GRAIN TRADE AUSTRALIA

NewsInGrain

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CHAIRMAN'S MESSAGE

The following is an edited version of a presentation given to NSW Farm Writers. For the full presentation go to: www.graintrade.org.au/news/presentations

For Industry's consideration…

1. What are the learnings and the challenges after two years of export wheat deregulation?
2. Where is the Industry headed; what are the risks and where do we find leadership?

- The **First Season** following deregulation was dominated by the effects of the Global Financial Crisis (GFC).
- Buyers' balance sheets and their capacity to fund pools and purchases were impacted.
- The market was dominated by large corporate grain companies and the continued strength of the container market.
- Growers deserted pools in preference for cash.
- Logistical problems for exporters – primarily on the West Coast. Some blamed the port asset owners but years of neglect to rail infrastructure was the real cause.
- Significant feedback from the market gave clear warnings to Industry – action was needed to address **Quality** and **Integrity**.

In the **Second Season** access to funds improved following debt reduction and the weakening credit crunch, this resulted in more competitive purchasing at more locations and support for a greater range of products. Storing and warehousing was also very popular.

- A push for better producer education by grain buyers and Industry organisations such as GRDC, GTA and BRI emerged.
- Debate shifted from, "wanting it the way it was", to "how do we learn to be better".

Quality and **Integrity** were addressed: Strong self regulation to protect the Australian wheat brand was adopted.

GRDC continues to support the Wheat Classification Council's (WCC) role of varietal classification. The WCC ensures quality performance of our segregations is not compromised and our export and domestic markets' performance expectations are met.

- Funded by the GRDC and Grain Growers Association (GGA), BRI produced its second Crop Report, a valuable tool for marketers and buyers.

It was accepted that a commitment to behaviour and practices was required to maintain our reputation for integrity. The Federally funded ***Australian Grain Industry Code of Conduct*** was developed by Industry through GTA and released in late 2009.

The Code offers best practice guidelines for behaviour across a range of activities, thus providing assurance and confidence for buyers and allowing us to build a reputation for integrity as sellers.

Logistical problems being tackled:

- Headway was made in the area of land transport – investment in rail assets by major grain companies continues so supply chain operations have a smoother pathway to market.

Over the past decade, lack of Government investment and privatisation has resulted in rail capacity being below average harvest demand and therefore road transport will continue.

What have we learnt?

- Firstly, gaps have emerged around the promotion of Australian wheat; protection of quality standards; technical support and maintaining credibility and integrity. **The Crop Report** and the **Australian Grain Industry Code of Conduct** address these issues but a more coordinated approach is required.
- Secondly, logistical issues will remain at the forefront during above average season crops as business will be wary of over investment in rail assets.

In **the Future** there is one big question: How do we improve the wheat industry model of self regulation based on our experiences? I believe there are four requirements:

1. Strong Leadership;
2. Market promotion and brand management;
3. Technical support on quality issues; and
4. A comprehensive and endorsed industry Code of Conduct.

Leadership

Leadership is fundamental to future success. Previous Industry leaders emerged through the agri-political structures. Future leaders should be merit based, whether they represent the production sector or the Industry more broadly.

How do we tackle the gaps identified to date and add further industry value? **Market Promotion, Branding and Quality**.

IN THIS ISSUE:

Key organisations representing different sectors of the supply chain already exist including:

- Large infrastructure owners;
- Australian Grain Exporters Association;
- Grains Research and Development Corporation;
- Wheat Classification Council; and
- Grain Trade Australia.

The missing link is a **national organisation representing the production sector**.

Any grower body emerging to play this role must have merit based representation, not only the ability to garner votes. Such a structure together with the other organisations, would form an overarching body to specifically address the "gaps".

I believe …

1. We need to get organised to ensure Australian wheat has responsive, generic market promotion to protect the brand and maximise value. This requires good, strong leadership and an inclusive, merit based representative organisation that spans all sectors.
2. Consolidation and growth of businesses providing services and value for customers will continue. Agriculture is now available to the broader investment community. It will become increasingly supported, encouraging "globalisation" and scale. Ultimately businesses will have reduced risks, lower cost supply chains, diversified revenue streams and be closer to the consumer.

I am confident the structural evolution of our industry which began in earnest 20 years ago will continue and I'm confident Industry will continue to prosper.

