

8 August, 2008

Mr Corey Dykstra  
Senior Manager  
The Allen Consulting Group  
Level 21, 44 St Georges Terrace

Dear Mr Dykstra,

AWB welcomes the opportunity to comment on the Western Australian Department for Planning and Infrastructure's Competition and Infrastructure Reform Agreement (CIRA) Review of Western Australian Ports.

The current review of port competition and regulation of WA ports is timely given the recent introduction of new wheat export marketing arrangements under the Australian Government's Wheat Export Marketing Act (WEMA) 2008.

As stated in the CIRA issues paper prepared for the Department by the Allen Consulting Group, the WEMA recognises and addresses many of the issues raised in this review of port access and regulation.

However, AWB notes that the Western Australian Department for Planning and Infrastructure's Competition review will only consider three of the sixteen ports in WA. Clause 4.3 of the CIRA commits to the review of the regulation of ports and port authority, handling and storage operations at significant ports and that these are defined in part as major bulk commodity export ports not considered to be part of the integrated production processes.

Under the WEMA at all bulk wheat ports, accredited bulk wheat exporters are required to meet an access test, that; before 1 October 2009 there is available on their

website a current statement and proposed terms and conditions and that after 1 October 2009 where there is no approved state or territory access regime then an ACCC approved access undertaking will be required.

These Commonwealth WEMA criteria aim to encourage fair and open access through the ACCC approved access undertakings for bulk wheat export ports where the operator of the port seeks accreditation through Wheat Exports Australia (WEA).

As noted in the WA CIRA issues paper, while the Commonwealth legislation attempts to ensure fair and open access, the WA Bulk Handling Act contains no provisions that govern the manner in which access is provided, nor how prices are to be determined.

A crucial issue therefore for this review, is to evaluate both overlaps and gaps in the coverage of different legislative instruments and the jurisdictional application of state and territory legislation. The CIRA states that all levels of government agree to establish a simpler and consistent national approach to economic regulation of significant infrastructure.

It is therefore crucial that any recommendations for future economic regulation and competition in the provision of port services takes into account the impending introduction of ACCC approved access undertakings for port services from 1 October 2009.

In Victoria, where there are existing state based access undertakings, the State Government of Victoria is faced with the difficult application of two separate access regimes. This situation has the potential to create additional imposts and compliance burdens on the industry, while unintended consequences of dual arrangements could promote confusion and inadvertent compliance breaches, as well as the difficulty of prioritising and coordinating state and federal laws in a complementary manner.

Under the 2006 CIRA, the state, territory and federal governments agreed that ports should only be subject to economic regulation where a clear need for it exists in the promotion of competition in upstream or downstream markets or to prevent the

misuse of market power and where a Party decides that economic regulation of significant ports is warranted, it should conform to a consistent national approach based on the following principles

The introduction of additional state based access undertakings under state legislation may be at odds with the COAG commitment to achieving a seamless national economy. The most recent COAG Communique of 3 July 2008 states that “COAG acknowledged that Australia’s overlapping and inconsistent regulations impede productivity growth.”

It might therefore be appropriate for any recommendations of the COAG Review of Western Australian Ports to report to the COAG Infrastructure Working Group to ensure consistency of approach and appropriate coordination with other bodies such as Infrastructure Australia and the possible COAG Infrastructure Working Group Stage 2 Reforms.

A recent submission by the Department of Agriculture, Fisheries and Forestry to the ACCC on the Cooperative Bulk Handling exclusive dealing notification raised concerns by Commonwealth that its policy objectives could be frustrated by companies with control of bottleneck infrastructure.

The Commonwealth Department states that Section 86A of the Wheat Export Marketing Act 2008 was inserted by the Federal Parliament specifically to avoid transport monopolies or prescriptive modes of transport being imposed. This was an ‘express wish’ of the Parliament.

As the Federal Minister for Agriculture, Fisheries and Forestry stated in the Parliament;

“There was also a particular issue regarding transport and trying to make sure that state governments did not try to impose transport monopolies on the way grain is transported around the country.” (Hansard, 23/06/08)

When introduced it was stated that these amendments were intended to ensure that no state or territory laws can interfere with or subvert the performance of contracts involving the growing, storing and transport of wheat.

The Senate Standing Committee on Rural and Regional Affairs and Transport Inquiry into the WEMA noted the concerns that access arrangements should apply to all points of the supply chain and that consideration needs to be given to ensuring an adequate level of regulatory oversight of protocols relating to the accumulation, movement and loading of wheat for export.

While the Port Authorities Act 1999 defines what constitutes a port zone, the CIRA Review issues paper recognises the wider implications of the integrated supply chain by stating;

“Consequently, given the range of goods being handled by the three Port Authorities, there may also be a broad range of relevant upstream and downstream product and service markets where competition may be promoted through economic regulation of ports.”

This issue was identified by the South Australian Essential Services Commission (ESCOSA) 2006 Review of port pricing and services that recommended that;

“The Commission also recommends that the Government consider the question of whether or not grain storage and bulk handling facilities should be subject to access regulation as part of a broader review, having regard to the entire grain supply chain.”

