

# NewsInGrain

ISSUE 7, AUGUST 2011

## GTA CHAIRMAN'S ADDRESS – AGIC 2011

The following is a summary of the major points made by the GTA Chairman at the opening of a highly successful Australian Grain Industry Conference held from 27 to 28 July 2011 in Melbourne.

The theme of the Conference "Weathering Risks: Creating Opportunities" is apt considering the risks that the Australian grain industry has had to manage in the last 12 months. Over half of the 22 million tonne eastern states wheat crop was downgraded to feed or low grade milling wheat due to the rain affected harvest, an occurrence that was also carried through to other winter crops. WA was the reverse in regards to weather, with a drought stricken crop.

Grain producers must be congratulated for their grit and perseverance in getting this weather damaged crop in. The post farm gate sector also stepped up and was able to receive, segregate, store and eventually find homes for this massive downgraded crop. A truly great cross industry effort. However, like all challenges, the handling of the harvest did identify opportunities for improvement of process.

### Key industry developments over the last year.

The National Working Party on Grain Protection continues to refine and promote the Phosphine Resistance Management Strategy to prolong its life for use in grain storage. The Australian Grains Industry Post Harvest Chemical Usage Recommendations and Outturn Tolerances document details the chemicals that are permitted for use post-harvest and applicable Maximum Residue Limits (MRLs) for grain out turned to Australian domestic or export markets.

GTA has been asked by the NWPGP to develop a "Code of Practice" relating to these issues that individual companies can sign up to and show they are industry leaders.

Last year, mention was made of the AQIS Grains Ministerial Task Force. This Task Force was a combined industry/AQIS activity which was tasked with improving efficiency in the export certification process following the removal on 30 June 2011, of the government's 40% rebate on AQIS inspection fees. As a result of these efforts, I am pleased to be able to report that substantial changes will be implemented over the coming months.

The Australian export wheat industry was deregulated in 2008. Under the former regulated arrangements new varieties were assessed and classified under a market driven wheat classification process. I am pleased to report that Wheat Quality Australia, a not for profit company limited by guarantee, was established by the Grains Research and Development Corporation (GRDC) and Grain Trade Australia and commenced operations on 1 January 2011 taking responsibility for wheat classification and related activities.

The Productivity Commission released its report into Wheat Export Marketing Arrangements in October 2010, although the Government is still to respond to the recommendations. In the intervening period, the South Australian Government has convened a Select Committee on the Grain Handling Industry and the Federal Government has tasked the Senate Standing Committee on Rural Affairs and Transport to review Operational issues in export grain networks.

Without wishing to prejudge the final Government outcomes of any or all of these reviews, the industry must work collectively to enshrine self regulatory processes.

GTA has developed standards and reference

## IN THIS ISSUE:

- Strategic Direction 2011
- EU Renewable Energy Directive
- The National Working Party on Grain Protection
- Eight factors impacting US and global grain markets over the next decade
- Grain Marketing a common sense approach
- GTA Endorsed Visual Recognition Standards Guide
- Wheat Quality Australia
- Observations of a Trade Rules, Contracts & Dispute Resolution Assessments marker
- Incorporation of GTA Dispute Resolution Terms into Oral Contracts
- Dispute Resolution Rules
- Recent Awards at Arbitration

methods for determination of grade quality but has had a policy not to adopt any form of prescriptive behaviour. Over the next 12 months GTA will investigate the possibility of a change to policy in relation to application of standards. That is, for GTA to become more involved in the development of accreditation programs for:

1. Training courses for grain sampling, testing and grade application;

*continued on page 2*

# GTA CHAIRMAN'S ADDRESS – AGIC 2011

*continued from page 1*

2. GTA approved procedures and equipment in relation to the sampling and testing of grain; and
3. Grain storage operators. Importantly one of the potential criteria for a storage operator accreditation program would be involvement in the National Residue Survey backed by a process to address any non conformance detected by NRS. This will for the first time provide teeth to the conduct of the National Residue Survey as they monitor the chemical health of domestic and export grain consignments.

Aligned to the above processes will be a review of the Australian Grain Industry Code of Conduct. GTA acts as the industry custodian of the Code and will support adherence to the requirements of the Code by all industry participants. The next step is to now link membership of GTA with adherence to the Code.

A further critical strategy for GTA this year is Professional Development. The industry has an obligation to support career development of its professional staff. To that end GTA has invested in the development of another 4 courses over the past 12 months and this year will add the qualification of Diploma in Grain Marketing.

These initiatives when combined with current processes will give added confidence to customers, both domestic and export, that Australia is and always will be a supplier of quality product. This message needs to be conveyed and therefore GTA will develop and implement an end-user communication strategy. Getting this message to the end user and the role GTA plays is of high importance to your Board and staff.

