

# NewsInGrain

ISSUE 4, JULY 2010

## From the Chairman

Solid moisture profiles across the Australian grain belt and a softer dollar (at the time of printing anyway), all point to the planting of a substantial crop. At this early stage ABARE is forecasting a winter crop of 34 million tonnes with some industry pundits expressing a higher figure. At these levels, wheat's share will be around 22 million tonnes meaning approximately 15 million tonnes will be exported by potentially 23 companies.

Obviously there are fundamentals with regard to the commercial processes required to trade the crop. The GTA Standards and Contracts are designed to handle these requirements and they do this most efficiently. Interestingly, at a recent industry workshop, the size of the track market was discussed and the general feeling was that the tonnes traded using the GTA "Track Contract" was in the range of 3 to 6 times the annual Australian winter crop.

To ensure GTA fulfils its charter to "facilitate trade" the GTA Board identified a number of projects, over and above its core roles, to be implemented in 2010/2011. We are now able to confidently engage in additional projects due to the sound financial position of the organisation which will be reported on at the AGM to be held in Perth in October.

In this coming financial year, GTA will:

- complete a review of the GTA Trade Rules;
- implement a new Professional Development Strategy at a budgeted cost of \$150,000;
- make an ongoing commitment to act as the secretariat to National Working Party on Grain Protection;
- follow up on the recommendation of the Wheat Classification Council for GTA to take on the role as the secretariat which includes the Varietal Classification Panel;
- continue to be responsible for the review and promotion of the Australian Grain Industry Code of Conduct; and
- for the GTA CEO to continue to act as the Chairman of the Grains Industry Ministerial Task Force.

All of these additional roles are aligned to the GTA charter and hence worthy of GTA support.

On other fronts, GTA must be continually evaluating the needs of industry. An example of this is the *Code of Conduct for the Road Transportation of Grain* developed in conjunction with the Livestock and Bulk Carriers Association. The amount of grain being hauled via road is increasing, particularly in

the eastern states. GTA encourages its members to use freight operators who abide by the provisions of this Code. This will ensure transport operators supply clean units for your grain which should be viewed as a food product.

There is anecdotal evidence some freight operators are hauling obnoxious substances such as compost, animal wastes and glass or metal shards and they are not following accepted cleaning down protocols. These practices have the potential to tarnish the reputation of the Australian grain industry and potentially cause additional statutory requirements.

Last year GTA accepted the Minister's request to develop a Code of Conduct for the Australian Grain Industry. It is pleasing to report this publication has been reviewed and will be released at the Australian Grains Industry Conference in July. Of particular note is a section on the containerisation of grain, an issue that has received some comment in recent times.

At a Board level we have accepted the resignation of **Josh Roberts** following his appointment to a US based organisation. Josh joined the GTA Board in October 2007. This announcement affords us the opportunity to formally acknowledge both our appreciation and his contribution, to the organisation and the wider grains industry.

The industry has undergone substantial change since Josh joined the Board. GTA recognised that a WA perspective at the Board level was essential and he has been able to communicate the needs of the WA grain industry in a non partisan, pragmatic manner. This perspective has ensured the Western Australian industry has embraced the ideals of GTA to the point where the majority of the WA trade has GTA membership.

His contribution to national policy for GTA has enabled GTA to be recognised by the broader grains industry, Government and associated grain groups as the "go to" entity in regards to commercial activities associated with grain trading and storage in Australia.

We wish Josh well in his future endeavours and look forward to seeing him back in Australia at some point in the future.

In closing, by the time of the next publication of NewsInGrain, the direction of the crop will be much clearer, and hopefully providing positive opportunities to all across the supply chain.

**Tom Keene**  
GTA Chairman

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# Industry self regulation at its best:

## Protecting the Australian crop from insect infestation

The NWPGP 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 NWPGP is open to all industry participants and is facilitated by Grain Trade Australia. NWPGP held its annual meeting on 9 & 10 June in Canberra and was attended by over 100 delegates from all sectors of the supply chain including researchers, growers, storage agents, marketers, customers and a range of suppliers of goods and services along the supply chain.

The meeting provided attendees with the opportunity to learn the latest changes in market and regulatory requirements, and how to manage the storage and handling process with the current tools available to keep grain insect free. There were a number of presentations on these subjects and the NWPGP sought and actively encouraged robust discussion between presenters and the attendees on each of the agenda topics.

As Chairman of the NWPGP Bill Murray said "It is vital that attendees not only hear from a range of speakers on the latest research and market requirements, but actually understand the implications for their business. As such we encouraged debate on the issues raised to reach agreement from the meeting on the required outcomes". These outcomes were developed with the full support of industry attendees, and will be posted on the GTA website shortly. Go to [www.graintrade.org.au](http://www.graintrade.org.au)

This year's meeting continued the changing focus of the NWPGP direction and its relevance to Industry as highlighted last year. The 2010 meeting considered two key themes:

### Changing market and regulatory requirements:

Internationally at both the Codex and importing country Government regulatory level, increasing pressure is being placed on reducing maximum residue levels (MRLs) for various chemical control



L-R Gerard McMullen (GTA), Bryan Clark (Grain Growers Association), Ian Reichstein (NRS), Phillip Clamp (GrainCorp), Raj Bhula (APVMA) and Bill Murray (Chair of the NWPGP).

strategies. In addition, the marketplace is picking up on those changes and reflecting these tighter restrictions in contracts. The meeting heard from a range of speakers about what those changes are and discussed a range of measures that can be adopted on how to meet those requirements both now and in the future.

