

# NewsInGrain

ISSUE 6, MARCH 2011

## New Board Appointments

In accordance with the GTA Constitution, the Board is pleased to announce the re-appointment of Mr. Tom Keene to the position of GTA Chairman. Tom has completed two years as Chairman and indicated his preparedness to continue in this role with the ratification and appreciation of the Board.

The GTA Board has also endorsed the appointment of two Deputy Chairmen, Mr. Robert Parkes of Ridley Agri-Products (reappointed) and Mr. Geoff Farnsworth, a Principal at Macpherson+Kelley Lawyers.

In accordance with the GTA Constitution Clause 3.5 (this allows for the elected members of the Board to appoint additional Directors with Special Qualifications), GTA Board is pleased to announce the appointment of the following Directors with Special Qualifications.

**Geoff Nalder** who manages a 10,000 acre family dry land cropping enterprise at Swan Hill in Victoria. Geoff has had extensive experience as an advocate for production sector organisations both at a state and national level. Geoff has had close

interaction with Grain Trade Australia as the Chair of the Victorian Farmer's Federation Grains Group where he encouraged regular GTA/VFF briefings. He has also participated as a speaker at the Australian Grain Industry Conference.

**Helen Harvey** is principal of Adelaide based firm Australian Brokerage International P/L. Helen has experience in all facets of the grain supply chain, from a family farming operation in Western Australia where her family also founded Paramount Seeds, later sold to Elders. Helen then moved to Adelaide where she gained experience as a grain broker before establishing her own business. Helen is a long standing GTA and Grain Industry Association of South Australia member and has represented the grain industry on South Australian government committees.

### The GTA Board Currently Consists of:

Members	Member Organisation (where applicable)	Category
Neil Johns	GrainCorp Operations Limited	Level A
Geoff Barker	Cargill Australia Ltd	Level A
Robert Parkes	Ridley Agri-Products	Level B
Michael Chaseling	Emerald Group	Level B
Chris Kelly	KM & WM Kelly & Sons	Level C
Phillip Holmes	Queensland Agricultural Merchants Inc	Merchant Association
John Orr	Premium Grain Handlers	Merchant Association
Jim Riordan	Riordan Group Pty Ltd	Merchant Association
Geoff Farnsworth	Legal – Macpherson+Kelley Lawyers	Special Qualifications
Malcolm Finlayson	Finance – Finesse Solutions	Special Qualifications
Helen Harvey	Australian Brokerage International	Special Qualifications
Tom Keene	Independent Chairman	Special Qualifications
Geoff Nalder	Grain producer – Victoria	Special Qualifications



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# Introducing Wheat Quality Australia Ltd

On the 1<sup>st</sup> of January this year Wheat Quality Australia Ltd (WQA) assumed responsibility for wheat classification and related activities. Following extensive industry consultation and discussion, WQA was established by Grains Research and Development Corporation (GRDC) and Grain Trade Australia (GTA) to undertake these critical functions on behalf of the industry.

WQA is a not for profit company limited by guarantee with GRDC, GTA and industry participants providing funding. The Board is Chaired by Christine Hawkins and other Directors are Geoff Honey and Robert Sewell while Cindy Mills has been appointed Executive Officer.

Wheat variety classification and wheat receival standards are the two primary tools through which wheat quality is identified and managed in the Australian supply chain.

- Variety classification is the assessment of new varieties of wheat to determine their inherent processing and end product quality. The act of classification places varieties with similar quality attributes into the same classes or groups. Classes are designed to meet the requirements of the market (flour milling/food manufacturing/consumers) both internationally and domestically. Wheat Quality Australia is responsible for conduct of variety classification activities.

- Application of receival standards is the assessment of physical grain quality attributes. The first step of the receival standard process is declare the classification of the variety. The next step is to test the physical attributes and to determine the bin or grade that the wheat will be delivered into. Grades are again designed to meet the requirements of the market. Grain Trade Australia is responsible for the establishment of wheat receival standards whilst storage agents across the country are responsible for application of receival standards.

Through the combination of variety classification and receival standards the industry identifies parcels of wheat that can be stored, transported and processed together without unacceptable loss of quality or variation in quality. This is fundamental in the Australian context where wheat is predominantly stored in a 'central storage system' and export generally requires rail movement to one of nineteen port terminals nationally.

The formation of Wheat Quality Australia will ensure that the industry has a sustainable wheat classification system that works to improve the value of Australian wheat for producers, marketers and processors/customers of Australian wheat; and to enhance the competitiveness of the Australian wheat industry.