It is also noted that Grain Producers Australia has been formed and is recognised as the producer body for consultation with GRDC under the legislative requirements of the Primary Industries and Energy Research and Development Act and is also responsible for the Plant Health Deed for the grains industry. This is a welcome development for the post farm gate sector.

In conclusion, industry organisations such as GTA will continue to support their membership ensuring a confident, vibrant industry that is responsive to the challenges of our business.

## Strategic Direction 2011

The release of GTA's 2011 Strategic Direction follows widespread industry consultation and ensures that GTA fulfils its key task to "facilitate trade" across the Australian grain supply chain.

Strategic Direction has been prepared for the Australian grain industry detailing strategies and longer term vision for the Australian grain supply chain.

GTA's 2011 Strategic Direction can be viewed, in its entirety, on the GTA website [www.graintrade.com.au](http://www.graintrade.com.au)



**As a result of the European Union (EU) Renewable Energy Directive (RED) the Australian canola export supply chain is under pressure to implement a sustainability certification scheme to be in place by the 2011/2012 harvest to avoid possible trade restrictions involving canola export to the EU.**

The EU has set itself an objective to achieve a minimum share of 10% renewable energy in transport by 2020. Where biofuels are used to achieve this target, these must meet a set of sustainability requirements. This means that biofuels cannot be produced from areas which have a high biodiversity value, such as protected areas, or from areas that store a high amount of carbon, such as forests or peat lands.

Supply chain organisations can choose whether to demonstrate compliance with these sustainability requirements through national systems (currently not available in Australia) or by joining a voluntary scheme which is recognised by the Commission.

As of July 2011, the Commission approved seven voluntary schemes, of which only two are available and suitable for the Australian canola export supply chain. These two schemes include:

1. **The ISCC Scheme;**
2. **2BSvs Scheme.**

Both schemes are supported by thorough independent auditing criteria set by the European

Directive 2009/28/EC. Independent auditing of the Schemes in Australia are provided by either:

1. **SGS**
2. **Bureau Veritas**

On the 6 June 2011 GTA posted a detailed discussion paper outlining the Renewable Energy Directive (RED) and the impact on the Australian canola industry. While not all Australian canola is used for biofuel, it appears that the EU importer requirement is for all canola imports to comply with the legislation and have sustainable certification.

GTA also held an industry forum in Melbourne on 8 July 2011 inviting key participants in the canola export supply chain, including Government and EU representation, as well as scheme providers and auditors. The aim of the meeting was for industry to discuss the implication the Directive may have on trade and how this should be addressed.

From this meeting it was agreed that GTA would continue to provide members with information through the GTA web site.





# THE NATIONAL WORKING PARTY ON GRAIN PROTECTION

**The National Working Party on Grain Protection** is the industry body responsible for providing management and leadership to industry in the areas of post harvest storage, chemical use, market requirements and chemical regulations. The reputation of Australian grain would be substantially diminished without the combined industry efforts of the NWPGP.

It continues to refine and promote the Phosphine Resistance Management Strategy to prolong its life for use in grain storage. The Australian Grains Industry Post Harvest Chemical Usage Recommendations and Outturn Tolerances document details the chemicals that are permitted for use post-harvest and applicable Maximum Residue Limits (MRLs) for grain out turned to Australian domestic or export markets.

The number of chemicals available for use for insect control remains under threat from a continued lowering of international MRLs, a lack of alternative chemicals and alternative control strategies being developed & adopted, insect resistance, and more importantly for all in the supply chain, the continued misuse of these

chemicals and/or supplying product to markets in violation of chemical MRLs. Industry needs to fully understand the implications of the misuse of chemicals such as phosphine and the threat this makes to the long term viability of our industry.

One of the many solutions to be implemented is an agreed "best practice management" approach to grain storage, chemical use and outturn of product to market – GTA has been asked by the NWPGP to develop a "Code of Practice" relating to these issues that individual companies can sign up to and show they are industry leaders. More will be revealed over the next few months.

Following this year's NWPGP conference held in June, this organisation is looking at expanding its current roles which include:

1. Ongoing education and more effective communication with industry on best practice management of grain storage and insect control
2. Wider industry involvement along the supply chain in NWPGP activities
3. A greater focus on meeting market requirements relating to chemical use
4. Continued evolution of NWPGP activities to enhance and link in with existing structures within the industry especially the GRDC and CRC for National Plant Biosecurity.

GTA will continue to offer administrative assistance to activities of the Working Party.

## DISPUTE RESOLUTION RULES – RIGHT OF APPEAL NOT AUTOMATIC

**Member Update 08 of 11 is repeated below due to the lack of recognition across the industry.**

### Recommendation

- GTA Members are strongly encouraged to seek legal guidance with the subject matter of Member Update 08 of 11.

