



Productivity Commission

**Inquiry into the regulatory burden on farm businesses
focusing on regulation that have a *material impact* on the
competitiveness and productivity of Australian agriculture**

12 February 2016

EXECUTIVE SUMMARY

Co-operative Bulk Handling Limited (“CBH”) notes the Productivity Commission’s inquiry into the regulatory burden on farm businesses, with a focus on regulations that have a material impact on the competitiveness and productivity of Australian agriculture.

CBH considers it is generally incumbent on Government to seek to minimise supply chain regulation as it often leads to increased costs, inertia, inefficiencies and market distortion, the adverse effect of which is ultimately borne by the grower. Likewise, poor or ineffective regulation in the absence of effective constraints can result in adverse economic outcomes for the Australian agriculture sector.

In making this submission, CBH is responding to those sections of the Issues Paper relevant to the CBH business - specifically transport, competition and investment - outlining a range of opportunities to enhance existing regulatory frameworks to ensure:

- An environment is created that incentivises ongoing investment into agricultural supply chains that increases the sustainability and profitability of primary producers;
- A wider understanding and appreciation that agriculture is different to other industry sectors (such as mining) given issues of weather and geography and must be treated differently if it is to provide an ongoing contribution to the national economy; and
- Policy is developed that strikes a balance between creating an incentive for foreign investment, but where that investment involves monopoly infrastructure (railway lines and roads) that the users of that infrastructure have some assurance that they may continue to access facilities with reasonable service and reasonable pricing.

Also important to note is that CBH’s perspective on regulations that have a material impact on the competitiveness and productivity of Australian agriculture is shaped by its structure. As a co-operative, rather than being motivated by profit and shareholder dividends, CBH seeks to invest in supply chain infrastructure and undertakes its business operations in order to ensure Western Australian grain growers are part of an efficient, well managed supply chain that contributes to their farm-gate returns.

This nuance is at times overlooked by regulators and this submission is a useful opportunity for CBH to reiterate just how co-operative, mutual and member-owned firms can play a distinct and important role in the Australian economy on the basis that their structure, function and motivations are fundamentally different from privately owned, profit orientated organisations. This doesn’t suggest *better*, just that a co-operative focus on member value, industry advancement and community development is different from objectives relating to profit and shareholder return.

Indeed, CBH’s co-operative structure has contributed to the development of an organisation which is now a leader in the nation’s grain industry ensuring its Western Australian grain grower members are part of an integrated, efficient and well managed supply chain that contributes to their farm-gate returns.

With this context, CBH is pleased to provide comment to the Commission’s review.

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1. INTRODUCTION

Co-operative Bulk Handling Limited ("CBH") notes the Productivity Commission's ("Commission") inquiry into the regulatory burden on farm businesses, with a focus on regulations that have a material impact on the competitiveness and productivity of Australian agriculture.

As a leader of the Australian grain industry, CBH welcomes the opportunity of making a submission in line with the Commission's Issues Paper.

In a general sense, CBH considers it incumbent on Government to seek to minimise supply chain regulation as it often leads to increased costs, inertia, inefficiencies and market distortion, the adverse effect of which is ultimately borne by the grower. Likewise, poor or ineffective regulation in the absence of effective constraints can result in adverse economic outcomes for the Australian agriculture sector.

An efficient farm gate to port grain supply chain is one that strikes a balance between the commercial imperatives of its users (growers and their customers) on the basis that:

- Growers can deliver their grain into the network during the busy harvest period as efficiently as possible;
- The storage and transport network (incorporating storage and in-land freight) provides an operational platform from which grain buyers can acquire grain from growers and for that grain to then be out turned in line with market demand; and
- This chain functions within a regulatory environment that allows management of businesses and infrastructure at an appropriate commercial return to operators to the extent that necessary levels of reinvestment can be made back into those chains.

In considering regulation that may have a material impact on the competitiveness of the Australian grain industry, CBH's submission reflects these principles.

2. BACKGROUND - THE CBH GROUP

CBH is a unique organisation with a history almost as long as the grain industry it serves. The co-operative's commitment to maintaining a partnership with its Western Australian grain grower members has helped build an industry that has been the backbone of the State's rural economy since the beginning of the bulk handling system 80 years ago.

This partnership has also been the basis of CBH's strength and success.