## Derivatives – ASX Grain Futures And Options

### APWN – An Acceptable Deliverable Grade For Western Australian Wheat (WAW)

The ASX Clearing Corporation has confirmed on the 10 December 2010 that the new binning grade in Western Australia "APWN – Australian Premium White Noodle Segregation" satisfies the minimum grade requirement for the Western Australian Wheat (WAW) Futures contract.

As a result, APWN is acceptable as a deliverable grade for WAW contracts.

The inclusion of APWN as an acceptable grade does not alter the existing contract specification.

The new hierarchy for the APWN wheat grade for binning in Western Australia follows the APW grade hierarchy except where indicated in the Master List for most varieties this is: APWN/APW1/APW2.

For further information on the APWN binning grade please refer to the ASX website: [www.asx.com.au](http://www.asx.com.au)

## GTA MEMBERSHIP

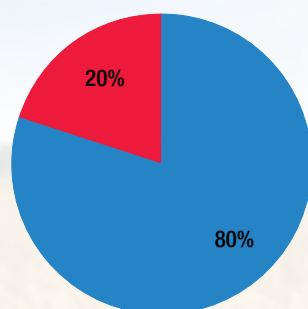
At a recent event the question was raised as to the membership structure of GTA.

In 2004 with the restructure of GTA, then known as NACMA, there was 140 Member organisations ranging from regional family businesses to large national and international trading/storage and handling companies.

Currently GTA has over 232 Member organisations, primarily consisting of trading organisations and organisations that have a direct vested interest in the commercial function of the grain trade.

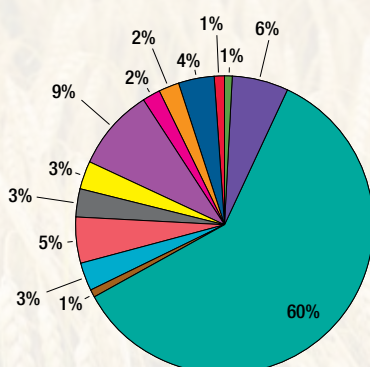
GTA members are responsible for over 95% of all grain storage and freight movements made each year in Australia. More than 90% of all grain contracts executed annually within the country refer to GTA's Grain Standards and/or Trade Rules.

The illustrations to the right highlighted this breakup of GTA membership. The Membership list is regularly updated and can be found on the GTA website.



### Membership Breakdown

- Grain Trader and Broker Membership
- Institutional Membership with Commercial interests



### GTA Membership

- Level A Ordinary Members
- Trade Level 1B Ordinary Members
- Trade Level B2 Ordinary Members
- Trade Level B3 Ordinary Members
- Trade Level C Ordinary Members
- Transport Operators
- Brokers Medium
- Broker Sole Operators
- Corporate Large
- Corporate Medium
- Corporate Small
- Industry Associations
- Mechant Associations



# RETENTION OF TITLE, ROT & ROMALPA CLAUSES – WHAT DOES IT ALL MEAN?

Over the last 15 to 20 years the law relating to “Retention of Title” (also known as “Romalpa”) clauses in contracts (“**ROT clauses**”) has undergone considerable development. Today, ROT clauses are common in contracts for the sale of goods. Some ROT clauses consist of only one paragraph. Others, like the Grain Trade Australia (“**GTA**”) ROT clause, are longer. However, all clauses have one thing in common; they provide that title to the goods sold remains with the seller until the price for those particular goods has been paid, notwithstanding that the goods may have been delivered. This is important because without a valid ROT clause, title to goods will normally be found to have passed at the time of sale and/or delivery, leaving the seller an unsecured creditor, with little recourse if the buyer becomes insolvent.

The purpose of ROT clauses is to protect the unpaid seller to an insolvent buyer by attempting to defeat the claims of an administrator who may wish to deal with the goods (and/or the proceeds of sale of the goods) as assets of the insolvent company. Drafted properly, the ROT clause can be a very powerful tool to protect an unpaid seller.

The courts have recognised that each case must be decided on the particular wording of the relevant clause. This article examines the GTA ROT clause.

## Is the ROT incorporated into the contract?

Before considering the operation of GTA ROT clause, it is important to note that the GTA ROT clause will only apply if it is incorporated into the relevant contract. This requires consideration of all the facts at hand and can change from case to case. However in short, the ROT clause must be embedded in the contract of sale at the time that the contract is formed, or otherwise incorporated into the contract by means of a variation to the contract. It will therefore be necessary to consider what documents evidence the intentions of the parties.