### Background

Parties should be aware that arbitration is a STAND-ALONE and EXCLUSIVE dispute resolution option. By electing to arbitrate disputes you are precluding your rights to have disputes determined in the Courts.

The GTA Dispute Resolution Rules are governed by NSW law. From 1 October 2010, NSW is subject

to the new Commercial Arbitration Act 2010. The new Act changes the domestic arbitration regime in NSW in several ways. In particular it severely curtails the already significant restrictions on recourse to the Courts from arbitration awards, i.e. disaffected parties DO NOT have a right of appeal or re-hearing.

### Right to appeal restricted

In summary, a party no longer has rights to appeal on the basis of error of law, and has very limited rights of "review" on the basis of (for example) procedural irregularities.

The new Act does however allow the parties to a contract containing an arbitration agreement to "opt-in" to rights of appeal. Logically this should be done in writing and BEFORE any award is published

(on the basis that the successful party is unlikely to consent to an appeal by the losing party).

GTA has reviewed this situation and in view of what appears to be a contemporary trend and policy towards restricting the ability of courts to intervene in arbitration, thereby promoting finality, GTA will not be amending the Dispute Resolution Rules to include "opt in" to appeal provisions.

### Can a member enshrine appeal provisions in their contracts?

If you wish to preserve your rights of appeal you will need to amend your standard contract terms to include a statement to the effect that the parties to the contract agree that an appeal may be made under section 34A of the Commercial Arbitration Act 2010 (NSW).

# 8 FACTORS IMPACTING US AND GLOBAL GRAIN MARKETS OVER THE NEXT DECADE

**Michael J. Dwyer, Director of Global Policy Analysis, USDA**

The following is a summary of a presentation to the Australian Grains Industry Conference. The full presentation can be viewed online at <http://www.ausgrainsconf.com>

Net takeaway: strong demand growth, especially from emerging markets, will be the central megatrend over the next decade, boosting global prices and profitability

## #1: The Global Economy Returning to Growth

- Global economy emerging from worst recession in decades. Developing countries performed better and growing faster than developed countries. This should continue through to 2020.
- "Middle Class" Outside the U.S. Expected to Double By 2020

## #2: Value of the US dollar expected to ease further putting upward pressure on grain prices

- Prices of traded commodities are denominated in dollars.
- Commodities are inversely related to the value of the dollar – as the dollar falls, commodity prices tend to rise. WHY? Falling dollar boosts purchasing power of foreign buyers of dollar-denominated commodities, thereby increasing

demand and putting upward pressure on prices.

- U.S. dollar has been trending down since 2002.
- Most economists expect U.S. dollar to ease over the longer term, particularly relative to emerging market currencies.
- If true, this will put continued upward pressure on a wide range of commodity prices as the dollar declines.

## #3: Biofuels production continues to grow, boosting feedstock demand

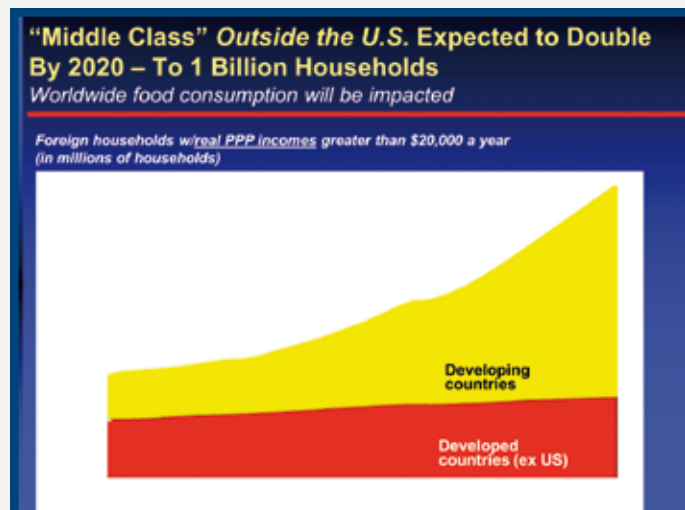
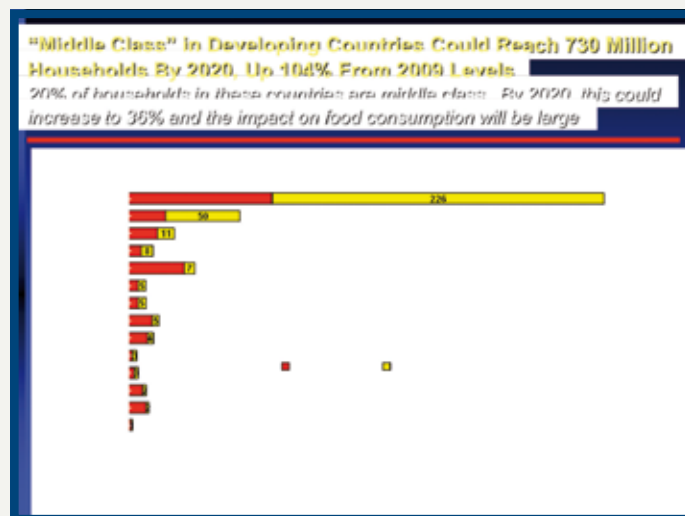
- Expansion of global biofuels production is boosting demand for feedstocks, such as grains, vegetable oils, and sugar.
- Continued growth in the number of countries adopting biofuels mandates (now up to 36), particularly in Western Hemisphere