CBH has constantly evolved, innovated and grown with operations extending along the value chain from grain storage, handling and transport to marketing, shipping and processing. Now Australia's biggest co-operative and a leader of the nation's grain industry, CBH is controlled by 4,200 grain growers.

The co-operative exists to create and return value to growers and for the advancement of the grain industry in Western Australia.

CBH currently employs around 2,700 permanent and casual employees. These employees are located across the co-operative's 10 regional offices, 195 receival site locations, 4 ports, engineering workshops, representative offices in Melbourne, Hong Kong, Tokyo, Krasnodar and a head office located in West Perth.

As a co-operative, rather than being motivated by profit and shareholder dividends, CBH seeks to invest in supply chain infrastructure and undertakes its business operations in order to ensure Western Australian grain growers are part of an efficient, well managed supply chain that contributes to their farm-gate returns. For example:

- In 2010/11 CBH took the decision to pursue enhanced above rail efficiencies by investing \$175 million in new rolling stock (locomotives and wagons) to be operated by a new above rail operator for the dedicated service of grain haulage in Western Australia. These arrangements provide a higher level of reliability, enhanced usage rates and greater productivity and have had a significant impact on the efficiency of the rail task. Since 2012, CBH has reduced average freight rates, after rebates, in CPI adjusted terms by \$3/tonne;
- CBH's Grower Rebate Program allows growers to enjoy a reduction in storage and handling fees on the basis of their patronage with CBH. Over the last 7 years, growers have enjoyed a rebate on the storage and handling fees of \$13.80 per tonne (cumulative), which promotes their competitiveness in the industry;

- Despite a very challenging cost environment, CBH's total storage, handling and transport costs are on average \$15-20 per tonne cheaper than East Coast equivalents; and
- On the back of ongoing investment in the storage and handling system, the CBH network is the most efficient, and the lowest cost, grain storage and handling system in Australia. Over the last 5 years, \$680 million was spent on capital expenditure and maintenance activities throughout the network.

3. RESPONDING TO THE ISSUES PAPER

In making this submission, CBH is responding to those sections of the Issues Paper relevant to the CBH business - specifically transport, competition and investment. In doing so, CBH has sought to provide the Commission with key pieces of information regarding:

- The time and cost of applying with regulation;
- Where there may be inconsistencies and/or overlapping regulation;
- Incidence where regulation has a particular impact on farming business; and
- Priorities for reform on the basis of where the grain industry might best be benefited.

3.1 Transport

The Western Australian grain industry is significant to the national economy with up to 50% of total grain exported from Australia originating from the State. 90% of Western Australia's annual crop is exported.¹ CBH itself exports to over 250 customers in 30 countries.

It is therefore essential for CBH and Western Australian grain growers to have access to an efficient and cost effective in-land transport network (rail and road) to ensure grain is available at port as required by the market and that WA remains competitive with other international origins of supply.

3.1.1 Rail

Approximately 70% of CBH's freight task is transported by rail to CBH's port facilities or the company's in-land grain terminal (the Metro Grain Centre) making it a critical element of CBH's supply chain. However access to the Western Australian Grain Freight Rail Network ("WAGFRN") has become increasingly difficult.

In 2010/2011, CBH made a decision to pursue enhanced "above rail" efficiencies, by investing \$175 million in new rolling stock (locomotives and wagons) to be operated by a new "above rail" operator for the dedicated service of grain haulage in WA. That operator is Watco WA Rail Pty Ltd (Watco).

For the first time CBH had full exposure of below rail costs from Brookfield Rail (the lease for the WAGFRN is held by various Brookfield entities (it expires in 2049) and operated by Brookfield Rail; part of the Canadian based Brookfield Asset Management Group). Previously below rail access charges were "retailed" to Western Australian grain growers by the previous above rail operator; ARG (now Aurizon) as a package including above and below rail fees.

In 2012, CBH signed a two year below rail access agreement with Brookfield Rail that saw growers pay on average \$43 million a year in below rail access.

In 2013, CBH attempted to negotiate a long term below rail access agreement with Brookfield Rail to this original arrangement however after 4 months, negotiations stalled and CBH made the decision to seek access to the WAGFRN under the Railways Access Code ("Code"), via the Economic Regulation Authority ("ERA").

Below rail arrangements

Unfortunately the current management and operation of the WAGFRN is making it difficult for CBH to realise any of the efficiency gains it has generated in its above rail operations.

