The Future of the Grains Industry and the *Wheat Export Marketing Act 2008*

**Background**

- Single desk arrangements were dismantled 2008 with Government promising to: ¹
  1. ensure effective competition.
  2. prevent development of three regional monopolies.
  3. establish a market regulator with ‘teeth’.
  4. evaluate the costs and benefits of new arrangements.
  5. provide fair and reasonable port access for other exporters.
  6. fund initial market information, acknowledging the need for equitable access to key market information.
- Productivity Commission review 2010; Continued industry debate around proposed deregulation.
- Ongoing industry consolidation and acquisitions by overseas interests. E.g. Cargill, Glencore, and possibly ADM.
- PC review identified ‘industry good’ (form of market failure) with general consensus across the industry that these need to be addressed.
- WEA has negative perception amongst many in the industry – although often these are accredited exporters, whose self-interest is in having no regulation.

**Objectives**

- Maintain market efficiency and freedom of choice through rules promoting a competitive market place.
- Reduce the costs of government intervention as well as combine with effective industry self-regulation.
- Address current market failures such as ‘industry good’ functions.
- Ensuring broad support of grower sector.

**Impact of the Government’s Bill on the Export Wheat Market**

- Removes government regulation, without leaving a framework for managing identified market distortions created by the integrated bulk handling networks.
- Does not facilitate competition:
  1. Makes access provisions to essential port infrastructure controlled by BHCs voluntary.
  2. Reinforces impact of asymmetry of market information in the favour of BHCs by failing to adopt best practice regulation of market information, such as in the USA or Canada.
- No minimum quality standards – such as in the U.S. or Canada.
- No protections for equitable financing arrangements, similar to that available for other financial products.
- Failure to provide industry oversight of competition and make arrangements to fund industry good functions.
- Leaves vested interests in control the Australian Grains industry through the exercise of market power.
- The majority of farming businesses & SFO’s do not support repeal of the Act
  1. QLD, NSW, Vic, SA, & some WA grower groups
  2. East Coast incl SA represent ~60% of exports, & ~80% of farm family businesses

**Why should Government intervene – ‘market failure’?**

Market failure is defined as a situation when a market ‘left to itself’ does not allocate resources efficiently. Where market failures exist, there is a potential role for government to improve outcomes for the community, businesses and the economy. Types of market failure demonstrated in the grains industry, warranting government intervention are:

- Public Good – a non-excludable’ and ‘non-rival’ good resulting in the ‘free-rider’ effect. This includes ‘industry good’ where most of the benefit falls to a prescribed industry group E.g. Varietal Development.
- Information Asymmetry - where one party to a transaction has more or better information. E.g. Grower stocks information not made available to the market by BHCs.
- Market Power : Monopoly / Oligopoly power - where one or a few buyers or sellers in a market have the ability to exert significant influence. E.g. Graincorp in East Coast; Viterra in SA; CBH in WA.

¹ Commonwealth, Parliamentary Debates, House of Representatives, 29 May 2008, 3857 (Tony Burke, Minister for Agriculture, Fisheries and Forestry).
• External impacts - costs or negative impacts on a third party not involved in a transaction. E.g. where an exporter damages Australia’s export reputation by out-turning low quality grain or high residue grain, which negatively impacting the whole market.

Port Access

Fair and reasonable access to port for exporters who are not related entities of the port terminal operator is essential to enabling competition in the export wheat market for farmers’ grain. Examples of concerns related to port access provisions are outlined below:

• Inability to Access Port Terminal facilities in East Coast, SA, or WA. Examples include:
  1. Viterra gave preferential treatment to itself booking most of the prime export shipping slots, resulting in the ACCC refusing to approve its port access undertaking in 2011/12.²
  2. CBH’s annual report outlines that its trading activities lost $23.4 million dollars in 2010-11, due to ‘trading and logistics challenges faced... on the East Coast’. This is despite ‘shipping more than $1.5 billion of grain around the world’.³
  3. “…the auction and rebate system can hurt a marketer by up to five million dollars thus affecting his capacity to buy grain and offer the best price to growers”, CBH Operations Manager
• Inability for grain growing groups to access arbitration through the ACCC’s Publish – Negotiate – Arbitrate with regard to the establishment of reference fees; yet concurrently pool operators, with the equitable obligation to ‘maximise returns to growers’, have not utilised this service.

Why Can’t ACCC manage Port Access via a Voluntary Code?

ACCC themselves have not recommended moving away from access provisions and issues with a voluntary code of conduct:
“.....when it comes to monopolies our regulation can be too light-handed. We do not have, for example, effective regulation mechanisms for airports or some ports that export wheat”, (emphasis added) Chairman of the ACCC 2012.⁴

• “…We thought that moving to eliminate the undertakings or the regulatory regime in the time period initially suggested by the Productivity Commission was perhaps too soon”;⁵
• “…It is a voluntary code. At the end of the day there is nothing we can do to force anyone to become part of a voluntary code...”⁶; and
• “…That is what a voluntary code is. It would be highly unusual for the ACCC, as an independent statutory government agency, to be part of a voluntary code as a dispute resolution body under a voluntary code.” Deputy Chief Executive Officer, Regulation, ACCC.⁷

The ACCC has also outlined that the operation of industry specific oversight assisted it in its role of approving and enforcing the access undertakings made as a requirement of the Wheat Export Marketing Act 2008.