**Cross industry cooperation:** The entire grain industry must work together to continue to have insect control options available in the longer term, given the changes to MRLs; a reduced number of treatment options; and the increasing development of insect resistance. The meeting considered this topic in relation to maintaining the effectiveness of one of our most valuable tools, the fumigant phosphine.

Agreement was reached on progressing a Code of Practice that is applicable to not only phosphine use but to all other insect control options. This Code will be developed over the ensuing months by a sub-group of the NWPGP following input from the 2010 meeting.

The key issues for inclusion would be:

- using best practice insect control;
- meeting and understanding the implications of customer requirements;
- understanding the implications of inappropriate actions for other participants in the supply chain; and
- tools to ensure compliance with regulatory requirements.

The Code will utilise and link in with key work done previously including the Phosphine Resistance Management Strategy and the various extension and communication strategies conducted by many in the industry. As the Code is progressed, further input will be sought from the wider industry prior to presentation at the 2011 annual NWPGP meeting.

Go to the GTA website [www.graintrade.org.au](http://www.graintrade.org.au) for more information about:

- National Working Party on Grain Protection (NWPGP)
- National Phosphine Strategy
- Australian Grains Industry Post Harvest Chemical Usage Recommendations and Outturn Tolerances 2009/2010

## GTA PROFESSIONAL DEVELOPMENT PROGRAM SET TO EXPAND

The GTA Strategic Direction document released in 2009 stated GTA must deliver a:

**"Professional Development Program that enhances the skills of industry participants – other industries and countries are competing for skilled human resources; GTA must deliver programs to "grow our own".**

To achieve this objective, the GTA Board has recently approved an expanded PDP strategy that will see the number of courses offered to members doubled over the next 12 months.

The current GTA Professional Development Program is centred on the *Professional Certificate in Grain Marketing* which has three compulsory modules:

1. GTA Trade Rules, Contracts and Dispute Resolution
2. GTA Grain Standards
3. GTA Grain Commodity Marketing & Trading

The above modules are compulsory – three modules must be completed and they are the only ones on offer. These modules have been delivered over the past four years with more than 300 industry participants attending courses in 2009/2010.

To provide additional choice for members, GTA will, over the next 12 months, roll out the following courses:

1. Understanding Grain Markets
2. Grain Merchandising
3. Grain Accounting
4. Export Contracts, Documentation & Chartering
5. GTA Arbitrator Training

The development of the new courses and review of existing courses will be managed by Associate Professor Dennis Wise from Curtin University in WA with support from specialist grain based course writers from around Australia.

### The GTA Investment

GTA has budgeted \$150,000 towards completing the objectives of the PDP Strategy to ensure members have access to grain based, commercially focussed tertiary level training.

Watch for the above courses as they are released!



# GTA Chairman addresses members of the NWPGP

I was pleased to open the 2010 annual meeting of the National Working Party on Grain Protection (NWPGP) held in Canberra on 9 and 10 June.

Members of the NWPGP are the quintessential "quiet achievers" of the grains industry. This organisation is one of the best kept secrets of our industry. That's not because what it does isn't valued – Industry knows the NWPGP's work affects every part of the grain value chain – from growers storing grain on-farm to exporters gaining access to international markets. Industry's recognition of the work carried out by this group was evidenced by the record number of participants from across the industry attending the 2010 NWPGP Annual Meeting... more than 100 registrations were received.

In 2009 GTA was offered the opportunity to act as secretariat for the NWPGP and since accepting this role I have seen first-hand the value of researchers working alongside: Government; grower organisations; storage and handling companies; chemical companies; silo manufacturers & other equipment providers; millers and processors; stockfeed manufacturers; and seed companies. The NWPGP has a collective knowledge of current regulations and those areas under review; of current issues affecting grain storage and those likely to be present in the future; of actual practices in place and emerging trends and as such is well placed to make recommendations to ensure Industry get on with the job.

In my opening address I acknowledged the NWPGP provides valuable leadership in the key areas of entomology, industry education, technical relationships and the resolution of problems. The effective treatment of insects post-harvest is a foundation stone on which the Australian grain industry is built.

I shared my view that now isn't the time for this group to stand still as the environment in which our industry operates keeps changing – we now have more than 20 exporters of bulk wheat and they sell grain to 40 different countries! The container shipment of grain around the world is commonplace and competitive supply chains are working towards being low cost. All this puts pressure on best practice with regard to grain hygiene.

Now more than ever before I see challenges for the NWPGP. It has to adopt a more contemporary role going forward. Steps in this direction have already been taken, traditionally the NWPGP was research focussed – 70% of its members came from the research related sector. In 2009 the NWPGP agreed to some significant changes: Less research and more strategy; a greater focus on industry leadership; wider membership across the supply chain and a greater effort to engage other participants.