The GTA ROT clause is found in the GTA Standard Terms and Conditions (“STCs”) and “Track” Contract, but is NOT part of the GTA Trade Rules. If a seller wishes to be able to rely on the ROT clause, they must ensure that the GTA STCs are incorporated into the contracts for sale.

To be clear, you will not incorporate the GTA ROT clause simply by referring to or incorporating the GTA Trade Rules.

The GTA STCs may be incorporated into the contract by reference. However, sellers may find that they are unwittingly left without the protection of the ROT clause by virtue of other documents having been incorporated into the sales contract. For example, each party to a commodity contract often sends the other party a purchase contract or confirmation. While those documents will frequently contain the same information (or

terms), this is not always the case in that one may incorporate the GTA STCs while the other may not. Similarly, where a broker is involved in commodity sales, it is common practice for the broker to send both parties a Brokers Note, often incorporating only the GTA Trade Rules.

As each document may contain different terms and conditions, it is important to consider which documents, if any, form part of the relevant contract for sale.

Sellers wanting to rely on the GTA ROT clause should therefore be careful when entering into contracts for sale to ensure that the GTA standard terms and conditions are incorporated into the sale agreement.

## How is the ROT clause applied?

Assuming the ROT clause is incorporated into the relevant contracts, it then becomes necessary to consider how the ROT clause is to be applied.

Each case must be decided on the wording of the relevant ROT clause, and take into account all circumstances of the particular case at hand. The GTA standard terms and conditions contain the following ROT clause:

### “OWNERSHIP AND PASSING OF TITLE:

Risk in any goods supplied by the Seller to the Buyer shall pass to the Buyer when they leave the possession of the Seller however title shall not pass until payment in full has been received by the Seller.

Until full payment is received the Buyer and/or its agents and 3rd parties hold the goods as bailees only.

On breach of any payment terms, the Buyer on its own behalf and on behalf of its agents and 3rd parties authorises the Seller to enter any premises and retake possession of the goods without notice to the Buyer, its agents and 3rd parties.

Where the goods have been comingled with other goods, the Buyer becomes an owner in common of the bulk goods and the undivided share of the Seller shall be such share as the quantity of Seller's goods bears to the quantity of the goods in the bulk.

Until such time as the Seller has received payment in full, any on-sale by the Buyer is made as the Seller's agent and the Buyer holds the proceeds of any on-sale of the Goods as trustee for and on behalf of the Seller and must account to the Seller for those proceeds, on demand.

Where at the time of default in any payment terms to the Seller the Buyer has not received proceeds of any on-sale the Seller is expressly authorised to receive proceeds of on-sale direct from the Buyer's customer.”

The GTA ROT clause not only entitles an unpaid seller to re-take possession of goods but goes further, in that it protects the unpaid seller in circumstances where the goods have been comingled with other goods or where those goods have been sold to a third party. In essence, the clause sets out to ensure that the seller is entitled to the proceeds from the sale of the goods.

One other useful aspect of the GTA ROT clause is that it provides that the buyer is the agent of the seller for the purpose of re-sale. The underlying intention of this clause is to create a fiduciary relationship between the seller and the buyer that enables the seller to claim any sub-sale proceeds from the buyer via the remedy of tracing.

The leading case on ROT clauses, in Australia, is the decision of the High Court in *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (In Liq)* (formerly *Metropolitan Engineering and Fabrications Pty Ltd*) and *Another* [2000] HCA 25. The clause in that case was somewhat similar to the GTA clause which provided:

“[1] It is expressly agreed and declared that the title of the subject goods/product shall not pass to the [buyer] until payment in full of the purchase price. The [buyer] shall in the meantime take custody of the goods/product and retain them as the fiduciary agent and bailee of the [seller].

[2] The [buyer] may resell buy only as a fiduciary agent of the [seller]. Any right to bind the [seller] to any liability to any third party by contract or otherwise is, however, expressly negated. Any such resale is to be at arms length and on market terms and pending resale or utilisation in any manufacturing or construction process, is to be kept separate from its own, property stored, protected and insured.

[3] The [buyer] will receive all proceeds whether tangible or intangible, direct or indirect of any dealing with such goods/product in trust for the [seller] and will keep such proceeds in a separate account until the liability to the [seller] shall have been discharged.

[4] The [seller] is to have power to appropriate payments to such goods and accounts as it thinks fit notwithstanding any appropriation by the [buyer] to the contrary.