## #4: Trade will increase and trade liberalization will continue

- Global agricultural trade has grown sharply over the past decade to an estimated \$700 billion in 2011, up 150% since 2000 -- could exceed \$1 trillion by 2020.
- Most countries ag imports have increased substantially but China and East/Southeast Asia. U.S. and EU imports growing, too.
- Almost all major agricultural exporters have seen sharp gains in recent years.
- Growth in global demand and trade is fuelling production gains worldwide, as land harvested and yields increase.
- FTAs have proliferated worldwide, boosting trade.

## #5: Policy errors increase price volatility and distort markets

- Shrinking supplies and food security/inflation concerns have led some countries to restrict exports.
- Export bans distort markets and increase world prices. In the short run, increases domestic availabilities and reduces local food inflation. However, it also lowers local producer prices





and profits and negatively affects long-term domestic production.

- This happened during food price crisis of 2008. It happened again in 2010/11. Will countries continue their use?
- Use of these practices discourage foreign investors since their profits will be affected by unpredictable government policy.

#### #6: Higher energy prices are likely, increasing agricultural production costs

- Agriculture is an energy-intensive industry – planting, harvesting, transportation and processing.
- As energy prices increase, agricultural production costs increase. This reduces farmer profits and output, and leads to higher long run agricultural and food prices.
- However, higher energy prices (particularly gasoline and diesel prices) lead to higher biofuels prices through substitution effect.
- This helps offset higher costs of biofuels feedstocks to biorefineries.
- Net impacts on biofuels producers' profitability? It depends since feedstock costs are 75-85% of biofuels cost of production.

#### #7: Role of biotechnology will grow

- Producers who use biotechnology have higher yields and/or reduced input use than those who do not.
- Producers' pursuit of higher yields to capture higher prices and incomes will lead to greater usage of biotechnology. Will lead to new cycle of innovation.
- Acceptance of this technology is not universal but growing. EU has been a major opponent and this has affect others through trade linkages.
- Sound science should be the only criteria used to review the safety of biotechnology or any new technology.
- Technology Is Key to Meeting Future Demand. Use of biotechnology and innovation is key to boosting yields and production

#### #8: Planted acreage will increase

- How aggressively will producers around the world react to strong commodity prices, especially in South America?
- Most of the increased production will come from higher yields but strong prices will encourage at least some increase in planted acreage.
- Where will the gains occur? Transportation/storage infrastructure and marketing costs to global markets will play a big role.
- South America will likely lead in land expansion (largely Brazil) as will the Former Soviet Union. Africa has more uncultivated land that could be used but high marketing costs, poor infrastructure, and long distances from markets will be a constraint.
- Land tenure issues, laws governing foreign investment, and the degree of price transmission will also play a big role.

#### BOTTOM LINE:

Strong demand growth from emerging markets (particularly in Asia) and a weak US dollar are expected to keep agricultural commodity prices higher over the next ten years than over the past ten years.

# Incorporation of GTA Dispute Resolution Terms into Oral Contracts

In Member Update No. No. 13 of 10 we advised Members of the importance of properly incorporating GTA Dispute Resolution Rules into written contracts.

Recent Court and arbitration decisions have highlighted the importance of proper incorporation of GTA terms into oral contracts, in circumstances where a counter-party does not sign a subsequently issued contract document.

In those circumstances, while it may be possible to establish that a binding contract has been created, unless you can prove that the GTA Dispute Resolution Rules are referenced during that call, you may not be able to refer any dispute to GTA arbitration.

It is critical therefore that during telephone negotiations, your agents say (words to the effect of) "This contract is subject to the GTA Trade and Dispute Resolution

Rules". This should be a standard instruction issued to all traders and agents who negotiate over the phone as even if calls are not taped, and the agent does not recall the exact content of a particular call, he or she should be able to give evidence that they believe that they would have complied with the company's standard contracting procedure.

Obviously the written contract confirmation, subsequently issued, should be consistent with the terms negotiated over the phone.

It should go without saying that the difficulties highlighted by these recent decisions would have been avoided if Members had insisted on obtaining signed contract confirmation from the counter-party.

If you have any queries, GTA recommends that you speak to your legal counsel.