Highlighted also was the need to protect phosphine in the face of the increasing number of industry participants, at the same time it is acknowledged its use in the long term remains problematic. Indiscriminate and bad practise in the use of phosphine can only result in jeopardising its sustainability.

An important step towards extending its use could be achieved through education. To assist in achieving this outcome the recommended phosphine resistance strategy document developed by the NWPGP and the CRC for Plant Biosecurity should be widely distributed and its recommendations adopted. GTA is playing its part – the document is on our website and it has been provided to all GTA members and NWPGP contacts on file.

Just as there are anecdotal reports from customers on grain quality, there are also similar reports on hygiene. A complying product must meet all standards – both here and overseas. Our industry needs to know what our customers want. I warned we must not assume we know their requirements or it will be to our detriment. It is only through communication can we gain an accurate picture. I see a direct relationship between the success of the NWPGP and the level of communication achieved. The annual meeting was the perfect forum to listen to industry views and identify our customers' needs and the structures within the NWPGP could be used to inform and promote the outcomes of the meeting.

I asked the NWPGP to consider how GTA can extend its involvement and assistance providing the group agreed GTA was adding value and assured everyone present that GTA was keen to assist this group continue its contribution to the grain industry.

**Tom Keene**  
GTA Chairman

## GTA SNAPSHOTS

### Vital Signs

- Members: 240 (204 @ 30/6/09)
- Cash reserves: \$850 k (\$710 k @ 30/6/09)

### Trade facilitation – services and products

- Grain Standards for 2010/2011 – released early August
- GTA Location Differentials – released early August
- GTA Trade Rules – major review of the Trade Rules to ensure they reflect the current commercial environment
- GTA/AGEA FOB Contract – NEW!! NEW!! to be released shortly
- Dispute Resolution Service – currently handling 44 arbitrations, a massive increase over previous years. Read the summaries – it may just save you!

### Industry support services conducted by GTA

- Australian Grains Industry – Code of Conduct. This year's edition will include a section on grain quality related to container packing.
- National Working Party on Grain Protection. GTA is committed to continue to support this vital industry initiative.
- Commercial GM – report to the federal Primary Industry Standing Committee. In conjunction with the Australian Oilseed Federation, a report will be prepared for PISC on the growing, trading and logistics of GM grain on a yearly basis.
- Wheat Classification Council. GTA is set to become heavily involved in the classification of wheat varieties and establishment of the appropriate grades. (watch this space)
- AQIS Grains Ministerial Task Force – a federal initiative to reform AQIS chaired by GTA.

### Industry support products offered by GTA

- GTA Professional Development Program – expanded PDP Strategy for roll out in 2010/2011
- Australian Grains Industry Conference – registrations in 2009 was over 700!
- Grains Industry Common Interest Forum – where the GTA Technical Committees report to members.
- GTA Advisory & Compliance Workshop – for grain marketing advisers.

## SHARE YOUR NEWS

GTA publishes *NewsInGrain* three times each year – the next edition will be available in November 2010.

GTA is always pleased to receive articles that are informative and of interest to those in the grain industry. As such we invite you to forward any industry news, notices or relevant information to GTA. Share your news by forwarding an article to [admin@graintrade.org.au](mailto:admin@graintrade.org.au) in word format and please ensure any accompanying images are sent as high resolution jpegs.

*NewsInGrain* is an effective communication tool – it's distributed free of charge to an extensive network across the grain industry including GTA members, Government, national & international contacts and friends of GTA.

As with any publication, there are space restrictions and as such GTA reserves the right to edit or decline to publish any material received.

# MANAGING THE QUALITY OF AUSTRALIAN GRAIN TESTING FOR CHEMICAL RESIDUES

The National Residue Survey (NRS) monitors export and domestic grain to underpin market access and provide customers with an indication of the residue status of Australian grain. The NRS grains monitoring program covers all grain commodities and a report are produced each year.

In the following article Kevin Healy, Manager – Plant Programs with NRS, encourages exporters and handlers of export grain to participate in the NRS testing program. Participation ensures Australia's reputation of supplying grain to accepted international standards is safeguarded.

## Pesticide and contaminate residues

Pesticides used in Australian agriculture may leave residues that are above importing countries maximum residue limits (MRLs). Of particular importance to the grains industry are insecticides for the control of insect pests in stored grain. These have been detected by the NRS export grain monitoring program in grain destined to markets sensitive to chemical residues and where the level of residue is inappropriate for that market. The residues found have been well below the Australian MRLs. However, markets including Taiwan, Korea, China and the EU have very low MRLs or no MRLs set for some of these chemicals and therefore residue detections may be a contravention of their national standards.

Exporters should also be aware of contamination issues. There has been examples of trade disruption where grain treated with pesticides for the purpose of protecting seed for sowing, is found in export consignments of grain. Grain with residues of these treatments is unfit for sale for either stockfeed or human consumption, whether it meets importing countries MRLs or not. Typically, this grain is dyed a bright colour to signify its solitary purpose is sowing seed.