While Brookfield's involvement has been welcomed by the Western Australian State Government, it seems Brookfield's commercial objectives are increasingly at odds with the users of the WAGFRN; the growers of Western Australia and the State's \$3-4 billion grain industry.

Brookfield Rail and CBH have fundamentally different positions regarding the operation of the WAGFRN. Brookfield is seeking to operate the rail network in order to maximise profit on behalf of its shareholders notwithstanding that its profit maximisation inflicts a comparatively greater economic loss on the Western

¹ Western Australia's annual crop is around 11.3 million tonnes

Australian economy. Meanwhile, CBH and the growers of Western Australia, as users of the track, are deprived of the most efficient and effective transport network possible in order to transport grain to local and international markets.

It has become increasingly obvious that these two objectives are mutually exclusive; for example:

- Brookfield Rail has closed those sections of the WAGFRN on which it is not making very high levels of profit, without surrendering them to an alternate user, on the basis that it can continue to increase revenue and margins from a reduced section of the rail network without increasing its own productivity. This behaviour is indicative of a true monopoly asset, as it can be run without regard to the interests of its customers. This closure is sought despite those assets remaining an important component of the local supply chain, the use of which would avoid increased costs being passed onto the community;
- Rail performance standards are decreasing while access fees are increasing:
 - Growers currently pay on average \$6 per tonne in below rail access fees to Brookfield Rail which is approximately 40% of a grower's total rail freight cost and 11% of a grower's total average supply chain cost to get grain from their farm to port and loaded onto a ship;
 - By contrast globally, below rail freight costs generally contribute 15-20% of the total rail cost of freight;
 - In Victoria, the cost of below rail access of railing grain from Dimboola to port (300km) is >\$1.90 per tonne. In Western Australia, the below rail access cost of railing grain from Merredin to port (300km) is >\$7.90/t. This comparison is based on non-Government subsidised, Australian Rail Track Corporation ("ARTC") rates;
 - Despite Government funding for the Strategic Grain Network Review Tier 1 and Tier 2 re-sleepering program, there are currently over 700 speed and mass restrictions placed on the WA grain freight rail network that hinder effective rail operations; and
 - Four independent rail experts contracted by CBH to survey and assess the WA grain freight rail network concluded that the current access fees charged by Brookfield Rail should be sufficient to maintain the network to appropriate performance standards.

CBH's submission to the ERA

CBH made its submission to the ERA as one of only three proponents to have sought access under the Code. CBH is also the only proponent to have had input from the ERA on the determination of costs relevant to the grain freight rail network operated by Brookfield Rail which is covered by the Code. This has given CBH unique insight into the many failures of the Code in giving effect to the Competition Principles Agreement ("CPA").

While CBH submitted a proposal for access to the WAGFRN back in December 2013, only in May 2015 was CBH able to commence the process of negotiating with Brookfield Rail under the Code. The process is only just at the stage where CBH can commence arbitration.

Since lodging its proposal, CBH was forced to seek injunctive relief in the Supreme Court to enforce its rights under the Code (which was ultimately settled with Brookfield Rail before trial), and commenced arbitration proceedings which took over nine months to resolve a preliminary issue about capacity.

The process of obtaining access under the Code has had a significant negative effect on the efficiency of CBH's operations, and has resulted in uncertainty and increased costs for CBH and its grain grower members. Not being able to secure long-term access on reasonable terms to a vital part of the grain supply chain has jeopardised the competitiveness of Western Australian grain growers, and their ability to transport their grain to highly competitive international markets efficiently and effectively.

This directly affects the competitiveness of the Western Australian grain industry, and its significant contribution to Australia's national economy.

Issues with the Code

CBH's experience as an access-seeker is that the provisions of the Code do not give effect to the CPA and that significant reform is required in order to ensure that the Code promotes access to the railways covered by it.

And the need for change is urgent.

CBH has communicated the specific nature of this required change by way of a detailed submission to the ERA on its current review of the *Railways (Access) Code 2000*.