The ESCOSA Report also states that;

"In the Draft Report, the Commission sought comment on whether or not the ports access regime should be extended to cover at-port grain storage and bulk handling facilities. The appropriateness of such action depends on the potential for, or actual, misuse of market power by the provider of these facilities, and benefits of imposing regulation on them. Having considered

comments on this issue raised in submissions to the Draft Report, the Commission has concluded that there is a prima facie case for regulating access to at-port grain storage and bulk handling facilities given the existence of market power, but that it is appropriate for any regulatory scheme to be considered in a broader context by the State Government, having regard to the whole of the grain supply chain. The current ports access review is necessarily limited to at-port services and many of the services envisaged here extend well beyond the port boundary."

The Australian Government has stated that it will continue these arrangements and the possible extension of access provisions beyond the conditions currently imposed on the geographic footprint of port zones.

AWB is of the view that in reviewing the economic regulation and competition in the provision of port services it is important that all relevant stages in the supply chain are taken into consideration to ensure that least cost pathways and non-restrictive are available to industry participants.

To achieve genuine competition in port services it is crucial that competition in the supply chain is permitted and promoted, with inter-modal competitive tension at all levels of government (local, state/territory and federal) and stages of the supply chain.

It is imperative that the WA Bulk Handling Act, the Transport Co-ordination Act 1966 and all other relevant state laws support fair and open access and not favour particular freight modes through restriction or cross-subsidisation.

The Bulk Handling Act was first passed in 1967 and may require further consideration in light of recent reforms by the Federal Government and regulatory reviews of supply chain arrangements in Western Australia. For example the Act states that the proprietary interest in grain is vested in the person who, for the time being, is entitled to obtain it from bulk stocks held by the Company or under its control but as CBH Chairman Neil Wandel admits "*Like, 30 years ago we had one grade of wheat in WA, which was called FAQ. Today the CBH Group, we can handle 50, 60, 70 different segregations.*"

Another example of a potential distortion in open market access would be the new licence introduced this year to curb road freight access at Bunbury Port to help secure the rail infrastructure in the region. Minister MacTiernan said at the time that "Without some regulation, it is impossible to revitalise rail services to support the plantation timber industry in Western Australia's South-West.

Restrictions on the loads and types of vehicles operating on a particular route under the Transport Co-ordination Act 1966 can be used during commercial negotiations with the potential to restrict access and reduce competition in the market at ports in Western Australia.

The Western Australian Government's Economic Regulation Authority (ERA) Review states;

"The supply logistics (including the relative rail/road freight differentials) will determine the share of grain delivered by the relative transport modes. For example, the majority of grain is delivered by rail freight to the Kwinana terminal, while for the Esperance terminal the majority is delivered via road freight."

There have been concerns in the past within the industry about the possible impact of restrictions on mass overload permits and other potential distortions on fair and open access to port zones.

AWB considers it crucial that the current review reiterate the CIRA pricing principles and ensure that these are applied to port infrastructure and services in WA.

The CIRA Review issues paper Discussion Point 6 states that any claims of conflict of interest must be substantiated, however AWB would draw attention to the Chamber of Commerce and Industry Western Australia report 'Implications of Wheat Marketing Deregulation: March 2007' and the Grain Licensing Authority 2005-06 Annual Report which stated that;

“The uneven application of charges by CBH on GPPL Ltd and SEL’s may be justified in some instances. For example where there are clearly greater costs involved in dealing with the requirements of the SEL’s. However in a number of instances there does not appear to be justification for some of the policies, fees and charges that CBH has put in place.”

The Western Australian Government’s Economic Regulation Authority Review of the Grain Marketing Act recommends the dismantling of the Grains Licensing Authority and the deregulation of grain exports in WA in time for the 2009/10 harvest.

Consistent with the objectives of the WEMA on the timely and transparent access to stock data the ERA Report states that;

“The Authority considers that information held by CBH should be made available to all participants in the Western Australian coarse grains industry and that the coordination of this task would be best undertaken by the Department of Agriculture and Food Western Australia (DAFWA).

AWB supports the principle of the efficient operation of the market and the provision of industry wide data on stock levels as well as an efficient and competitively neutral shipping stem to achieve the COAG objectives for port infrastructure and services in Western Australia.

The COAG CIRA pricing principles would allow port terminal service providers to;

- generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services and include a return on investment commensurate with the regulatory and commercial risks involved;
- allow multi-part pricing and price discrimination when it aids efficiency;
- not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and

- provide incentives to reduce costs or otherwise improve productivity.

The Western Australian Department for Planning and Infrastructure could also give consideration to the COAG recommendation that the objects clause, declaration thresholds and pricing principles now embodied in Part IIIA of the Trade Practice Act which, among other things, allow for multi-part pricing and price discrimination when they aid efficiency should be incorporated into all State and Territory rail access regimes.

The Review provides an opportunity to ensure the necessary application of the CIRA to port infrastructure and services in Western Australia and to ensure consistency in legislative and regulatory requirements to reduce inefficiencies and promote competition through a more open and transparent supply chain, not just within the geographic limitations of the port zone.

AWB is committed to the provision of fair and open access not only at port but across the entire supply chain in the grains industry and in the promotion of more efficient and productive industry through the introduction of greater competition and choice for growers, not just in bulk export marketing but in all products and services.

Yours sincerely,



Gordon Davis  
Managing Director  
AWB Ltd