All users of pesticides, including producers, should ensure they comply with label instructions that are printed on or attached to pesticide containers. Failure to comply with these instructions may result in residues that are above Australian MRLs.

## Consequences for industry

These residue and contamination issues have the potential to result in trade disruption for the Australian grains industry, which is valued at \$7.0bn per annum. The risk of market disruption increases with each incident and history shows that trading partners may place restrictions on all Australian grain exports, rather than targeting individual exporters. In the case of shipment refusal, the exporter can expect additional costs that may become a significant financial burden. Likely consequences of residue and contamination problems include refusal of entry, redirection of grain consignments, cleaning or sorting and downgrading of quality/price.

For these reasons it is imperative exporters know the chemical residue status of the grain to be exported and also know the MRLs and industry recommendations that apply to the country of destination.

## Participation in the NRS Grains Program

Exporters of grain are encouraged to participate in the NRS grains monitoring program. The testing is fully funded by producers through 0.015% 'farm-gate-value' levy and therefore there is no monetary cost to exporters. Bulk shipments have a sample taken from every hatch or hold of each vessel and it is analysed for a range of insecticides, fungicides, herbicides and environmental contaminants. Container exports have a sample taken from each 'line' of grain. A line of grain is considered to be from single source or location. Results are provided back to the exporter and handler within three working days of receipt of the sample at the analytical laboratory.

To participate in the NRS Grains Program, please contact NRS on +61 2 6272 5790 to arrange the supply of sampling equipment, sample forms and sampling guidelines. Participation comes at no additional cost to the handler or marketer.

In addition, all exporters should ensure they have adequate procedures in place to ensure all parties involved in the export process of their parcel of grain are aware of the residue limits applying to the country of destination. Consideration should be given to the use of quality assurance programs, involving declarations of chemical use, sampling and testing other than through the NRS program.

## MRLs and industry outturn standards

Exporters are encouraged to view an international grains MRL database which is maintained by the NRS and can be found at [www.daff.gov.au/agriculture-food/nrs/industry-info/mrl](http://www.daff.gov.au/agriculture-food/nrs/industry-info/mrl)

Exporters can also access a document titled 'Australian Grains Industry Post Harvest Chemical Usage Recommendations and Outturn Tolerances 2008/09'. This document lists requirements for specific markets and can be viewed on the GTA website [www.graintrade.org.au](http://www.graintrade.org.au)

## Summary

The grains industry cannot afford to have residue incidents undermine consumer confidence and jeopardise grain markets. Producers are aware of the implications these incidents can have on the industry and therefore provide funds through a levy to enable the NRS grains monitoring program to proceed. As responsible participants in the grains industry, exporters and handlers of export grain are expected to participate in the testing program.

**Kevin Healy**  
Manager – Plant Programs with NRS

# RECORD INDUSTRY SUPPORT FOR AGIC

26-28 July 2010 at  
Melbourne's Crown Promenade –  
[www.ausgrainsconf.com.au](http://www.ausgrainsconf.com.au)

AGIC (Australian Grains Industry Conference) is the most important event on the grains industry calendar and this year it has attracted record support from Industry. AGIC is hosted by Grain Trade Australia (GTA), the Australian Oilseeds Federation (AOF) and Pulse Australia.

The theme for 2010 is: How the grains industry can, and is, prospering in the face of global economic, social and environmental changes. High profile international and domestic speakers include the Hon. Tony Burke MP, Minister for Agriculture, Fisheries and Forestry, who will deliver the opening address; Alan Oster, Chief Economist NAB who will discuss the economic outlook and implications for the commodity sector and Dan Basse, President of the leading US based consultancy AgResource who will give delegates an insight into the global outlook for grains and the implications for importers and exporters.

## AGIC thanks all its sponsors for their generous support:

### Gold:

NAB Agribusiness, Emerald Group Australia Pty Ltd

### Silver:

Cargill Australia Ltd, ANZ, Glencore Grain Pty Ltd, GrainCorp, Grain Growers Association, GRDC, Maersk Line, Cox Inall Communications, FCStone Australia

### Conference Dinner:

CBH Grain

### Welcome drinks:

Grain Growers Association

### Bronze:

Barley Australia, Viterro, Agriex Australia

### Delegate Materials:

AgriFood Technology, ASX Limited, Elders Toepfer Grain, Macpherson + Kelly Lawyers, National Grower Register

### Supporters:

Societa Cofica Pty Ltd

### Exhibition:

Agribusiness Systems, AgriFood Technology, Australian Oilseeds Federation, BRI Australia, Cargill Australia Ltd, Clear Grain Exchange, Cooperative Research Centre for National Plant Biosecurity, Cox Inall Communications, Emerald Group Australia Pty Ltd, dbcSMARTSoftware, Glencore Grain Pty Ltd, Grain Growers Association, GrainCorp, GRDC, Igrain.com.au, Maersk Line, NAB Agribusiness, NIR Technology Systems, Perten Instruments, Pulse Australia, Rentokil Fumigation & Pest Control Products, Rimfire Resources, Rural Press Agricultural Publishing, SGS Australia

### Satchel inserts:

Igrain.com.au, SieveMatic Pty Ltd

### Print Media Partner:

Rural Press Agricultural Publishing



# INTERNATIONAL TRADE IN GM GRAIN – LIABILITY & REDRESS

The international movement of GM grain is influenced by the Cartagena Protocol on Biosafety (BSP), more fully detailed in the NewsInGrain Issue 2, November 2009.