• [on being asked about the impact of having a party with a proactive oversight role] “…sometimes that is made easier... It is to separate out the noisy claims or the ones that are not actually real from those claims where you say, 'Yes, this looks like it might be something realistic’... Probably one of the most helpful things where you have a group that has stronger oversight. It is not so much what they refer on; it is what they get out of the system that does not clog up our system.”

Why Can’t DAFF enforce a voluntary code?

DAFF have prepared options for the Port Access Code Development Committee, in which DAFF would be the agency responsible for enforcing regulatory compulsion for membership and compliance with the Code. Utilising a Government department to regulate commercial trade is fraught with danger:
• DAFF implement government policy – they are not an independent decision making regulator.
• DAFF are answerable to the Minister for Agriculture.
• The government may open itself to criticism of:

² ACCC ‘Viterra Operations Limited Port Terminal Services Access Undertaking Draft Decision 11 August 2011’
³ CBH Annual Report 2010-11. Other examples may be found in evidence from AWB to the Regional and Rural Affairs and Transport Committee’s inquiry into operational issues in export grain networks.
⁵ Mr Mark Pearson, Deputy Chief Executive Officer, Regulation, Australian Competition and Consumer Commission, Committee Hansard, 14 May 2012, p. 50.
⁶ Ibid 51.
⁷ Ibid 52.
1. Political influence in regulating commercial trade. E.g. Live cattle; commercial fishing.
2. Using the Customs Act or Export Control orders to create artificial barriers to trade.
3. Using Export Control Orders to act as the regulatory enforcement for exporters to comply with an industry code may be open to legal challenge. i.e. it is not the objective of either Act to restrict commercial wheat exports.

- Despite utilising export control orders – were a code committee to make a recommendation, then DAFF would have to conduct a separate investigation, which ultimately may be open to administrative or legal challenge.

**Transparency of Market Information (stocks inventory)**

It is a fundamental principal of markets that transparency and integrity of stocks facilitates market liquidity, price discovery, and improves market confidence. Examples of concerns related to market information are outlined below:

- Transparency of Stocks information is restricted by bulk handlers who consider the stocks information proprietary.
- BHC’s however are acting as ‘warehousemen’ of third party stocks, and are custodians of the information but do not own it.
- It is on the public record that the trading divisions of two of the three bulk handlers legally use this information to the exclusion of others in the market.\(^8\)
  1. In recent senate hearings this was referred to as ‘insider trading’
  2. It is understood a complaint has also been lodged with ASIC regarding the fact that ASX offers grains futures contracts which are deliverable to BHC sites, who also own trading divisions trading in physical grain contracts and ASX Futures contracts, and that stocks information is being made available to the BHC trading arm and not to the whole market\(^9\).

- Bulk handlers arguably do not want transparency as this would also bring accountability for stocks in the system, which it is understood Bulk Handlers currently utilise to blend at a profit. This is also another form of market failure – an ‘externality’ impacting upon the growers whose grain in effect loses value due to the actions of the Bulk Handler.

**Export Market Confidence – Cargo Integrity**

Varietal, quality, and hygiene (residue) integrity is a key issue for the Australian wheat industry. Examples of concerns related to cargo integrity are outlined below:

- Countries with official Wheat Export standards are preferred by international millers.
- Both the United States and Canada have bodies that enforce wheat quality standards. E.g. The United States Grain Standards Act; the Canadian Grain Commission.
- Correct varietal classification and receival standards will provide exporters the ability to market grain to the quality requirements of each customer.
- “Everything must be done to protect the integrity of the name APW. Once the brand is damaged, it will be gone forever” - South East Asian Miller to Wheat Exports Australia.\(^10\)
- “...Probably more importantly, the USDA and the Canadian Grain Commission are not voluntary regimes; they are mandatory”.\(^11\)

**Exemption from Financial Services Regulation**

- Grain acquisition contracts and Pools are products displaying similar features to financial instruments; however these are not subject to regulation under ASIC (Corporations Act) due to a class exemption. This results in farmers not receiving the same availability to seek remedies as other persons dealing with financial services.
- WEA has recently commissioned a study which shows a disconnect between the estimated pool return being offered at harvest, compared to the final pool return upon closure.\(^12\)

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\(^8\) Wheat Exports Australia, Response to Submission No 14 (supplementary) to Senate Rural and Regional Affairs and Transport Legislation Committee, Inquiry into the Wheat Export Marketing Amendment Bill 2012, 13 June 2012, 5-8.

\(^9\) Ibid.


\(^11\) Mr Dugald Hunter, Manager, Agricultural Derivatives, ASX, Committee Hansard, 14 May 2012, p. 20.

2010 / 11 season Emerald Grain offered a pool product to wheat farmers in all states with a provision for an early commit bonus of $20 per tonne for grain contracted to the pool before June 2010. The end result for the Emerald pool was a decline in the APW pool estimate from $350 to final pool return $300 = $50 decline, as well as greater discounting of lower wheat grades. Potential losses of up to $200,000,000.

WEA utilised the powers of accreditation to investigate Emerald and as a result identified changes to its pools management procedure which have been adopted by Emerald.  

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13 Wheat Exports Australia and Emerald Group Australia, ‘Emerald commits to further improvements in its wheat pool management systems, processes and disclosure’ (Media Release, 11 May 2012)