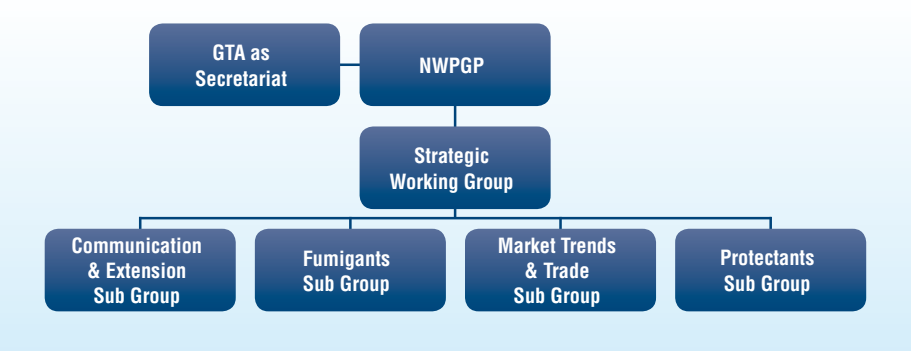
Tom Keene
GTA Chairman

The National Working Party on Grain Protection (NWPGP)

PLANNING IS UNDERWAY FOR THE 2010 NWPGP ANNUAL MEETING

When: Wednesday 9 June & Thursday 10 June 2010

Where: Rydges Lakeside, London Circuit, Canberra **Cost:** $330 per person 2 days



Who is the NWPGP?

The NWPGP is the Industry body responsible for management and providing leadership to Industry in the areas of post harvest storage, chemical regulations and chemical use, as they relate to market requirements. GTA acts as secretariat for the NWPGP.

What does the NWPGP do?

Issues addressed by the NWPGP include entomology, insect infestation, grain protectants, fumigants, physical control methodology, pesticide residue violations, market requirements, application technology, extension, and technical relationships with domestic customers. Furthermore, National and International Regulation are discussed across a wide range of Industry organisations in an attempt to identify specific problems and determine directions for resolution. Regulatory requirements, reviews and information requests are considered, and agreed Industry submissions produced and submitted to regulatory organisations.

How does the NWPGP operate?

The Strategic Working Group as a subset of the NWPGP, is formed to assist the NWPGP operate successfully and achieve its desired outcomes.

Members include: Bill Murray (GRDC) – Chairman, Pat Collins (DEEDI), Phil Clamp (GrainCorp), Gerard McMullen (GP McMullen Consulting) and Shane Madigan (GTA – Secretariat)

Communication & Extension Sub-Group

- Review effectiveness of Industry communication pathways & communication material
- Review existing and recommending additional material to assist Industry to comply with regulatory and Industry self-regulatory requirements relating to chemical use and insect control
- Recommend key messages and pathways for delivery of those messages to Industry and researchers
- Provide input into NWPGP communication activities

Members: Rosemary Richards (Australian Grain Exporters Association) – Chairman, Stephen Buick (Viterra), Philip Burrill (DEEDI), Jon Dadd (Dow Agrosciences), Gavin Gibson (Pulse Australia), Matthew Head (GrainCorp), Joanne Holloway (Industry & Investment NSW), Chris Newman (Dept. Agriculture & Food) and Alan Umbers (Grains Council of Australia).

Fumigants Sub-Group

- Review current insect control techniques, their effectiveness and impact on the supply chain
- Review new fumigants for compliance with Industry protocols

Members: Robin Reid (GrainCorp) – Chairman, Simon Ball (Australian Fumigation), Stephen Buick (Viterra), Philip Burrill (DEEDI), Greg Daglish (DEEDI Agri-Sciences QLD), James Darby (CSIRO Entomology), Rob Emery (Dept Agriculture & Food), Joanne Holloway (Industry & Investment NSW), Matthew Mews (CBH), Kerry Miles (Grain Storage Solutions), Shawn Miley (Rentokil Fumigation & Quarantine Services), Manoj Nayak (DEEDI Industry Services QLD), Garry Pannach (Norco), Colin Peace (Australian Fodder Industry Assoc), Yonglin Ren (Murdoch University – School of Biological Sciences), Matthew Slavin (Fintran Australia) and Peter Williamson (SA Rural Agencies).

Market Trends & Trade Sub-Group

- All domestic and export human consumption trade related aspects of chemical use and insect control
- All domestic and export animal consumption & other industries trade related aspects of chemical use and insect control
- Review current insect control techniques and their impact on trade
- Advise short term and long term market requirements
- Review new chemicals for their impact on trade

Members: Adrian Reginato (AWB) – Chairman, John Agnew (AgForce Grains), Allison David (Allied Mills), Jonathan Fahey (Dept of Primary Industries), Gavin Gibson (Pulse Australia), Jeremy Harrison (Ridley Agriproducts), Rosemary Richards (Australian Grain Exporters Association), Paul Rigoni (Barrett Burston), Darren Robey (SGS Australia), Ken Saint (Viterra) and John Stuart (GrainCorp).