GTA is a member of International Grain Trade Coalition (IGTC) and as such its members' interests are represented at world trade forums such as the BSP. IGTC was formed to represent the interests of the world grain exporters and importers in the BSP negotiations.

One of the more contentious issues relating to the BSP is defining who will be liable for the damage to human health, safety or the environment should there be an issue involving a Living Modified Organism that originated in a transboundary movement, for instance, GM grain. It all revolves around the definition of "operator" as identified in the BSP.

Readers are reminded that Australia, like most other major grain exporters is NOT a signatory to the BSP and therefore is not bound by its provisions, unless an exporter is requested by an importing country. The downside is Australia is not able to formally participate in the meetings, i.e. Australia has no voting rights.

At a meeting held in Kuala Lumpur recently as part of the negotiations to develop the BSP, the definition of operator was finally agreed. Dennis Stephens, on behalf of the IGTC, was present at the meeting and reports as follows:

After many years of negotiations, the definition of operator under the Supplementary Protocol has been defined under Article 2.2(f) as...

**"Operator" means any person in direct or indirect control of the living modified organism which could, as appropriate and as determined by domestic law, include, inter alia, the permit holder, person who placed the living modified organism on the market, developer, producer, notifier, exporter, importer, carrier or supplier;"**

This is added to the redefinition of scope under Article 3.2 to read...

**"This Supplementary Protocol applies to damage resulting from living modified organisms and [products thereof] which find their origin in the transboundary movement.**

- a) Intended for direct use as food, feed, or for processing;**
- b) Destined for contained use;**
- c) Intended for intentional introduction into the environment"**

And with the modification of response measures to highlight that the operator may be more than one entity as follows:

**7.2 Parties shall require, the appropriate operator or operators in the event of damage, subject to any requirements of the competent authority, to:**

- (a) Immediately inform the competent authority;**
- (b) Evaluate the damage; and**
- (c) Take appropriate response measures.**

IGTC has largely achieved its liability and redress objective to place the focus of damage to biodiversity on the living modified organisms and not on the activities involved in the transboundary movement, employing what is in effect a fault based system.

The decision to allow the determination of who the operator is to be determined by domestic law was made on the recognition that the operator could be a different entity depending on the specific circumstances involved. For example, if the damage was caused by an exporter selling

an unauthorised event into an importing country, the exporter could be the operator; if an importer imported the shipment for feed, food or for processing and then sold the shipment for seed, then it could be the importer; but if the damage was caused by the inherent quality of the trait introduced into the plant, then the operator could be the developer, the permit holder, the person who placed the living modified organism on the market etc.

As a result, delegates at the KL meeting decided they could not name one link in the supply chain as operator. They also recognised that if they stayed with the original concept of having the operator defined as the person in control at the time of the damage, the link in control at the time – likely the importer or farmer, could be liable when the damage actually occurred with the introduction of the trait. Therefore they decided on an indicative list to provide guidance to countries that the operator could be one or more links along the chain or one or more entities.

A downside of the decision is there will be considerable flexibility for individual countries to define operator. As a result, IGTC members will have to have discussions with their respective governments to ensure their country's domestic law reflects their industry's requirements. However there is considerable time to address this challenge. There are still difficult outstanding issues to be resolved such as "products thereof" and financial security. Following this the Supplementary Protocol must be approved by COP/MOP-5 in Nagoya, Japan this October. Finally, it must be ratified by 40 Parties before it comes into effect.

The decisions discussed above by the Friends of the Chair on Liability and Redress are very significant and as mentioned, go a long way to achieving IGTC's objectives. Special thanks go to Klaus Schumacher and Teresa Babuscio of COCERAL, Ricardo Calderon of APPAMEX and Sonia Tomassone of CAPECO as the European Union, Mexico and Paraguay played particularly significant roles in convincing delegates to shift the focus of liability from the activities involved in the transboundary movement to the living modified organism. This created the environment where the decisions on scope and operator described above became possible.

**Dennis Stephens**  
**Canada Grains Council & Secretariat to the International Grain Trade Coalition**



## 2010 – 2011 GTA Membership Reminder

GTA's membership runs July 2010 to June 2011 and as such you can expect to receive your invoice and contact details confirmation in early July.

If you're a GTA member and reading this notice at the Australian Grain Industry Conference but haven't seen your membership invoice let GTA know!

GTA is pleased to advise there are no changes to membership fees for this coming year but additional services are being offered...

- More courses in the Professional Development Suite; and
- Ongoing improvements are being made to the GTA website allowing interactive course/training registrations

Remember GTA is only ever a call or email away – contact the GTA Office Management Team on **02 9247 6408** or **admin@graintrade.org.au** and see how we can assist your business or organisation.