## GTA ENDORSED VISUAL RECOGNITION STANDARDS GUIDE

The GTA Standards Committee is currently in the process of reviewing the Visual Recognition Standards Guide. The current version from 2006 has been used by a large number of people over the last 5 years. During this time, this has become an invaluable tool in assessing grain defects and their classifications.

Although the guide is still in the early stages, a sub group has been established and are in the process of photographing all new samples, with better, clearer and more defined imagery. As well as fine tuning the new design layout, colours and overall feel of the book.

The aim is to once again create a very comprehensive guide that covers a wide variety of commodities and defects, while still proving to be an invaluable guide of definitions and photographic references of each defect.

The aim is to have the new guide available in time for this harvest. Once complete the guide will be available in book form and online for commercial use. When published this will create a stronger reference guide, with little or no doubt of unacceptable defects while sampling.



# GRAIN MARKETING: A COMMONSENSE APPROACH

Lloyd George, AgIntel gave the following presentation to grain producers recently.

A lot has changed in the Australian grain market over the past half a dozen years that would have even the most seasoned marketer's head spinning. So it doesn't come as a total surprise that some growers are struggling with the changed environment.

The removal of the 'single desk' for 'bulk wheat' exports in 2008 saw an influx of new grain buyers which added new complexities for grain growers when it comes to marketing. As well as the change to the local grain marketing arrangements, growers have also had to contend with some unprecedented international market volatility, further adding to the challenges of their grain marketing task.

I have a long-held theory that farmers in general are very innovative and quick to adapt to changes. There is no question about this when it comes to agronomic advances as witnessed by the rapid advances in yields over the past 20 or so years. But the 'quick to adapt' theory doesn't stop at agronomics.

I've objectively looked at how the bulk of grain growers fared in the first years since the wheat market has been deregulated.

There's good evidence to suggest that many growers are also making some excellent grain marketing decisions which have added significant dollars to bottom line returns. A good dose of commonsense has served growers well since bulk wheat exports have been deregulated rather than a detailed knowledge of grain marketing strategies.

Growers have shown they've been patient sellers and willing to adapt their selling methods in different market circumstances. One example is the increased usage of grain warehousing to assist marketing post-harvest, rather than a harvest orientated sales program which many relied upon pre-deregulation. There have been numerous examples where exporters have needed to raise their prices to secure grain as a result of slow grower sales.

Growers have also shown a willingness to use different marketing tools, with 'pools' still an important tool in low price years, and multigrade cash contracts when prices are better. Pools were a big winner in 2009 when harvest prices were low. Whereas multigrade wheat cash forward sales were a big success in 2010, particularly with the downgraded harvest.

I'm not saying grain marketing is easy...far from it. But it's important to understand, as a whole, growers have made a good fist of the initial years of export deregulation by applying a commonsense approach into grain marketing.

How do we build upon this?

Like most things, it starts with a plan. In my view, it's critically important to build the same commonsense approach into your marketing plan. Your marketing

plan should set out how and when you intend to market your grain and it needs to cater for your own circumstances.

It's a good idea to have a written plan as a discipline. This is to avoid making decisions on the run which are easily lost in the emotion and can be costly. It's important to set a plan that suits your own business and is achievable.

Some growers might say that their marketing plan is to sell for the highest price. The reality is even the best marketers only know the market highs with the benefit of hindsight.

Weather is the primary driver of grain prices but forecasts are highly unreliable beyond a week.

Factors influencing your marketing plan will include:

- **Your average yield plus your yield variability** – growers in higher yielding regions with less yield variability will have greater confidence in forward selling some grain prior to harvest if a pricing opportunity arises. Whereas a low yield in a more marginal area may mean a grower isn't comfortable selling grain prior to harvest.
- **The biggest grain marketing mishaps** are almost all directly tied to forward commitments in drought years when grain prices jump by around \$150 per tonne as consumer's toy with grain imports to cover their needs.
- **Understanding your cost of production** is critical in determining what is an acceptable price when selling grain. The starting point is that you want to sell your grain at a profit but at the same time you will need to be realistic about the costs or you may never sell your grain. Remember that the costs of producing a crop such as wheat is much the same in most of the major exporting countries, so if prices are below production costs in Australia it's likely to mean producers in other parts of the world are either reluctant sellers or they will decrease their intended plantings, thereby reducing supply. On the other hand high prices will attract more selling and increased plantings which will push prices lower.
- **Know what the high and low prices have been** for the last six or so years, as this might assist you in determining selling points. History tends to repeat itself, so these can act as benchmarks. An old grain marketing adage is 'there is nothing like low prices to fix low prices'. The same applies to high prices. The point is, patience is rewarded in low markets but don't get too greedy when prices are good.
- **Tailor your marketing to suit your cash flow needs** – few growers have the luxury of not having to worry about cash flows, so most will need to ensure their grain sale



Lloyd George, AgIntel.

revenue fits with their outgoings, such as machinery, fertiliser and chemical payments.

