Minister "declare" a service provided by way of an infrastructure facility. Having a service declared is a hard and long process. It requires showing that the facility is "of national significance", that access would promote competition and that it would be uneconomical to develop another facility. This usually requires analysis by economists and evidence from the access-seeker's own business files. A recent high-profile case was Fortescue's attempt to get access to railway tracks owned by BHP Billiton and Rio Tinto to transport iron ore from Fortescue's mines. The Minister made decisions with respect to four tracks which were appealed to the Australian Competition Tribunal. Decisions with respect to two of the four tracks were further appealed to the Full Federal Court and are the subject of ongoing attempts to appeal to the High Court of Australia. As things currently stand, only one of the four tracks was declared.

If a service is declared, the infrastructure-owner and access-seeker will attempt to negotiate terms of access. If no agreement can be reached, the dispute is settled by the ACCC which will, in effect, set the price and conditions of access.

Key outcomes

One of the big differences between Part IIIA and the current access undertaking regimes is that Part IIIA will only provide access to excess capacity. The current access undertakings provide for port

terminal capacity to be allocated on a non-discriminatory basis, effectively allowing for equal access. There is nothing to stop a vertically integrated port terminal operator using most, if not all, of a port's capacity for its own needs, even if its service is declared under Part IIIA. This is particularly relevant in the wheat exporting context where demand is cyclical. Peak shipping periods last only several months of the year and there is intense competing demand for services within those periods. It is quite possible that a port terminal operator may alone be able to utilise the entire shipping capacity during peak periods leaving no capacity for any access-seeker under Part IIIA.

Users of port terminal services will have a particularly strong interest in ensuring that voluntary codes address broad industry needs and requirements.

Exporters who currently obtain access to ports via an access undertaking should carefully consider the consequences of these next waves of deregulation. It might be possible to enter into a contract with a port terminal operator now which provides for port access after 30 September 2014. Alternatively, building or converting a port terminal facility (either alone or as part of a joint venture) should be considered.

Put simply, there is no guarantee that port terminal operators will continue to provide access to other wheat exporters after 30 September 2014. Even if an exporter was successful in having a port declared under Part IIIA, there is a real chance that there would not be enough excess capacity to make that effective.



While the move to deregulation was expected and the reduction in red tape, compliance costs and regulation will come as a relief, the consequences will have to be planned for between now and the start of the new marketplace on 1 October 2014. Participants in the industry should stand warned: the end is nigh and it is best to be prepared!

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