# Recent Awards at Arbitration

## Area Contracts do not allow you to choose when you plant – Arbitration 68

**Arbitration Committee** – Lloyd George (Chairman), Craig Perkins and Don McDougall

**Claim** – The dispute concerned an area contract for the sale of wheat and the alleged failure by the Respondent to plant wheat in accordance with the contract.

**Issue for determination:** Did the Respondent have the discretion to choose whether to plant wheat or not in the second season of their area contract?

### Details:

The contract was formed during discussions at the Respondent's farm and subsequently recorded in the Claimant's Form which the Claimant sent to the Respondent.

The contract extended over 2 seasons and the Respondent performed its obligations in respect of the first season.

The parties did not dispute there was a contract but rather did the Respondent's obligations under the contract require the Respondent to plant a crop or whether, fearing production failure, the Respondent had the discretion to plant or not.

As per the terms of the Claimant's Form, the Respondent undertook to plant a crop, even if the risk of production failure fell upon the Claimant. The Respondent was in default of its obligations under the contract in not planting a crop for the second season.

### Award findings:

- There was a contract between the parties and the terms of this contract were:
- The Respondent was obligated to make land available, plant wheat over the 800 hectares and reasonably maintain the area for the Claimant.
- The agreement extended over two years.
- The Claimant bore the production risk of the wheat produced from the area. In the case of drought or poor yields, the Claimant wore the risk from the given area of wheat.
- Although the contract was not signed by the Respondent and returned to the Claimant, the Respondent performed under the Contract in the first year to the satisfaction of the Claimant.
- Rotational considerations did not cancel out the Respondent's obligations to plant wheat for the Claimant.
- It was not at the Respondent's discretion to decide whether it planted the agreed area or not, this was a core term of the contract, and it was not the intention of the parties to make this term optional.

### Award:

1. The claim was allowed and the Respondent was ordered to pay the Claimant \$154,830.00, interest and the Claimant's arbitration and legal fees.

### Take out:

Never make assumptions with contracts, ask if you are unsure. Remember when taking out area contracts you don't get to choose if you sow or not.

## Ensure your entity details are correct on all contracts – Arbitration 91

**Arbitration Committee** – Cecilia Pryce, (Chairman), Vernon Ezzy, and Robert Danieli

**Claim:** The dispute arose over three contracts for the sale of barley, their financial settlement and subsequent payment on the Contracts.

### Issues for determination:

The Claim related to 3 contracts between the Claimant and Respondent which the Claimant says, as at the date of its insolvency, it was \$510,000.00 "in the money".

The 3 contracts were yet to be executed when provisional liquidators were appointed. The Respondent was advised the appointment of the liquidators was an "insolvency event" within the meaning of Rule 17.6 of the GTA Trade Rules.

The liquidators again wrote to the Respondent giving notice of the close out of the 3 contracts at "Fair Market Price", being (cumulatively) \$510,000.00.

In answer to the Claim, the Respondent said (in summary) that;

- a) On a proper construction of Rule 17.6 of the Trade Rules, it is not obliged to pay the Claimant, as the defaulting party, anything;
- b) Alternatively, the Respondent said that under s553C of the Corporations Act it was entitled to "set-off" amounts owing to it by the Claimant to it.

### Details:

In reference to Rule 17.6 this was a case of default due to insolvency. Rule 17.6, whilst it may not apply exclusively to insolvency situations, should prevail to the extent of any inconsistency.

In issue were 7 contracts between the parties. The Claimant put 3 in issue. The Respondent put a further 4 in issue.

What was material was the identity, or possibly the capacity, of the parties to the contracts. The Claimant said it was the trustee of 2 discretionary trusts (Trust 1 and Trust 2)

The Claimant's documents in evidence included different ABNs and addresses and some were unsigned.

The Respondent's documents in evidence were all brokers notes again with differing details.

It was reasonably clear the entity which contracted in each case was the Claimant. The Arbitration Committee did not doubt it was a trustee. However there was no evidence that at the time the brokers bound the parties to the contracts the brokers were at all conscious of the differing capacities in which the Claimant may have been acting.

### Award findings:

The Arbitration Committee found:

All open contracts between the parties needed to be considered. The "Trust 1" and "Trust 2" status was not clear at the time of trading or contract confirmations. It appeared to be an internal audit issue in any event;

As per clause 17.6 all contracts were to be taken into account and "washed-out" at the Fair Market Price.

As per section 553C of the Corporations Act, the parties were entitled to mutual credit and set-off.

After all contracts were taken into account, \$140,534.40 was payable by the Respondent to the Claimant.

### Award:

1. The Claim was allowed in part. The Respondent was ordered to pay the Claimant \$140,534.40, interest and the Claimant's costs and expenses.

### Take out:

Ensure all entity details are correct on all your contracts, including your name address and ABN.

## Keep track of your remaining tonnages – Arbitration 127

**Arbitration Committee** – Steven Burt (Chairman), Mike Chaseling and Jock Benham

**Claim:** The Claimant (Seller) alleged the Respondent (Buyer) did not take delivery of the entire 2000t wheat on their Buyers Call contract.