Protectants Sub-Group

- Review current insect control techniques, their effectiveness and impact on the supply chain
- Review new protectants for compliance with Industry protocols

Members: Matthew Head (GrainCorp) – Chairman, Greg Daglish (DEEDI – Agri-Sciences QLD), Joanne Holloway (Industry & Investment NSW), Kerry Miles (Grain Storage Solutions), Manoj Nayak (DEEDI – Industry Services) and Garry Pannach (Norco).

For more details go to the NWPGP page on the GTA website: www.graintrade.org.au/nwpgp

Australian Grains Industry Conference (AGIC)

When: Monday 26 July to Wednesday 28 July 2010 **Where:** Crown Promenade Hotel, Melbourne

The Australian Grains Industry Conference is the 'must attend' event on the grains industry calendar. It provides a one stop opportunity to hear the latest developments in the industry, meet with clients and catch up with friends and colleagues.

The AGIC 2010 Program and social events, provides the perfect forum to discuss common issues, share current information, explore marketing aspirations and network informally with peers.

For regularly updated details about this year's conference go to: **www.ausgrainsconf.com**

Sponsorship opportunities are available. Registrations open in early June.

THE AUSTRALIAN GRAINS INDUSTRY CONFERENCE

JOINT (GRAIN & SEED) INDUSTRY/ AQIS MINISTERIAL TASKFORCE (MTF)

Export Certification Reforms

The Minister for Agriculture, Fisheries and Forestry, Hon Tony Burke MP, has implemented a joint Industry / AQIS ministerial taskforce to review and implement reforms to the delivery arrangements for the AQIS grain and seed export service.

This has arisen in line with the recommendations of the independent review of quarantine and biosecurity arrangements, that the 40 percent government contribution towards AQIS export certification functions lapse as scheduled on 30 June 2009.

New export fees and charges returning Industry to full cost recovery commenced in December 2009 with rebates in place to assist exporters to transition to the new fees and charges.

The joint Grain Industry – AQIS Ministerial Taskforce (MTF) has been re-established and is finalising the work plan to implement the grain export industry reform agenda.

Taskforce members are drawn from the following organisations;

Grain Trade Australia, Viterra, Australian Grain Exporters Association, Australian Oilseeds Federation, Australian Seed Federation, GrainCorp Operations, Pulse Australia, Sunrice, AWB Ltd, Australian Fodder Industry Association, Australian Cotton Seed Industry, Grain Pool Pty Ltd, CBH Group, Grains Council of Australia, Australian Nut Industry Council, Australian Quarantine and Inspection Service and Biosecurity Australia.

Geoff Honey, GTA CEO, is the Chairman of the MTF and Gerard McMullen has been appointed as the Project Manager.

Funding and completion

There are two components of the Export Certification Reform Package for the grain export industry:

1. $9.222 million for fee rebates to assist exporters to transition to the new fees and charges. This funding will be used to provide a 40 percent offset of the full cost impact on export industries to 30 June 2011. The rebates will be automatically applied to all invoiced fees and charges; and
2. $3.496 million for reform of the regulatory and export supply chain to 30 June 2011.

Reform package

A broad reform agenda was presented to Minister Burke in June 2009. The Ministerial Taskforce has identified six key areas:

1. Export Legislation;
2. Operational aspects of the export pathway including certification, inspection, capacity to provide service and approved arrangements;
3. Market Access;
4. System interfaces between industry and AQIS including export documentation;
5. Financial Analysis of various inspection models and existing AQIS fees and charges; and
6. Communication pathways and industry interface with AQIS.

Industry engagement

Industry representatives will be consulting with their member organisations. There will be a number of opportunities to provide input and feedback into the specific areas for reform. If anyone has any issues or ideas they would like to put forward please contact a member of the taskforce or email **grainsmtf@daff.gov.au**

Further details are available at www.graintrade.org.au/advocacy

NEW GTA WEBSITE IS NOW LIVE

Go to www.graintrade.org.au

One of GTA's core roles is keeping members and others informed whilst strengthening and promoting GTA's reputation through corporate, member and external communications.

The GTA website is a vital tool for communication throughout the grain industry and as such its provision of relevant, accurate and current information is continually reviewed.

The new website is a fully public website and you are encouraged to visit the new site to review its content.

If you have bookmarked the old NACMA website address, please replace this immediately as the previous domain is no longer available.

If you encounter difficulties accessing the new website please contact GTA.

GTA STRIVES TO ENHANCE THE SKILLS OF INDUSTRY PARTICIPANTS

The GTA Board has recently endorsed a Professional Development Strategy that elevates this role to a core GTA activity alongside grain standards, contracts/trade rules and dispute resolution.