Fundamentally, the Code does not effectively constrain the monopoly power of railway owners, and therefore does not deliver efficient access outcomes. This is on the basis that:

- The process under the Code is slow and provides a railway owner many opportunities to delay progress. This is compounded by the fact there are no "transitional" provisions that provide "default" access until the process (which may include multiple arbitrations, and potentially litigation) is completed;
- The access pricing outcomes under the Code are highly uncertain, which fundamentally undermines the utility of the process. The gulf between the floor price and ceiling price (which set the parameters for access pricing) is so large it essentially provides no real limit or guidance on pricing outcomes. In the case of CBH's access proposal, the "global" annual ceiling price is \$526 million higher than the global annual floor price. Such a price range provides little real guidance as to the appropriate access price. This is compounded by the "pricing guidelines" in the Code, which provide considerable scope for argument about where, and how, the price should be set;
- The Code does not address the inherent "unevenness" of information between a railway owner and an access seeker. The lopsided nature of this relationship is fundamental to a railway owner's ability to take advantage of its natural monopoly over below-rail services. The Code needs extensive and immediate reform to address this problem;
- CBH is concerned about the difficulties with enforcement of the Code, and submits that the ERA's, and an access seeker's, ability to effectively enforce the Code is significantly limited because the Code can only be enforced by an injunction obtained by the ERA or an access seeker from the Supreme Court, or through arbitration. This stands apart from other regimes, which grant the ERA the power to impose infringement notices, and pecuniary penalties (among other remedies) for breaches; and
- The Code currently provides a railway owner with numerous opportunities (should it wish to use them) to delay and hamper the process by committing repeated "small" breaches of the Code, which have a significant cumulative impact.

Indeed, a range of key stakeholders consider the Railways Access Code (2000) provides little effective oversight having been:

- Found deficient by the National Competition Council (NCC) stating in 2011 that "*the Regime does not provide for a consistent approach to regulation of third party access to railways in Western Australia*"
- Criticised by the 2013 Western Australian Auditor General's report Management of the Rail Freight Network Lease: Twelve Years Down the Track as lacking "... *the requirement to meet the needs of rail users*" and
- Considered by the Western Australian Legislative Assembly Economics and Industry Standing Committee in its Report into the Management of Western Australia's Freight Rail Network Report as "*not having allowed the government's vision to be realised due to deficiencies in the lease instrument, the regulatory regime and the Public Transport Authority's (PTA's) management of the lease.*"

Australian rail networks need a consistent regulatory framework ensuring more efficient price setting and performance monitoring. It is CBH's strong view that an opportunity exists for national rail access reform to consider the construction of an effective regime that would provide fair and consistent regulation across Australia, for both users and operators.

On the basis that ACCC's oversight of the ARTC rail network has been generally well regarded by industry participants throughout southern and eastern Australia, CBH considers that a similar ARTC regime would be a useful model to form the basis for a national regime.²

3.1.2 Road transport

The second key element of the Western Australian grain supply chain is road transport; both growers delivering grain into the CBH storage and handling network during the harvest period and CBH in turn transporting that grain to port (around 30% of the annual crop).

² At the time of developing this submission, the ERA has announced a range of recommendations for changes to rail access laws that includes making them workable and consistent with regulations across Australia.

Given the importance of road transport, CBH and the grain growers of Western Australia need a pragmatic regulatory framework that ensures workable access to the network; preferably one that has been established following consultation between Government and road users.

Unfortunately the development and oversight of Western Australia's Restricted Access Vehicle System ("RAV") has created a range of jurisdictional challenges that is confusing for both administrators and road users alike.³ A road pathway can pass through various State and Local Government instrumentalities with each proffering a different RAV rating making it impossible for users to have any clarity regarding an acceptable consistent pathway for a particular vehicle configuration.

Exacerbating the issues with RAV ratings is the Western Australian Government's implementation of Chain of Responsibility and Accredited Mass Management Scheme ("AMMS") legislation. Both regimes were developed with little industry engagement such as considering the impact it would have on road transporters. Indeed there has been little consideration as to whether Government authorities would have the resources to physically inspect the roads required for assessment and incorporation into the RAV network yet the legislation is so rigid, there is no room to accommodate the issues faced by the Department of Transport's lack of available resources.

Despite these administrative short comings, the risk associated with a possible breach resides with the road transporter.

So in Western Australia there now exists well intentioned legislation which makes it increasingly problematic for growers to transport grain from farm to receival site (without considerable investment and upgrade to the country road network) - a situation that may have been averted with Government adopting a more pragmatic approach incorporating deeper industry consultation.