[5] In the event that the [buyer] uses the goods/product in some manufacturing or construction process of its own or some third party, then the [buyer] shall hold such part of the proceeds of such manufacturing or construction process as relates to the goods/product in trust for the [seller]. Such part shall be deemed to equal in dollar terms the amount owing by the [buyer] to the [seller] at the time of the receipt of such proceeds.”

The facts of *Associated Alloys* can be summarised as follows: Associated Alloys Pty Ltd (“**Associated Alloys**”) sold steel to Metropolitan Engineering and Fabrications Pty Ltd (“**Metropolitan**”) from 1981 to 1996. The terms of trade included a ROT clause. Metropolitan purchased the steel to manufacture various goods, and then on-sold the manufactured goods to a third party Korean company. Metropolitan went into liquidation. At that time, Metropolitan had not paid the full amount owing to Associated Alloys. The liquidator recovered substantial amounts from the Korean company, and Associated Alloys claimed an entitlement to the proceeds of sale of the manufactured goods and sought a declaration from the court that the liquidator held the outstanding amount in trust for the benefit of Associated Alloys. Associated Alloys also sought a declaration that title in the goods had not passed to Metropolitan and that Metropolitan or the liquidator were guilty of conversion to the extent that they, or either of them, had acted against Associated Alloy’s interests.

The liquidator on the other hand, argued that the proceeds clause in subclause 5 constituted a charge requiring registration pursuant to the *Corporations Act*, and as it was not registered, the clause was void as against the liquidator.

The joint majority judgment of Gaudron, McHugh, Gummow and Hayne JJ disagreed finding, amongst other things, that the proceeds clause was not a charge, but an agreement to constitute a trust of an asset to be acquired in the future. Accordingly, Associated Alloys’ right to trace the proceeds of the sub-sale had priority over the rights of the other creditors. While the GTA ROT clause and the Associated Alloys’ ROT clause are not entirely the same, they are somewhat similar and it seems likely that the GTA ROT clause would be interpreted in much the same way as the ROT clause in Associated Alloys.

Further, the court held that the proceeds clause operated when Metropolitan used the steel to

manufacture product because Associated Alloys could no longer retain title as it was no longer capable of being identified as the original steel product. Placed in context, the reasoning in Associated Alloys may support the view that under the GTA standard terms and conditions, the buyer who is, or becomes insolvent, nevertheless passes “clear title” to a third party because the seller’s rights are only against the purchase price, and not the goods themselves. In any event, it is likely that clear title in goods sold to an innocent third party for value, would be held under common law principles relating to contract law to have passed to the third party.

What is unclear, however, is whether the unpaid seller is entitled to the whole of the proceeds of the sale between the original buyer and third party buyer, or only that part which is owed to the unpaid seller by the original buyer. For example, if A sells wheat to B for \$280 per mt and B on-sells the wheat to C for \$310 per mt, is A entitled to \$280 per mt or \$310 per mt?

Another potential issue which may arise under the GTA ROT clause is who should the buyer from the insolvent party pay? Presumably the administrator or liquidator of the insolvent seller will demand payment of outstanding invoices (particularly if the goods have been delivered), at the same time as the unpaid seller is demanding that the sale proceeds be paid to it.

In that situation, unless the parties can arrive at an amicable solution, C would probably be well advised to seek legal advice and/or the court’s directions to avoid any claims being brought against it by A or B.

In summary the following points can be gleaned from the GTA clause and the current state of the law:

1. To be able to rely on the GTA ROT clause, the GTA STCs must be incorporated into the contract of sale.

Assuming the GTA STCs are incorporated (and subject to other factors such as the GTA Trade Rules):

2. an unpaid seller may be entitled to possession of the goods where they have not been on-sold and are still in possession or control of the buyer;
3. where goods have been comingled with another parties’ goods, the buyer may become an owner in common of bulk goods and the seller may be entitled to a share of the bulk goods;
4. where the goods have been on-sold to a third party, the unpaid seller may be entitled to the trace the proceeds of the sale; and

where the goods have been on-sold to a third party, but the buyer has not received any proceeds of the on-sale, the unpaid seller can direct the buyer’s customer to pay the proceeds of the on-sale directly to the unpaid seller.

As you can see, ROT clauses can be a difficult area to navigate around. However, a well drafted ROT clause is an invaluable tool for an unpaid seller because it offers some protection by preventing transfer of ownership of goods until payment is made in accordance with the terms of the relevant contract, or otherwise an entitlement to the proceeds of the sale where the goods have been dissipated.