- **Spread your risk** – it's usually a good idea to spread the risk of your sales program to take advantage of market variability. Growers are increasingly less prepared to sell forward prior to harvest but increased amounts of on-farm storage, as well as grain warehousing arrangements has made it easier to sell throughout the year.
- **Use trusted marketers** – it goes without saying that the most important part of a marketing plan is to be fully paid at the agreed amount by the buyer. There are a lot of good, solid grain marketers out there with strong credentials and histories. Choose yours carefully.
- **Use products and tools that you are comfortable with** and understand their risk and cost profiles. There is a wide range of marketing alternatives and marketing tools available to growers. These range from; forward cash contracts, cash contracts, pools as well as a range of futures, swaps and option based products. They all have a role, but only use products you are comfortable with. As with all products, it's important to understand their costs so you can compare them. For example, comparing a pool return with a cash price.
- **Ask lots of questions** – one observation I have made over a long time is that the people that ask the most questions generally outperform their peers when it comes to grain marketing.

Marketing plans don't have to be complicated to be good; some of the simplest marketing plans can turn out to be the most effective.

There's a lot of 'jargon' in the grain industry which can add to the complexity but the principles behind it are remarkably simple. Building a number of these simple components such as; knowing your costs of production, historical high and low prices, spreading your risk and using trusted marketers is all commonsense but it's also the basis of good grain marketing.



# THE GRAINS INDUSTRY AND PERSONAL PROPERTY SECURITIES LAW REFORM

## GEOFF FARNSWORTH PRINCIPAL, M+K LAWYERS

The new Personal Property Securities (“PPS”) scheme is due to begin on 31 October 2011. It is likely to have a significant impact on many areas of business including the grains industry.

The new scheme is complex and it is hard to predict with clarity how it will operate in practice. This note is intended to provide an overview only.

### What are the reforms?

The reforms will change the way people give and take securities over personal property (that is, everything other than real estate and land). It will affect the way personal property is dealt with in the event of insolvency.

In summary, a security interest in property (for example a fixed or floating charge) allows a lender (for example) to secure an obligation (such as repayment of a loan; or payment of the purchase price) over some identified personal property.

Central to the new scheme is a new on-line register for security interests.

In the grains industry in particular, they will affect the way;

- grain is sold under a contract containing a retention of title clause;
- finance is provided against inventory

In general, the PPS scheme applies to “security interests” in “personal property”.

The reforms will affect the way;

- security interests are created;
- security interests are enforced;
- priority between competing security interests.

### New Language

The reforms are modeled on schemes in North America and as introduced into New Zealand. They have a new language, or terminology.

The person who gives the security interest is the **Grantor**.

The person who benefits from the security interest is the **Secured Party**.

The property over which the interest is secured is the **Collateral**.

A retention of title clause is a **Purchase Money Security Interest**, or **PMSI**.

Before a security interest can be enforced, it must **Attach** to the Collateral.

A security interest can also be enforced against the **Proceeds** of the Collateral, that is personal property that is derived directly or indirectly from a dealing with the Collateral (eg flour will be proceeds of wheat).

An entry on the PPS Register is a **Financing Statement**.

In order for a security interest to have priority over other security interests, it must be **Perfected**.

By way of example, if a Grower sells grain to a Merchant, and the contract contains a retention of title clause;

The Grower is the **Secured Party**;

The Merchant is the **Grantor**;

The grain is the **Collateral**;

The contract/retention of title clause is a **PMSI**.

### The Reforms in Practice

The reforms are contained in the Commonwealth **Personal Property Securities Act** 2009 and the Regulations to that Act. The new laws are due to take effect from 31 October 2011 (however they have already been deferred twice).

There is a two year “moratorium” on the operation of the law, meaning that priority of security interests existing at the time of commencement will be preserved for two years.

### PPS and Grain

The new laws contain specific provisions relating to agricultural and bulk commodities.

Part 3.2 of the Act deals with Agricultural Interests, principally crop liens.

The new Act provides that a security interest may attach to crops while they are growing.<sup>1</sup>

A crop lien will have particular priority so long as it was necessary to grow the crop (for the purchase of seed, or fertilizer, for example), and was created while the crops were growing, or within 6 months prior to planting.<sup>2</sup>

The Act also makes express provision for the enforcement of securities over crops, including granting the secured party the right to enter the land on which the crops are, or were, growing.<sup>3</sup>

### PPS and Bulk Commodities

Part 3.4 of the Act deals with “Processed or commingled goods”.

Section 99 makes clear that a security interest in goods that subsequently become part of a product or mass continues in the product or mass if the goods are so commingled that their identity is lost in the product or mass.

Under section 123, the Secured Party is authorised to seize collateral if the debtor is in default under a security arrangement.