3.2 Competition regulation

While CBH will always seek to invest in supply chain infrastructure and undertake its business operations to provide Western Australian grain growers with access to an efficient and well managed value chain, the co-operative would welcome an enhanced regulatory framework that ensures:

- An environment is created that incentivises ongoing investment into agricultural supply chains that increases the sustainability and profitability of primary producers;
- There is a wider understanding and appreciation that agriculture is vastly different to other industry sectors (such as mining) given issues of weather and geography and must be treated differently if it is to provide an ongoing contribution to the national economy;
- Policy is developed that strikes a balance between creating an incentive for foreign investment, but where that investment involves monopoly infrastructure (such as railway lines, pipelines, or port authorities (as opposed to port terminals which are replicable)) that the users of that infrastructure have some assurance that they may continue to access services provided by those facilities with reasonable service and reasonable pricing: and
- More broadly, supply chain regulation is minimised as it leads to increased costs, inefficiencies and market distortion that is all ultimately borne by the grower.

In line with CBH's stance against increased regulation, and consistent with the recommendations of the Commission, CBH seeks a broader comment from Government on its longer term vision for regulation together with detail on its agenda for the continued deregulation of the grain industry, so that the industry has a greater degree of certainty for the future and may plan accordingly.

Likewise, when planning a supply chain operation, activities must be coordinated across three levels of Government to avoid the potential for inconsistent application of regulations resulting from misaligned incentives (as outlined in Section 3.1.2 a lack of consistent policies and determinants for heavy vehicle pathways is one example of potentially inconsistent application detrimentally affecting the supply chain).

CBH has seen contrasting examples as to how Government and regulators consider CBH's position in the Western Australian grain industry. The Government's recent Port Access Code exemption is a positive example of recognising that co-operatives and mutuals can be treated differently. The ACCC's revocation of the notification of CBH's Grain Express logistics system by contrast is an example where Australia's

³ These guidelines have been prepared by Main Roads Western Australia to assist Local Government, Main Roads' staff and operators or consultants in assessing the suitability of routes proposed for the operation of "standard" Restricted Access Vehicles (RAVs) on roads within the State of Western Australia.

regulatory framework has created the potential for Western Australian grain growers to be less competitive internationally.

3.2.1 Port Access Exemption

Grain terminal operators including CBH, pursuant to the provisions under the Wheat Export Marketing Act 2008 ("WEMA"), were required to provide an access undertaking to the Australian Competition and Consumer Commission ("ACCC"), in relation to the export of wheat from its port terminals.⁴

Not only were these port access arrangements costly for CBH and the grain industry, they also restricted the flexibility with which port operators and grain marketing organisations could respond to changing market conditions, be it price or production. This lack of flexibility increases the likelihood of international customers seeking grain from alternative origins of supply.

In late 2014, the Federal Government introduced the Mandatory Port Access Code of Conduct for Grain Export Terminals under which CBH was granted an exemption from the highest tier of regulation on the basis that, as a grower owned co-operative, CBH has no incentive to exclude or hinder access to their terminals by Australian growers and the grain marketers that buy their grain. Further, CBH is driven by their grower members to offer access to the services of their storage and handling facilities in order to drive competition for their (grower's) grain, in the process, facilitating exports from the State.

The recognition of the different business objectives and responsibilities of a co-operative to its grower members compared to a shareholder owned entity effectively reduces the regulatory burden and costs faced by Western Australian growers and their supply chain - allowing CBH to compete with storage and handling competitors on a level regulatory playing field.

Since the exemption has been in place, CBH has been able to sign up long term agreements with its grain exporting customers providing these organisations with a level of service and flexibility that was not possible under the rigid regulatory arrangements previously in place.⁵

3.2.2 Grain Express

Grain Express is an integrated storage, handling and logistics model that creates efficiencies by better managing the flow and movement of grain from upcountry receival sites to ports. It enables CBH to offer some of the lowest storage, handling and transport fees in the country.

Grain Express was introduced in 2008 as a simpler logistics system to improve transport utilisation and investment in the transport network; streamline grower receivals; and provide full marketing options to all growers.