Expansion of courses for Certificate in Professional Grain Trading

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

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

These modules have been delivered over the past four years with more than 300 Industry participants attending courses in 2009. A central plank of the new strategy is the development of five new courses which will allow, for the first time, elective subjects within the Certificate in Professional Grain Trading.

What's coming in 2010?

The following courses are in the final stages of development and likely to be available in 2010:

- Understanding Grain Markets
- Grain Accounting
- Export Contracts, Documentation & Chartering
- GTA Arbitrator Training

Looking further ahead…

The following course is currently being developed and it is anticipated it will be available in 2011.

- Grain Merchandising

Introduction of a GTA Dispute Resolution Service (DRS) Workshop: 2011

This workshop will benefit members and non-members alike. Both an individual's and a company's legal representatives may also benefit. Introduction of a specialist Dispute Resolution Service (DRS) Workshop will give participants an understanding of the GTA DRS and assist them to determine their course of action based on the provision of sound information.

What's available now?

There has been a terrific response to GTA's release of its 2010 Professional Development calendar. Numerous registrations are being received for the three compulsory modules of the Certificate in Professional Grain Trading. These modules have been scheduled across all grain producing States. As course numbers are limited, early registration is encouraged:

1. GTA Trade Rules, Contracts and Dispute Resolution:

Perth – 14 April 2010
Adelaide – 28 April 2010
Melbourne – 8 June 2010
Wagga Wagga – 11 May 2010
Sydney – 25 May 2010
Brisbane – 29 June 2010

Dennis Wise, Associate Professor
GTA Project Manager

2. GTA Grain Standards:

Perth – 21 & 22 September 2010
Adelaide – 14 & 15 September 2010
Melbourne – 23 & 24 August 2010
Parkes – 7 & 8 September 2010
Toowoomba – 30 & 31 August 2010

3. Grain Commodity Marketing & Trading:

Perth – 2 & 3 August 2010
Melbourne – 16 & 17 August 2010

PROCEDURAL POLICIES

GTA often receives enquiries or is challenged with regard to the method used to determine various Industry tools such as Location Differentials (LDs) and Grain Standards. Accordingly GTA publishes procedural policies as required. These policies detail the process and procedures used when developing Industry tools such as Location Differentials and Grain Standards.

The following two policies were released in February 2010 and are available on the GTA website:

1. Application process to become a GTA Registered Bulk Handling Company (BHC)

A key determinate of the success of the GTA Contract for Grain & Oilseeds in Bulk – Basis Track, "the Contract" is the confidence that grain traders have in the ongoing viability of the storage and handling companies (BHCs) registered by GTA.

GTA's role is to facilitate commercial activity across the grain supply chain. This is best achieved if GTA supplies to members certain information to assist the member to make a considered judgment about whether to conduct business with a particular bulk handling company.

GTA obtains information from bulk handling companies who wish to be listed as a GTA Registered Bulk Handler. This information is placed on the GTA website and GTA members are able to view this information and make their own commercial decision.

To view this policy go to:
www.graintrade.org.au/governance

Development of GTA Location Differentials (LD)

GTA LDs are widely used by the Australian grain industry to price "port based" contracts, in particular the GTA Contract No 2 Grain and Oilseeds in Bulk – Basis Track commonly called the "Track Contract".

The majority of grain produced in Australia will, at some stage, be priced and sold on a "port based" contract, which refers to the GTA LDs. Therefore, development of the GTA LDs must be transparent and receptive to the needs of the commercial grain sector in order that GTA fulfils its charter to "facilitate trade".

A **Location Differential** is the value attributed to a specific up-country grain site to an export port by the GTA Transport, Storage and Handling Committee for the purpose of valuing up-country grain on a 'port basis'. The up-country grain site must be operated by a GTA Registered Bulk Handler.

The **Natural Terminal Port** for a site with rail access will be the port with the lowest Location Differential. Where a site does not have rail access the Natural Terminal Port for that site will be the port with the lowest road-based Location Differential.

To view this policy go to:
www.graintrade.org.au/governance

Future Procedural Policies

GTA is drafting a policy "Development of Grain Standards" that will be presented to the GTA Standards Committee. With their recommendation, it will be presented to the GTA Board for approval.

MAJOR BIOSECURITY INVESTMENT TO PROTECT GRAIN MARKETS

By Catherine Norwood

Protecting the Australian grains industry from new pest and disease threats is a major focus of research being undertaken by the Cooperative Research Centre (CRC) for National Plant Biosecurity.