### Details:

- The parties entered into a "Track" contract for 2000t Wheat at \$412 per tonne, (Special Condition – Final delivered price to be agreed on will depend on location of stock transferred and market prices on day).
- Delivery period was December/January 2007 Sellers Call, (Special Condition – to be converted to delivered Goulburn Valley contract Jan to Sept 2008 Buyers Call at time of Track Transfer).
- At the end of December 2007 the Claimant reduced the contracted delivered value to the Respondent to \$400 per metric ton with monthly carries commencing on 1 February 2008 over the period of the contract on a "Buyer's Call" basis.

# CASE MANAGEMENT OF THE GTA DISPUTE RESOLUTION SERVICE

- From February 2008 to December 2008 the Respondent ordered, accepted and paid for 1,574.35 metric tons of wheat.
- By the end of the contract period at 30 September 2008 there was a remaining 511.69 metric tons of wheat outstanding under the Contract.
- December 2008 the Respondent ordered and paid for another 86.04 metric tons of wheat.
- The Respondent telephoned the Claimant's Agent, advising he believed the parties had completed the Contract
- The Claimant's Agent advised the Respondent the next day of outstanding tonnages
- The Respondent advised he had not received the correspondence.
- The Claimant submitted that at the time of the discussions, there was still 425.65 metric tons to be delivered under the Contract.

## Award findings:

- This Contract was Buyer's Call.
- When Buyers control the timing and quantity of delivery they should also keep proper records of the amounts remaining to be delivered.
- In circumstances where a party wishes to depart from its contractual obligations in reliance on the conduct of the other party, the conduct and evidence of that conduct must be compelling and unequivocal. There was no such evidence in this case.

## The Arbitration Committee found:

- The Respondent had an obligation under the terms of the "Buyer's Call" contract to manage the contract delivery tonnage and call for the delivery of the entire contracted tonnage within the delivery period.
- The Respondent failed to substantiate its defences based on the alleged representation that the Contract had been fulfilled or that the parties had agreed to waive the balance of the tonnage deliverable under the Contract.
- The Respondent was in default for failing to take delivery of the contracted tonnage within the contract period as was extended.

## Award:

1. The Claimant was successful. The Respondent was ordered to pay damages of \$60,422.30, interest and the Claimant's arbitration and legal fees.

## Take out:

Buyers in a Buyers Call contract must keep proper records of the remaining amounts to be delivered.

## Introduction

GTA works to resolve disputes by peer review, through its Dispute Resolution Service (DRS). The DRS is designed to save time and expense while providing an efficient, fair and equitable means to settle disputes related to commercial transactions.

Disputes will be referred to GTA arbitration where;

- The relevant contract incorporates the GTA Dispute Resolution Rules; or
- The parties reach a separate or "ad hoc" agreement to refer a dispute to GTA Arbitration.

While the arbitration process is by definition arbitrary, arbitration awards have a similar status and effect to judgments of the courts and accordingly the process by which an award is obtained must be subject to some procedural and legal rigour.

The GTA Dispute Resolution Rules and process seek to achieve the appropriate balance between arbitrary (fast and low cost) and rigorous (reasoned, reliable and legally compliant).

## Incorporation of the GTA Dispute Resolution Rules

Some care needs to be taken to ensure the effective incorporation of the Dispute Resolution Rules.

The words of incorporation should refer to the Dispute Resolution Rules and/or arbitration.

Simply saying "All other terms as per GTA" may not be sufficient particularly where you are trying to enforce an unsigned contract.

GTA Member Update No: 13 of 10 that was issued on 12 May 2010 includes standard clauses that can be used to ensure the contract falls under the GTA Trade Rules and that GTA has jurisdiction in the case of a dispute.

## The Legislation

All (non-International) arbitrations conducted in Australia are subject to the provisions of the Commercial Arbitration Act (Act) applicable in each State. The GTA Dispute Resolution Rules are expressed to be subject to the NSW Act.

Failure to comply with the provisions of that legislation may put an award at risk of being set aside by the Courts resulting in substantial cost and inconvenience to the parties, and embarrassment for the arbitrators and the arbitration administrator.

The central concepts of the Commercial Arbitration Act are;

- The existence of an "arbitration agreement", namely an agreement in writing to refer present or future disputes to arbitration (ss 4 (1));
- Discretion of arbitrators to conduct proceedings in such manner as they think fit (s14) (but subject to the terms of the arbitration agreement);
- Awards are final and binding on the parties (s28);
- Form of the award, including a statement of reasons (s29);
- Enforcement of an award through the Courts (s33);
- Judicial review of awards (s38);
- Court power to set aside for misconduct (s42 (1));

## The Process

The concepts of natural justice and procedural fairness are central to all arbitration. These concepts are perhaps intentionally imprecise and include:

- A party's right to know the case that is being put against it;
- Avoidance of bias (inc the apprehension of bias) by arbitrators or administrators;
- Right to an oral hearing; and
- Decision based on submissions and/or evidence;

The combined effect of the GTA Dispute Resolution Rules with the Act provides a procedural framework to ensure that the procedural fairness is observed.

Despite the significant demands made on arbitrators there is no mandatory form of qualification required. Traditionally arbitrators have been "commercial men" engaged in the industry the subject of the arbitration.