The proposal to better integrate freight into the storage and handling service made it prudent to lodge an exclusive dealing notification with the ACCC which was unopposed. At the time the ACCC Chairman, Mr Graeme Samuel stated that:

"The ACCC believes there are likely to be significant efficiency benefits under Grain Express as a result of the central coordination of grain storage, handling and transportation in Western Australia,"

The ACCC retained the right to review the competitive impact of the notification (as with all notifications) and in June 2010 stated:

"Now that Grain Express has been operating for two harvest seasons, and given that concerns have been raised about Grain Express, the ACCC has decided to review the notification"

During the review, the ACCC advised CBH on 6 December 2010, of its draft decision to revoke the immunity it provided CBH in allowing the company to offer storage and handling services to growers and/or customers on the basis that those customers also acquire grain transport services via CBH. The final decision to revoke the Grain Express notification was handed down by the ACCC on 29 June 2011. This demonstrates the difficulty that may arise in determining the outcomes of the substantial lessening of competition test, which can often be a purely theoretical exercise with different results at different points in time for the same conduct. Applying for authorisations or notifications in making ordinary business decisions is inefficient and cumbersome.

⁴ For the period from the inception of the Wheat Export Marketing Authority ("WEMA") to the introduction of the Port Code of Conduct – 19 Sept 2014

⁵ CBH has secured 10 million tonnes, with 10 marketers into the CBH system under Long Term Agreements. This demonstrates the confidence of major exporters in the competitiveness of the CBH network.

3.2.3 Ensuring regulation that does not impede the creation of member value

As outlined in Figure 1, the CBH's integrated business model (storage, handling, transportation, marketing and port operations) operates to create value for the growers of Western Australia by ensuring they have influence and control throughout each element of the chain as well as providing the vital interface between growers and their customers.

This Australian based business has been augmented by the company's investment in 7 flour mills in South East Asia. CBH holding a fifty per cent stake in these processing facilities located in Indonesia, Vietnam and Malaysia means that growers can receive direct and transparent information around consumptive trends and quality requirements from these markets (such as increased demand for high protein milling wheat) and as a consequence make more informed planting/cropping decisions.

The fundamental value of CBH's integrated supply chain is that decisions are made on the basis of what is optimal for the entire chain rather than the alternative, more fragmented approach adopted in other geographies that will often see participants in a discrete section of the chain make decisions based purely on what is best for that specific component. The CBH's integrated approach takes a more holistic view examining what creates the most value for Western Australian grain growers across the chain (see Figure 1).

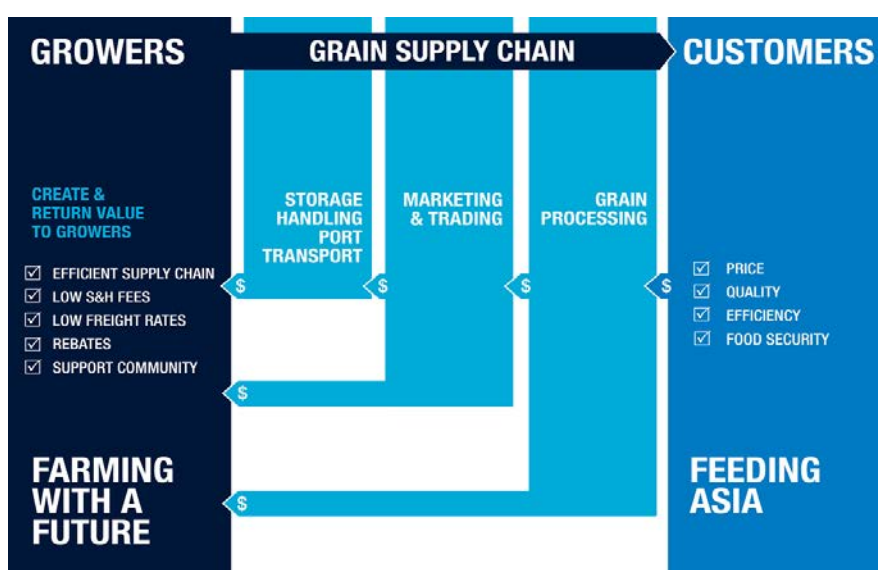


Figure 1 - CBH's integrated business model - a whole of chain approach

Industry stakeholders occasionally suggest that CBH providing supply chain services to both its internal marketing division as well as other exporters somehow creates a conflict of interest. CBH contends very strongly that its obligation on behalf of growers in Western Australia is simply to create value for those growers irrespective of which commercial entity markets their crop. Indeed other marketers are acquiring and exporting significant volumes of grain via the CBH supply chain each year and there are around 18 marketing and trading organisations, collectively exporting around 5 million tonnes grain from Western Australia each year. Since the deregulation of the wheat export market, CBH has facilitated the development of a vigorous market to acquire grain from Western Australian growers within its supply chain.