Projects range from an analysis of plant and insect genetics to determine how chemical resistance evolves, to pest monitoring via mobile phone networks; all protecting domestic food production and the $5 billion grain export industry.

The CRC for National Plant Biosecurity was first established in 2005 with a five-year charter to lead plant biosecurity research and education, protecting market access for all Australian plant-based industries. In response to emerging pest threats in the grains industry – particularly resistance of stored-grain insect pests to the most widely used grain fumigant phosphine – the CRC made a successful $30 million supplementary funding bid in 2007.

CRC chief executive officer Dr Simon McKirdy says this allowed the CRC to establish the Post-Harvest Integrity Research Program, in collaboration with the Grains Research and Development Corporation, ABB Ltd, CHB Group, and GrainCorp. Phosphine resistance among stored grain insect pests is a major focus of this program, which includes projects reviewing phosphine application techniques to improve effectiveness, new fumigation protocols in response to identified resistant insect populations, and genetic research to identify resistance mechanisms.

In 2009 the CRC also invested in the appointment of Associate Professor YongLin Ren to lead the stored grain research team at the Department of Agriculture and Food, Western Australia. Associate Professor Ren is investigating nitrogen as an alternative fumigant to phosphine. His work is part of a three-year appointment at Murdoch University, which also involves improving capacity by helping to train the next generation of stored-grain researchers.

CRC research to reduce biosecurity risks is focusing on a wide range of grain pests and diseases including the lesser grain borer, flat grain beetle, rust-red flour beetle, khapra beetle, Russian wheat aphid, wheat rust, ascochyta, fusarium head blight, karnal bunt and rice blast. Some, like the lesser grain borer are already endemic in Australian and the risk is one of resistance to phosphine increasing insect contamination of grain and threatening export markets.

Others, such as the Russian wheat aphid, are not yet present in Australia and research aims to reduce the risk of incursion and to develop industry responses in the event of an incursion, such as new aphid-resistant wheat varieties. Through the CRC, Australian researchers are involved in an international collaboration to identify how the Russian wheat aphid has evolved to overcome resistance bred into different wheat varieties in the USA and South Africa, in order to improve resistance in future varieties.

Dr McKirdy says the grains industry will also benefit from research as part of the CRC's other programs, from preparedness projects through to the adoption of research findings and new technologies. The CRC has established a network of remote microscopes in Australia and South East Asia, linked to the internet-based Pest and Diseases Image Library (PaDIL), hosted by Museum Victoria. PaDIL provides access to thousands of detailed images of insects and plant diseases and is already proving to be a widely used international diagnostic tool.

The CRC's network of remote microscopes further links frontline quarantine inspection officers and researchers in real time, with specialists who are able to quickly diagnose potential new insect or disease incursions. In conjunction with PaDIL, the CRC has developed the Plant Biosecurity Toolbox, which provides protocols for action when specific pests or diseases are identified. Dr McKirdy says being able to quickly identify and respond to new pest incursions significantly reduces the impact of an outbreak on production, and on markets.

Dr Simon McKirdy – CEO

Software is also being developed for use with mobile phones that allows surveillance staff to provide systematic data collection with near real-time monitoring, improving the level of detail and efficiency of biosecurity surveillance systems. The software is currently being trailed at CBH storages in Western Australia, and in a number of other surveillance programs including fruit fly monitoring in New South Wales.

"Monitoring is essential in maintaining access to increasingly competitive markets," Dr McKirdy says. "It is no longer enough for us to tell customers that a problem is 'not known' to exist. We have to be able to say it is 'known not to exist'. Any improvement we can make to our monitoring and surveillance systems will help to achieve this."

In the case of grains, the sampling processes used to test for contaminants are being reviewed and another project is working on a biosensor – attempting to mimic the way stored grain insects locate each other, in order to identify the presence of insects in storages.

Dr McKirdy says Australia is relatively free from many of the plant pests and diseases that affect agriculture in other countries and this has provided valuable competitive advantage in terms of securing market access and maintaining lower production costs. However faster and more frequent travel of people and products is making biosecurity threats increasingly more immediate.

For more information about the CRC for National Plant Biosecurity visit www.crcplantbiosecurity.com.au

(left) Rust-Red Flour Beetle; (above) Flat Grain Beetle; (right) Lesser Grain Borer Source: DEEDI

Export Contracts

FOB Contracts

A recent English legal decision relating to parties' obligations under FOB contracts may directly impact on Australian FOB sellers' obligations under contracts for the international sale of grain. The case is a timely reminder to all Australian FOB sellers of the impact a "choice of law" clause in an FOB contract can have.