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**Disclaimer:** Whilst all reasonable efforts have been made to substantiate the information contained in this document, it is of a general nature only. Comments do not represent specific advice therefore you should not try to act on this information. If you require personal advice you should contact Macpherson+Kelley Lawyers. No responsibility can be accepted if the information is incorrect or inaccurate.





# JOINT GRAIN AND SEED INDUSTRY / AUSTRALIAN QUARANTINE AND INSPECTION SERVICE (AQIS) EXPORT CERTIFICATION REFORMS

April 2009 the Minister for Agriculture, Fisheries and Forestry established a joint Grain industry and AQIS Ministerial Task Force (MTF) Chaired by Geoff Honey, CEO of GTA. The Joint MTF terms of reference aims to explore delivery arrangements for AQIS export certification and inspection services in line with recommendations of the Beale Report (Dec 2008) to promote efficiencies and improve productivity. The MTF will provide a final report on implementation of the export certification reform program ECRP to the Minister by 30 June 2011.

Currently the MTF is working on a number of critical projects in its reform agenda including:

- a detailed legislative review;
- implementation of an improved service delivery model;
- developing an equitable and fair fee model;
- initiating a strategic plan for market access for the grain, seed and nut industries;
- identifying improvements to export documentation processes and IT systems;
- developing a prioritisation process to action market access requests;
- formulating an extensive training program and roll-out plan for both AQIS staff and industry to ensure full awareness and understanding of the changes and new requirements coming into effect from July 1 2011.

Benefits from the reform will include:

- less dependence on end-point goods inspection, minimising inefficient movement of export goods and reducing delays to exporters;
- flexible, responsive AQIS systems that support industry's operating hours;
- National standards to improve consistency in inspection;
- amended Legislative Orders and Schedules to remove prescriptive elements and become outcome focussed;
- quicker integration and adoption of improved inspections, technologies and techniques;
- improved phytosanitary information.

The Grain Taskforce Reform Workplan and Issues Register have recently been reviewed and Working Groups are progressing projects and ensuring all issues raised, that are within the scope of the Taskforce's agenda, are being addressed.

## Grain Taskforce work plan and projects

Project	Benefit	What this means for you
1. Legislative review and re-write	Modernised legislation that is less prescriptive and more outcomes focused. This will involve a set of standards that will help improve consistency across the industry.	In developing national standards, a transparent process of industry consultation will be undertaken by AQIS. The International reputation of AQIS will be ensured through the retention of the nil tolerance policy for live insects and limiting on board fumigations of bulk vessels, as mooted in past issues papers circulated by the MTF for industry comment.
2. Operation and inspection models	World-class inspection model	AQIS inspectors will continue to serve the industry at full-cost recovery beyond 1 July 2011 but you will also have the opportunity to have the flexibility of an Approved AQIS Operator (AAO) embedded within your business.
3. Market access	Improved market access for exporters	The current AQIS Grains Industry Consultative Committee (AGICC) will be retained as the principle advisory forum to AQIS in introducing major policy and operational changes to the AQIS Grain and Plant Products Export Program, including under the proposal to establish national standards and remove the prescriptive detail in the current legislation.
4. IT systems interface	Harmonised system interfaces between industry and AQIS, including export documentation	A review of third party software, Exdoc, providers is underway and will be made available to you to help with your current use of the Exdoc system or to help you understand how Exdoc can be introduced you're your business along with the other benefits from using such software. Workshops are proposed to be held at the Australian Grains Industry Conference (AGIC) in Melbourne in July.
5. Financial analysis of inspection models and AQIS charges	Equitable charges based on user pays model	In developing a new fee structure, a transparent process of industry consultation will be undertaken by the Taskforce and AQIS. More information in this area will be made available shortly.
6. Communication pathways and industry interface with AQIS	Enhanced relationships between government and industry	Contact your industry association or AQIS ( <a href="http://www.daff.org.au/aqis">www.daff.org.au/aqis</a> )

To read the workplan visit [www.daff.gov.au/ecrp](http://www.daff.gov.au/ecrp) and navigate to the Grain Taskforce page.

# Recent Awards at Arbitration

## Arbitration 45 (as NACMA)

### Notice to Members

**Date of Issue: November 2008**

**Claimant** – Commodity Buyer

**Respondent** – Commodity Seller

**Arbitration Committee (AC)** – Mr Alick Osborne, nominated by the Claimant; Mr Andrew Wilsdon, nominated by the Claimant in lieu of Respondent nomination, Mr Henry Wells, Arbitration Committee Chairman, appointed by NACMA.