It is consistent with the concept of party autonomy that the parties are largely able to choose who will determine their dispute.

An Award is likely to be more "palatable" where a party (even if unsuccessful) has had a role in the selection of the Tribunal.

The GTA Dispute Resolution system is possibly unique in Australia: that is... an industry solution provided by the industry. It is genuinely a peer review system consistent with the "look-sniff" tradition of commodity arbitration.

## Legal Supervision of the Process

Despite its commercial roots, arbitration has become "legalised" if not "legalistic".

The demands made upon arbitrators and administrators mean that unless they are qualified lawyers (and possibly, even if they are) they may need external legal support.

That support routinely takes the form of;

- Advising arbitrators/administrators in relation to the Dispute Resolution Rules particularly in relation to any interlocutory or procedural applications a party may make;
- Participating in the arbitrators teleconference to provide advice on procedure and evidence;
- Drafting an award to reflect the arbitrators' decision and deliberations.

## Conclusion

Because of its specialised nature, it is important the Australian grain industry has an appropriate dispute resolution mechanism on which the industry can rely. More information, including a copy of the Grain Trade Australia (GTA) Arbitration Guidelines can be found on the GTA website.

**Geoff Farnsworth – Principal  
Macpherson+Kelley**



## WHEAT TEST WEIGHT IN MILLING GRADES OF WHEAT TO INCREASE

Following two years of industry deliberations, the GTA Board has accepted the recommendation from the GTA Standards Committee to increase the test weight in milling grades of wheat to 76kg/hl with its introduction to be no later than the 2013/14 season.

Data indicates the greater proportion of the Australian wheat crop will not be affected by this change. It sends a clear signal to the world importers of grain, that Australia is able to provide export consignments to a higher test weight.

A large portion of world export trade is contracted at a test weight of at least 76 kg/hl and Australian exporters need to have confidence that they will be able to not only buy, but receive a higher test weight on out turn in order for them to have the confidence to participate in these markets.

Keeping a lower test weight, will limit an exporters' ability to participate in potential export opportunities and/or see this risk priced into prices offered to growers, thus penalising both the grower, and broader grains industry.

It is vital the integrity of Australian wheat quality is maintained and Australia retains its high standing within international markets. Our wheat standards are an essential tool used by customers to make judgements about the quality of Australian wheat.

Increasing the test weight number sends a strong market based signal to wheat breeders that a higher test weight is a desirable.

## GTA Calendar

GTA Common Interest Forum: Melbourne, VIC	26 July 2010
GTA Advisory & Compliance Workshop: Melbourne, VIC	26 July 2010
Australian Grains Industry Conference: Melbourne, VIC	27 & 28 July 2010
GTA Grain Commodity Marketing & Trading Course: Perth, WA	2 & 3 August 2010
GTA Grain Standards Course: Melbourne, VIC	9 & 10 August 2010
GTA Grain Commodity Marketing & Trading Course: Melbourne, VIC	16 & 17 August 2010
GTA Grain Standards Course: Melbourne, VIC (fully booked)	23 & 24 August 2010
GTA Grain Standards Course: Toowoomba, QLD	30 & 31 August 2010
GTA Grain Standards Course: Parkes, NSW	7 & 8 September 2010
GTA Grain Standards Course: Adelaide, SA	14 & 15 September 2010
GTA Grain Standards Course: Perth, WA	21 & 22 September 2010
GTA Trade Rules, Contracts & Dispute Resolution Assessment	12 October 2010
GTA Grains Standards Assessment	19 October 2010
GTA Management of Grain Marketing & Trading Assessment	26 October 2010
GTA Annual General Meeting: Perth, WA	26 October 2010

More information about and registration forms for GTA's Common Interest Forum, Advisory & Compliance Workshop and upcoming GTA Professional Development courses are available on the GTA website [www.graintrade.org.au](http://www.graintrade.org.au)

For the latest information about and to register for the Australian Grains Industry Conference go to: [www.ausgrainsconf.com.au](http://www.ausgrainsconf.com.au)

# GTA ARBITRATOR TRAINING

**SYDNEY, 17 AUGUST 2010**  
**COST: NO CHARGE**

The GTA Dispute Resolution Service operates via the enormous amount of honorary work conducted by GTA's approved arbitrators. To ensure GTA arbitrators are kept up to date with regard to the legal framework in which they operate, GTA will be holding specialist arbitrator training in State capital cities over the next 12 months as part of the expanded GTA Professional Development Program.

The workshops aim to increase the number of suitably skilled grain industry practitioners in the field of arbitration, ensuring parties receive a timely and binding outcome. Workshops provide an appreciation and understanding of the role of arbitration, the process and the legislative framework.

The workshop will provide an opportunity for Arbitrators to expand and refresh their knowledge.

Topics to be covered will include:

- Commercial Arbitration Legislation
- GTA Dispute Resolution Services
- Conduct of an Arbitrator
- Common Issues Faced By Arbitrators
- Awards

Numbers are limited and details will be announced shortly on the GTA website under Professional Development and via Member Updates.