KG Bominflot Bunkergesellschaft Fur Mineralole MBH & Co KG v. Petroplus Marketing AG (the "Mercini Lady") [2009] 2 Lloyd's Rep 679

This was a case involving the FOB sale of gas oil to be shipped on board the vessel "Mercini Lady" or substitute FOB Antwerp for shipment to Spain. The contract provided that the gas oil should meet certain specifications at the time of shipment, with a standard "conclusive evidence clause". After loading was completed, composite samples from shore tanks taken prior to loading showed that the gas oil conformed to the contractual specification on shipment. On arrival in Spain only four days later however, the receivers rejected the gas oil as not conforming to the contract specifications, and the FOB buyers commenced the subject proceedings. Bominflot, as the FOB buyers, alleged that Petroplus, as FOB sellers, were in breach of an implied term that the cargo would be of satisfactory quality following a normal voyage, and for a reasonable time thereafter.

Under a standard FOB contract, risk and all other responsibility passes to the buyers on shipment. The FOB seller's obligation was to load a cargo in accordance with the specifications in Antwerp. It did this, evidencing same with the production of a clean inspector's report.

The Court held that in the absence of any express term to the contrary, there was to be implied into the FOB contract a term under both the English Sale of Goods Act legislation, and common law, that the gas oil would be of satisfactory quality, not only when the goods were delivered on to the vessel, but also for a reasonable time thereafter. The Court also held that a term would also be implied at common law that the goods should remain in accordance with the contractual specification (if any) for such a reasonable time thereafter. The Court was influenced by previous English cases in which it had been held that the condition that the goods must be merchantable means that they must be in that condition when appropriated to the contract, and that they will continue so for a reasonable time. The Court reasoned as follows:

"… suppose that goods sold FOB contain an ingredient that does not render them of unsatisfactory quality or off-specification when delivered, but it has these consequences within a short period of time thereafter; is it not right and just that the FOB buyer should be entitled to hold the FOB seller to account for such an outcome? Put another way, is not the FOB buyer entitled to expect that, in exchange for the price, he will receive goods that will be of satisfactory quality for a sufficient time to enable him to have some beneficial use of the goods or to sell them on?" (at page 686)

As to what was to be deemed "reasonable time", the Court did not fix any hard and fast rule, rather preferring that such an issue be determined on a case by case basis, applying the yardstick of "reasonableness" in determining the content of obligations arising under the contract.

One of the difficulties with the judgment, is that the Court did not explain how one is expected to formulate the FOB seller's duty in such cases. In turn, this could impact on the burden of proof of the parties in any given dispute concerning off-spec cargo. In other words, if the duty is one to provide goods that, at the time of shipment, are (absent unusual circumstances) such as will remain good for a reasonable period, then it is arguable that an FOB buyer would be required to allege evidence of a problem with the cargo on shipment. A valid "conclusive evidence clause" would put paid to such an argument. If, however, the FOB seller was required to warrant that the goods would actually remain in the said condition throughout the reasonable period, then arguably, all the FOB buyer would need to do to prove its case would be to show unsatisfactory condition on arrival.

Comment:

Unlike the position under English law, under the various Australian Sale of Goods legislation, there is no general implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale. There are, however, some exceptional circumstances stated in the Australian legislation where a similar implied warranty may apply. Australian FOB sellers should bear this in mind when contracting. For instance, if GAFTA contracts or terms applied, then ordinarily English law would apply, such that this case would have direct consequences to an Australian FOB seller. If, on the other hand, the FOB contract was in GTA terms (or was otherwise subject to Australian law and jurisdiction), then this case would not have direct impact.

Maurice Thompson
Partner | HWL Ebsworth Lawyers

Voyage Charters – Know your "Port" from your "Berth"

Knowing whether your voyage charter is a "berth charter" or a "port charter" could potentially save (or cost) you hundreds of thousands of dollars in demurrage.

While there are many different types of voyage charter, all voyage charters can be divided into "port charters" and "berth charters".

While agreeing whether a fixture is one or the other does not usually feature in negotiations over charterparty terms, and many parties to a charter will not know (or even care) whether their fixture is one or the other, the differences can be significant in dollar terms and are worth considering.

Under a berth charter, the vessel cannot tender a valid Notice of Readiness (NOR) and time will not count (with certain qualifications) until the vessel is in the loading or discharging berth. Under a port charter, NOR may be tendered and time will usually start when the vessel has arrived off the port.

The distinction is particularly important at ports prone to congestion.

As a general rule, a charterer will prefer a berth charter (where time starts to count as late as possible) while an Owner will prefer a port charter (where time starts as early as possible).