### The Power of the PMSI

One of the most important reforms under the new scheme is the elevation of the retention of title clause as a PMSI.

While retention of title clauses are common forms of security and their operation and efficacy has been recognised by the courts, the PMSI now takes its place along side other more recognised (and indeed, formalised) forms of security interest.

That said, while the new Act recognises and gives priority to PMSIs, there are no formal requirements under the Act as to what may amount to a PMSI.

The Act defines a PMSI as a “security interest created in collateral, to the extent that it secures all or part of its purchase price.”

It is common for retention of title clauses to do much more than that. For example, the clause may purport to create a trust in relation to the proceeds of sale of

the collateral, or provide rights of entry to property to secure control of the collateral.

### The PPS Lease

One of the new “creatures” of the scheme is the “PPS Lease”.

The PPS lease is a form of deemed security interest created by section 13 of the Act.

Central to the concept of the PPS Lease is a bailment of goods for an extended period of time (usually in excess of 12-months). It will apply to equipment leased or hired to 3rd parties.

It is possible that a failure to register an otherwise registerable PPS Lease may affect the owner's rights in the property in the event of an insolvency of the lessor/bailee.

### Protection for Purchasers

Section 46 of the Act provides protection for purchasers. A purchaser who buys goods in the ordinary course of business will acquire those goods free of any security interest.

In the previous example, where a Grower sells grain to a Merchant subject to a PMSI, if the Merchant sells that grain to a Miller, the Miller takes the grain free of the security interest. In other words, if the Merchant does not pay the Grower, the Grower is not able to seize the grain from the Miller (even if the actual retention of title clause purported to give the Grower that power).

The exception to the rule is when the purchaser buys the grain with actual knowledge that it is buying the grain in breach of the terms of the PMSI.

### Registration

An important aspect of the new scheme is an on-line searchable register of security interests.

A security interest will become perfected when it is either registered, or in the case of some collateral, when the secured party has possession and control of the collateral.

It is anticipated that the cost of registering a financing statement on-line will be around \$7.40 for 7 years or less, or \$37 for 7-25 years.

It will be important that details are entered accurately as inaccuracies could affect registration and priority.

Failure to register will not mean that a security interest cannot be enforced. It may however affect the priority of the security interest.

### Conclusion

The new scheme is almost upon us and businesses will all need to learn how to live with PPS. The new scheme is intended to improve the availability of capital to businesses by improving the rights of secured lenders. It is also intended to stream-line registration processes by replacing multiple State-based registers with one centrally administered on-line register.

Clearly these benefits need to be weighed against the significant administrative burdens created by the new system.

- 1 Section 84A(1)
- 2 Section 85
- 3 Section 138B(3)

# RECENT AWARDS AT ARBITRATION

## Arbitration No. 116

### Notice to Members

Date of Issue: May 2011

Claimant: Grain Buyer &

Respondent: Grain Seller

### Arbitration Committee (AC)

- Mr Chris Heinjus, nominated by the Claimant;
- Mr Ray Marshall, nominated by GTA in lieu of nomination by the Respondents;
- Mr Richard Clark, Chairman appointed by GTA.

### Dispute

This is an arbitration pursuant to the Dispute Resolution Rules of Grain Trade Australia Ltd ("GTA"). At issue in this dispute is an alleged breach of contract, but this award is concerned solely with the jurisdiction of the Tribunal to deal with this dispute.

### 1. Jurisdiction

This dispute concerns a contract between the Claimant and the Respondent. The Claimant says this contract was negotiated by phone on 15 May 2006, and a Contract Confirmation form was faxed to the Respondents that same day.

In answer, the Respondents appear to accept that there was a contract but say that this Tribunal does not have jurisdiction. Their Points of Defense allude to other grounds for resisting the claim but they have asked for jurisdiction to be dealt with as a preliminary matter.

First, they say that the claim was not made in accordance with article 3.1 of the GTA Dispute Resolution Rules (the "Time Bar Point").

Second, they say that there was no arbitration clause in the contract (the "Arbitration Point").

### 2. Findings

The Tribunal found:

1. that they had no jurisdiction in relation to this matter. While there appears to have been a contract for the sale of canola, there is no evidence that the Respondents agreed to refer disputes to NACMA or GTA arbitration. The Contract Confirmation faxed to the Respondents is unsigned by the Respondent. The standard terms do not appear to have been faxed.

The face of the Contract Confirmation does not reference the GTA or NACMA Trade Rules or Dispute Resolution Rules. While it does refer to terms and conditions it does not identify what those terms might be. The contract was unperformed. Even if Mr DP for the Claimant advised Mr Grain seller that the Claimant's standard terms were to be incorporated, there is insufficient evidence of a course of dealings and insufficient evidence that Mr Grain seller objectively or subjectively understood those terms to include a reference to NACMA or GTA arbitration.