#### Claim:

The main issue for determination in this dispute is whether or not a contract between the parties came into existence on 18 July 2006 and if so what are its terms.

#### Details:

The Claimant submitted that it entered into a contract with the Respondent on 18 July 2006 by telephone. The Claimant submits that a contemporaneous entry in its agent's day book confirms this. The Claimant submits that the contract was entered into its system by its agent's assistant who was to post the contract to the Respondent by regular mail.

The Respondent submits that it did not enter into a contract on 18 July 2006 with the Claimant's agent. The Respondent submits that the Claimant has failed to establish the content of that alleged conversation and therefore cannot demonstrate that both parties agreed on the terms of any such contract.

#### Award findings:

The AC found that:

- A conversation did take place between the parties;
- They cannot be satisfied of the contents of that conversation; and
- The Claimant has failed to prove that the conversation resulted in offer and acceptance of the key terms to form a contract.

#### Award:

The Claimant was unsuccessful and instructed to pay the Respondents reasonable arbitration and legal fees.

## GTA Arbitration 131

### Notice to Members

**Date of Issue: November 2010**

**Claimant** – Commodity Seller

**Respondent** – Livestock Producer

**Arbitration Committee (AC)** – Lyndon Benecke – nominated by GTA.

This arbitration was conducted as a Fast Track arbitration and hence has only one arbitrator nominated by GTA and approved by the parties.

**Claim:** This dispute relates to the terms of the contract between the parties.

**Details:** It is the Claimant's case that they supplied the Respondents with a "test load" of stock feed and thereafter they contracted with the Respondents for

the supply of 250mt of pellets at the price of \$355 ex store, plus freight, for delivery between 11 April 2008 and 31 October 2008.

The Claimant faxed a contract confirmation document it to the Respondents on 17 April 2008. It was retransmitted on 30 May 2008.

It was claimed the Respondents had not received the transmission on 17 April 2008.

The Claimant made a delivery 28.34mt on 20 May 2008 and invoiced the Respondent accordingly for both that load and the 26.30 mt "test load". Both invoices were paid in full.

The Respondents say that the product supplied was "unsatisfactory" and the Claimant's Sales Representative was notified accordingly.

It was not entirely clear from the submission, whether the respondent had accepted a contract including the terms and conditions, and had subsequently terminated the contract for quality reasons, or whether no supply contract was entered into.

According to the Claimant, once the Respondents had indicated that they no longer wished to take supply under the Contract Confirmation, the Claimant varied the contract by altering the stock feed mix it was making for the Respondents. It is said in the Claimant's submissions that "the Claimants representative and the respondent agreed" to this. This is denied by the Respondents.

There were 7 invoices produced, dated between 4 April 2008 and 4 November 2008. With the exception of the first invoice, all of the invoices contain a reference to the original Contract Confirmation number.

#### Award findings:

In view of the objective evidence, the Claimant did contract with the Respondents on the terms of the Contract Confirmation.

In view of that finding, the Respondent is in default in failing to take the full contract quantity and that the damages calculation set out in paragraph 43(e) of the Points of Claim appears to be fair and reasonable.

However given that the product was used in other applications the claim for interest revoked.

#### Award:

The Respondents are to pay the Claimant A\$11,123.10 by way of damages;

The Respondents to indemnify the Claimant for its arbitration costs of \$2,000.00

## Arbitration No. 152

### Notice to Members

**Date of Issue: February 2011**

**Claimant** – Commodity Buyer

**Respondent** – Commodity Seller

**Arbitration Committee (AC)** – Mr Simon McNair, nominated by the Claimant; Mr Hugh Morison, nominated by the Respondent; Mr Graeme Dillon, Chairman appointed by GTA.

**Claim:** The Respondent breached contract by supplying out of spec barley for first 981 mt of a 4000 mt contract. The Claimant and Respondent could not agree on the quantum of the quality claim. The Claimant sought liquidated damages for balance of contract plus quality claim. Respondent denies it must pay liquidated damages and has terminated contract due to unpaid disputed invoice.

#### Details:

The Respondent admits that the barley it delivered in the First and Second Deliveries was not to the contract specification.

The Respondent says that the losses claimed by the Claimant in respect of those shipments are excessive.

Also at issue, is the treatment of the undelivered balance of the contract.

Following the default in respect of the First and Second (and notionally Third) Deliveries, it appears that the parties entered into negotiations in relation to how to deal with the losses resulting from the First and Second Deliveries.