In the Happy Day[1], the vessel arrived off the port of Cochin on 25 September 1998 to discharge a cargo of wheat. The vessel was prevented sailing to berth due to tides, but nevertheless tendered her notice of readiness on arrival at the port. The vessel commenced discharge on 26 September 1998 but did not complete discharge until 25 December 1998.

Owners claimed demurrage. Charterers responded that on the terms of the charter, time only commenced following tender of a valid notice of readiness and that as it was a berth charter (a fact not in dispute) time never started to run and that no only were Owners not entitled to demurrage, they were required to pay despatch.

The Court agreed, the decision being varied on appeal to the Court of Appeal[2] where that Court held that where Charters accept the vessel as ready to discharge without express reservation in respect of the NOR, time would commence to run on the commencement of discharge.

But how do you tell between a "port charter" and a "berth charter", particularly when charters are often expressed in terms of "one good safe port/berth"?

That was the sole issue which fell for consideration in Novologistics SARL v Five Ocean Corp [2009] EWHC 3046.

That case concerned an arbitration in which the experienced arbitrators had found that the relevant charter was a port charter and had allowed Owners demurrage of approximately US$500,000.

Unlike the Happy Day, the delays to the vessel were incurred between tender of NOR at the discharge port, and commencement of discharge some 20 days later.

Charterers appealed.

The form of the charter was in "recap" only and did not refer to a standard charterparty form.

The charterparty included, inter alia, the following terms:

"one good and safe chrts' berth terminal 4 stevedores Xingang to one good and safe berth Cadiz and one good and safe berth Bilbao [the "opening term"]

n.o.r./time-counting as per below c/p terms

DETAILS TO THE C/P

CLAUSE 2

[1] The vessel to load at one good and safe port/ one good and safe charterers' berths Xingang and to discharge at one good and safe port/one good and safe charterers' berth Cadiz and at one good and safe port/ one good and safe charterers' berth Bilbao.

[2] Shifting from anchorage/warping along the berth at port of load and at ports of discharge to be for owners' account, while all time used to count as lay time. ….

CLAUSE 4

At port of load and at port discharge notice of readiness to be given and accepted in writing and only during the period from 08.00 hours to 17.00 hours Mondays to Sundays…..

CLAUSE 6

…..At port of load and at ports of discharge time to commence to count at 14.00 hours if written notice of readiness is given during ordinary office hours before noon or at 08.00 hours the next day if written notice of readiness is given during ordinary office hours after noon"

In allowing the appeal and reaching the conclusion that the charter was a berth charter, Mr Justice Gross held that the "opening terms" clearly indentified the fixture as a berth charter. His Honour considered these words alone to be sufficient "assuming that the opening term is not overridden by any other provision/s of the charterparty".

He also considered that that the opening term provided expressly for Charterers to nominate the berth in Xingang.

In dealing with the ambiguity of Clause 2 (which referred to "one good and safe port/one good and safe charterers' berth) His Honour found that on a proper construction, clause 2 introduced a safe port warranty and reiterated the safe berth warranty and was not in conflict with or intended to depart from the "opening terms".

Conclusion

The distinction between berth and port charters is often overlooked by Owners and Charterers alike. This is in part due to the fact that a vessel's master will not know whether he is being employed on a berth or port charter and will customarily give NOR on arrival at or off the port.

The cases above however illustrate that care should be taken as a great deal of money may be involved.

Geoff Farnsworth
Principal | Macpherson+Kelley Lawyers

[1] [2001] 1 Lloyds Law Reports 754
[2] [2002] 2 Lloyds Law Report 487

Recent Awards at Arbitration

The outcome of these recent arbitrations should provide food for thought for anyone thinking of entering into dispute resolution.

Check the details of your contract – Fast Track Arbitration 93

Arbitration Committee – Bob Watters

Claim: This dispute relates to a delay in making a payment under a contract and the seller's subsequent repudiation of the contract and non-delivery of the balance of the contract.

Issue for determination:

Did the Buyer's (Claimant's) delay in processing payment justify the repudiation of the contract by the Seller?

Details:

The parties entered into a Multi Grade Barley contract for the sale, by the Seller to the Buyer, of 300mt of barley.

The signed contract referenced a Delivery Card Number (Card A). The payment term was "Cash 15 days, end week of delivery/transfer."

The contract was sent to the Seller under cover of a letter which stated: "To enable us to pay you in a timely manner, it is essential all details on the Confirmation of Contract are accurate. Please ensure that delivery complies with the contract specifications, including; Delivery Card Number".

The Seller delivered 125.31mt of barley under the contract against a different delivery card (Card B) than the one referenced in the contract (Card A).

A delay in payment resulted because delivery was recorded against an NGR other than the NGR identified in the contract.