2. Having reached this conclusion, there is a difficulty in relation to the Time Bar Point. Having found that we agree with the Respondents' submission that the NACMA/GTA Dispute Resolution Rules were not incorporated, Art 6.3.1 can have no application as it was not incorporated, either.

The somewhat frustrating conclusion therefore is that while there appears to have been a contract, and the claim is not time barred, we have no jurisdiction to determine disputes arising under it, and the parties will need to refer the matter to the Courts if they wish to pursue it.

## Arbitration No. 132

### Notice to Members

Date of Issue: April 2011

Claimant: Grain Buyer &

Respondent: Grain Seller

### Arbitration Committee (AC)

- Mr Mark Lewis, nominated by the Claimant;
- Mr Adrian McDonald, nominated by the Respondent;
- Mr Lloyd George, Chairman appointed by GTA.

**This arbitration resulted in a majority award and a minority award.**

### 1. Dispute

The substance of this dispute is straightforward. Unfortunately its resolution was not.

The Claimant says that as a result of a discussion on 15 April 2008 between Mr BM for the Claimant, and RP for the Respondent, the Claimant contracted to sell, and the Respondent to buy, 500 tonnes of tapioca pellets/meal at the price of \$380 pmt, delivered. The Claimant says it confirmed this agreement in a fax sent to the Respondent that same day. It made deliveries against the contract of approximately 35 mt on 22 April 2008 and 23 May 2008 for which invoices were issued and paid.

### 2. Facts & damages – majority award (Mark Lewis & Lloyd George)

The result may be in some respects be unsatisfactory as neither party can be said to be at fault, the Tribunal has to resolve this dispute based on objectively ascertainable evidence. For that reason, the majority view was in favour of the Claimant finding that the parties concluded a contract for 500 tonnes of tapioca. It follows that the Claimant is entitled to damages. However the Tribunal was not satisfied with the formulation set out in the Points of Claim and recalculated damages based on commercial principles.

### 3. Facts & damages – minority award (Adrian McDonald)

The arbitrator could not agree that the parties contracted to buy and sell 500 tonnes of tapioca on the terms asserted by the Claimant. In his view of the evidence, the Claimant simply misunderstood what it had agreed with the Respondent during the discussions on 15 April 2008. Therefore the Respondent is not in default and that the Claimant is not entitled to damages.

## Arbitration No. 143

### Notice to Members

Date of Issue: July 2011

Claimant: Grain Buyer &

Respondent: Grain Seller

### Arbitration Committee (AC)

- Mr Gerard Langtry, nominated by the Claimant;
- Mr Brett Cooper, nominated GTA in lieu of a nomination from the Respondent;
- Mr Angus McLaren, Chairman appointed by GTA.

### 1. Dispute

At issue in this dispute is the question of contract formation and default, being non delivery of grain against the contract. Damages equated to the non payment by the grain seller of options purchased as part of the contract.

### 2. Facts

It must be said from the outset that the Respondent has denied, or does not admit, virtually all of the Claimant's allegations. Leaving that to one side for the moment, it is alleged by the Claimant that the Respondent:

1. signed a Contract Master Agreement;
2. entered into a Contract signed by the Claimant and appears to bear the Respondent's signature
3. nominated an "Authorised Persons"
4. appears to have executed a "Preferred Customer Information Form."

The Claimant annexed these various documents to its Claim. They appear to be signed by the Respondent. That much is not denied by the Respondent, though neither is it admitted.

It is the Claimant's case in summary that the Respondent defaulted in performance of the Contract in failing to deliver any grain.

### 3. Damages

It is incumbent on Claimants in arbitrations to produce clear and rational calculations of damages claimed with such supporting documents as may be necessary. There is little point going to lengths to establish liability if there is then no evidence to support the damages claim.

In the event the Tribunal was satisfied with the calculation of liquidated damages submitted by the Claimant.

Having considered the Submissions the Tribunal made the following Final Award:

1. The Claim is allowed.
2. The Respondent to pay damages to the Claimant in the sum of \$38,126.36.

GTA Upcoming Events	Date	Venue
GTA Annual General Meeting	25 October	Melbourne
Professional Development Training		
Grain Standards	6–7 September	Parkes
Export Contracts and Documentation	13–14 September	Sydney
Grain Standards	13–14 September	Adelaide
Grain Accounting	22 September	Melbourne
Grain Standards	20–21 September	Perth
Dispute Resolution Service and Arbitration	26 October	Melbourne
Export Contracts and Documentation	27–28 September	Melbourne
Grain Accounting	22 September	Sydney
Assessments		
Trade Rules Contracts and Dispute Resolution	11 October	Own Work Place
Grain Standards	18 October	Own Work Place
Grain Mechandising	25 October	Own Work Place