This is an important point. CBH's Western Australian based chain is about providing growers and their customers with an efficient and assured platform of exporting grain to their international markets. While Regulators will often be obliged to form a national approach to drafting items such as Port Access regimes, CBH would urge Government to avoid developing a blanket approach to ensuring access to export facilities on the basis of its observations of supply chains operating throughout south and eastern Australia.

Such an approach would only serve to remedy a non-existent problem of supply chain access in Western Australia and encumber grain growers with unnecessary and costly regulation.

3.2.4 Harper Reform

The Competition Policy Review (Harper Review) Final Report was released on 31 March 2015 proposing the following changes to s46 of the Consumer and Competition Act (CCA).

FROM:

- “Misuse of market power
 - (1) A corporation that has a substantial degree of power in a market shall not take advantage of that power in that or any other market for the purpose of:
 - (a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;
 - (b) preventing the entry of a person into that or any other market; or
 - (c) deterring or preventing a person from engaging in competitive conduct in that or any other market.”

TO:

- “A corporation that has a substantial degree of market power shall not engage in conduct if it would have the purpose, or has the effect or is likely to have the effect, of substantially lessening competition (SLC)”

There are a number of important nuances between the proposed section and the current section that may be important. On 24 November 2015, the Federal Treasurer released the Government’s response to the Review indicating it would consult further before amending s46. On 11 December 2015, the Government released a discussion paper calling for submissions on 'options to strengthen the misuse of market power provision.'⁶

These nuances include:

- The removal of the “taking advantage test”;
- The addition of the “effect or likely effect of substantially lessening competition”; and
- The interaction between “purpose” and the “substantial lessening of competition” test.

CBH is of the view that these changes will increase uncertainty and cost for the co-operative. In effect, the co-operative may be penalised for undertaking efficiency measures that are designed to reduce grower supply chain costs but may be determined to lead to the ‘effect’ of lessening competition.

The purpose of the legislation should be focused on matters which are an abuse of market power as opposed to a co-operative acting in the interests of its members. There is a risk that CBH’s efficiency enhancing behaviours, for the benefit of increasing growers’ export capacity and competitiveness in the global market, are likely to be captured as unintended consequences. In this regard, the Grain Express example above provides a clear examination of how efficiency enhancing conduct can be caught.

Nothing in the current cases lend themselves to providing certainty as to whether and to what extent pro-competitive benefits of conduct would be taken into account under a revised section 46 nor how such calculations might be performed.

Implementation of reforms to section 46 could clearly have a material impact on the competitiveness and productivity of the Western Australian grain industry. CBH considers that there are existing measures that could be utilised before there is a requirement for change in section 46. However, if changes are required to be implemented then care must be taken to ensure efficiency driven behaviours such as those implemented by CBH in the best interest of growers in Australia are not penalised as an unintended consequence.

3.3 Foreign investment

CBH is not opposed to foreign investment or organisations seeking to make commercial returns for their owners or shareholders; on the contrary. The Australian grain industry like any sector needs access to appropriate levels of capital and corporate ambition to facilitate industry expansion and growth. However with investment comes the requirement to understand an investor’s commercial goals and the extent to which these are complementary to local industry; in this case the Australian (and Western Australian grain industry).

Into the future, it is critical that the problematic arrangements arising out of Brookfield Rail’s lease of the WAGFRN (outlined in section 3.1.1) are not repeated and Government in seeking to privatise key public

⁶ CBH is making a submission to the Review

assets needs to strike a balance between creating an incentive for investment (including foreign investment), and where that investment involves true monopoly infrastructure (railway lines and roads) ensuring that the users of that infrastructure have some assurance that they may continue to access those facilities with reasonable service, pricing and appropriate regulatory oversight.

Where foreign investment seeks to acquire true monopoly infrastructure, (such as railway lines and roads), the users of that infrastructure must have some assurance that they may continue to access those facilities with reasonable service and pricing by way of a robust, national approach to regulation.

FOR FURTHER INFORMATION

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