In the course of that negotiation, Respondent gave notice to the Claimant that it was terminating the Contract on the basis of the Claimants non-payment of its invoice in relation to the Second Delivery. In that regard it relied on GTA Trade Rule 13.3 which relates to *Delinquent Payments at Time of Conveyance*.

Subsequently the Claimant wrote to the Respondent rejecting the Claimant's assertion that it was in default, and holding the Respondent in default.

Rule 13.3 relates specifically to payments which are outstanding at the time of conveyance. In this case deliveries had been suspended while the parties tried to find a resolution.

#### Award findings:

The AC found that:

That the Respondent was in breach of contract in respect of the First and Second Deliveries and was liable to indemnify the Claimant in respect of the claims advanced in the amount of \$61,208.82.

Further, that the Claimant properly held the Respondent in default in respect of the balance of the Contract on 14 May 2010.

That the Claimant is entitled to damages in respect of the balance of the Contract in the sum of \$126,828.24, or a total of \$188,037.06.

Deducting from that sum the amount of the unpaid invoice in respect of the Second Shipment (that is, \$111,861.75), the balance payable by the Respondent to the Claimant is \$76,175.31.

#### Award:

The Respondent shall pay the Claimant the amount of \$76,175.31.

The Respondent shall pay interest on the damages at the rate of 8.75% pa from 14 May 2010.

The Respondent shall indemnify the Claimant in respect of any fees paid by the Claimant to GTA in relation to this arbitration.

# AUSTRALIAN GRAINS INDUSTRY CONFERENCE PROGRAM

The Australian Grains Industry Conference 2011 will be held at the Crown Conference Centre in Melbourne on 25-27 July 2011, bringing together those interested in the Australian grains industry to analyse strategic developments and trends in the global, regional and local grain, oilseed and pulse markets.

The Conference will again gather leaders from industry, government and international markets to address global commodity and consumer trends, explore technological advances and identify opportunities for the grains industry.

The 2011 Australian Grains Industry Conference will address:

- the supply and demand outlook for the Grain, Oilseed and Pulse Industries
- trends in demand for Australian Grains and changing consumer requirements
- implications of the changing Grain Industry supply chain

At this year's Conference a number of concurrent sessions on key industry issues will be held including feed grains, coarse grains, pulses, oilseeds, technology and freight amongst others.

The Australian Grains Industry Conference will also host a number of related events. These include:

- Grain Trade Australia Common Interest Forum
- Australian Oilseeds Federation Standards Meeting
- Australian Oilseeds Federation General Meeting
- Pulse Australia Crop Reference Forum

The Conference will kick off on Monday evening 25 July 2011 with a welcoming drinks function to be held at the Crown Promenade Hotel, in the exhibition area.

The Conference Dinner, to be held on the Tuesday evening, has been a sellout event for the past two years. It is the key social event of the conference, an important networking event and an opportunity for delegates to relax and enjoy the company of colleagues and friends.

This year the dinner has moved to a new and larger venue – AAMI Stadium. The Conference organisers encourage you to invite customers, suppliers, colleagues and partners to attend the dinner.



## REVISED GTA DISPUTE RESOLUTION RULES & FEES

GTA subjects the Dispute Resolution Rules to constant review to ensure they remain contemporary from an industry perspective and also that they are aligned to the requirements of the *Commercial Arbitration Act 2010*.

The Board has approved an amended set of Dispute Resolution Rules and fee structure which are effective from 15 March 2011.

The amendments are as follows:

### 1. Amendments to the Dispute Resolution Rules

A number of amendments to the Rules that better clarify the current DRS process. These amendments were not of a material nature and are not contentious.

### 2. Fees

GTA currently has 32 matters listed, whilst only 16 Claimants have paid their arbitration fees to progress the arbitration. The current process allows a Claimant to lodge a request to initiate an arbitration and then GTA forwards all the necessary documentation to the Claimant, including an invoice and requesting payment. GTA does no further work on the matter until the arbitration fee as invoiced has been paid by the Claimant.

Many Claimants do not pay the fee on the hope that the dispute will be settled without the cost of arbitration. However, GTA has been exposed to modest costs in preparation of the initiating documentation as well as the constant updates to the Claimant enquiring about the status of the matter.

The new Rules and fee schedule allow for:

- Payment of a filing fee of \$500, payable when the arbitration is initiated. This will cover the GTA administrative costs to initiate the matter; and
- "Where the Claimant has not paid the Administration Fee within 12 months of invoice, GTA will consider the Process as abandoned and close its file." Article 4.5. Introduction of this Rule will ensure that matters are heard and the GTA DRS is not used as free option to hear a matter at the Claimant's pleasure.

## DISPUTE RESOLUTION RULES – RIGHT OF APPEAL

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.

In summary, a party no longer has rights to appeal on the basis of error of law, but 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.

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).

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



# GTA PROFESSIONAL DEVELOPMENT PROGRAM

GTA are continuing to present Professional Development Programs in 2011 with the objective of offering targeted, practical courses for people involved at all stages along the grain value chain, from the production sector to grain exporters.

Following the deregulation of export markets the Australian grain market has become more sophisticated, complex and risky. In response to these changes, Grain Trade Australia has developed a series of courses for grain growers, merchants and traders to meet their expanding educational demands.

GTA Courses have been developed to competency standards recognised by the Australian National Training Information Service, the peak educational authority for vocational training.

GTA currently offers seven specifically designed industry professional development courses and one workshop. These include:

- Understanding Grain Markets
- Trade Rules, Contracts and Dispute Resolution
- Grain Merchandising
- GTA Grain Standards
- Grain Accounting
- GTA Dispute Resolution Service and Arbitration
- GTA Export Contracts and Documentation
- Arbitrators Workshop

Full details of all the courses available in 2011 are available on the GTA website including registration forms, dates and prices as well as a full colour PDF brochure.

## PDP DATES AND LOCATIONS

### GTA Understanding Grain Markets – Trade (NEW)

2011 Date	Location
01 March	<b>Perth</b> – The Marque Hotel, Perth
16 March	<b>Melbourne</b> – Cliftons, 440 Collins Street Melbourne (Level TBA)
17 March	<b>Sydney</b> – Cliftons, 199-200 George Street Sydney (Level TBA)
06 April	<b>Brisbane</b> – Cliftons, 288 Edward Street, Brisbane (Level TBA)
14 April	<b>Adelaide</b> – Enterprise House – 136 Greenhill Rd, Unley

### GTA Trade Rules & Contracts

2011 Date	Location
24 March	<b>Tamworth, NSW</b> – Venue TBA
29 March	<b>Sydney</b> – Cliftons, 199-200 George Street Sydney (Level TBA)
31 March	<b>Melbourne</b> – Cliftons, 440 Collins Street Melbourne (Level TBA)
10 May	<b>Brisbane</b> – Cliftons, 288 Edward Street, Brisbane (Level TBA)
17 May	<b>Perth</b> – Parmelia House/Australia Place, Perth
19 May	<b>Adelaide</b> – Enterprise House – 136 Greenhill Rd, Unley

### GTA Dispute Resolution Service & Arbitration (NEW)

2011 Date	Location
03 August	<b>Sydney</b> – Cliftons, 199-200 George Street Sydney (Level TBA)
24 August	<b>Adelaide</b> – Enterprise House – 136 Greenhill Rd, Unley
21 September	<b>Melbourne</b> – Cliftons, 440 Collins Street Melbourne (Level TBA)

### GTA Grain Accounting (NEW)

2011 Date	Location
25 May	<b>Sydney</b> – Cliftons, 199-200 George Street Sydney (Level TBA)
15 September	<b>Melbourne</b> – Cliftons, 440 Collins Street Melbourne (Level TBA)

### GTA Grain Merchandising

2011 Date	Location
20 & 21 April	<b>Sydney</b> – Cliftons, 199-200 George Street Sydney (Level TBA)
04 & 05 May	<b>Melbourne</b> – Cliftons, 440 Collins Street Melbourne (Level TBA)
06 & 07 July	<b>Perth</b> – Parmelia House/Australia Place, Perth
21 & 22 July	<b>Brisbane</b> – Cliftons, 288 Edward Street, Brisbane (Level TBA)
28 & 29 July	<b>Adelaide</b> – Enterprise House – 136 Greenhill Rd, Unley

### GTA Grain Standards

2011 Date	Location
02 & 03 August	<b>Melbourne</b> – Venue TBA
09 & 10 August	<b>Toowoomba</b> – Venue TBA
06 & 07 Sept	<b>Parkes, NSW</b> – Venue TBA
13 & 14 Sept	<b>Adelaide</b> – Venue TBA
20 & 21 Sept	<b>Perth</b> – Venue TBA

### GTA Export Contracts & Documentation (NEW)

2011 Date	Location
16 & 17 August	<b>Sydney</b> – Cliftons, 199-200 George Street Sydney (Level TBA)
27 & 28 Sept	<b>Melbourne</b> – Cliftons, 440 Collins Street Melbourne (Level TBA)