The Seller believed it was the Buyer's responsibility to ensure the correct NGR appeared on the contract. The Seller claimed it was default by the Buyer's in meeting this obligation that resulted in the repudiatory delay in payment and therefore the Seller was entitled to bring the contract to an end.

Award findings:
The AC found:

- Despite the incorrect NGR appearing on the contract, the Seller signed the contract. The Buyer was entitled to assume that, in the absence of any corrections, the contract was correct.
- Any breach of the payment term by the Buyer, was caused, or at least significantly contributed to by the act of the Seller.
- The delay in payment was not repudiatory. It was an error, contributed to by the Seller, which was remedied when bought to the attention of the Buyer.

Award:

The Buyer (Claimant) was successful and the Seller (Respondent) was ordered to pay $21,137.49 for the non-delivery of 174.69 metric tonnes of barley and the Seller's arbitration and legal fees.

Take out:

Always check all details on any contract you sign are correct.

Contract variations can be problematic – Arbitration 100

Arbitration Committee – John Macqueen (Chairman), Terry Deacon and Tim Teague

Claim: The dispute concerns alleged breaches of express and implied terms under a contract between the parties for the sale of 240t of chickpeas.

Issue for determination:

The Claimant alleged the Respondent failed to meet its obligation to have containers available in a reasonable period of time for the Claimant to pack the goods for shipment during the contract shipment period, and that the Respondent failed to provide appropriate shipping instructions during the contract period.

The Respondent alleged the Claimant failed to deliver in accordance with the Contract.

Details:

The Claimant (Sellers) and the Respondent (Buyers) entered into a DCT Contract for 240t of Chickpeas.

The Sellers called for shipping instructions from the Buyers who advised the request for shipping instructions had been forwarded to the final buyer, (Party X).

Party X forwarded 'Container Packing Instructions' directly to the Sellers (the Original Booking) including where the containers would be packed, the nominated vessel, the estimated time of departure, the freight forwarder and the relevant shipping company.

The freight forwarder advised Party X the containers could not yet be released as per the Original Booking and confirmed alternate arrangements. The Sellers provided updated container release information that the containers would not be available until the new date.

The Seller's agent took delivery of 10 empty food-grade containers for packing and intended shipment. The Buyers requested to transfer the booking to another vessel (the New Booking).

The Sellers informed Party X and the Buyers it would proceed in accordance with the new instructions and advised the Packer. Party X informed the Sellers to proceed as per the Original Booking instructions. The Packer could not revert to the Original Booking because the containers were not supplied in time to have the goods packed.

The Sellers requested Party X roll the shipment to the next available vessel. Party X could not do so as it would bring the shipment outside the contract period.

Award findings:
The AC found:

- The Respondent's release of the containers to the Claimant was not within 'reasonable time' for the Contract to be fulfilled;
- However even if it was, the parties agreed to vary the Contract from the Original Booking to the New Booking;
- That in breach of the Contract (and the New Booking), the Respondent attempted to unilaterally vary the Contract back to the Original Booking and in further breach failed to supply further shipping instructions to the Claimant in accordance with an implied term of the Contract.

Award:

The Claimant was successful. The Respondent was ordered to pay damages of $39,960 + interest and the Claimant's arbitration and legal fees.

Take out:

Do not vary contracts or bookings without the approval of all parties concerned.

Insolvency, don't make assumptions – Arbitration 124

Arbitration Committee – Ron Storey (Chairman), Graeme Dillon and Allan Wallace

Claim: This dispute concerns the insolvency of the Claimants and whether, in accordance with the insolvency, the Respondent is required to make payments under contracts between the parties.

Issue for determination:

Is the Respondent required to make payments under contracts between the parties?

Details:

The Claimants entered into contracts with the Respondent, for the sale of wheat, destination buyer's call, payment terms, 30 days from the end of week of delivery.

The Respondent sent a letter to the Claimants advising it would not make further deliveries under the Contracts due to the Claimants' failure to make payments under the Contracts, and requested payment.

The Respondent sent a further letter to the Claimants advising the Contracts would be terminated in accordance with Clause 7(d) of the Contracts.

Provisional liquidators were appointed to the Claimants. The Claimants sent a facsimile to all contract holders notifying that an insolvency event had occurred and provisional liquidators had been appointed.

The Claimants sent correspondence and invoices to the Respondent advising the Contracts were washed out and they had suffered loss and damages in the amount of $75,000.

Award findings:

The AC found:

- The GTA Trade Rules were not incorporated into the Contracts between the parties, and as a result, the Standard Terms and Conditions within the Contracts govern all disputes arising out of or in connection with the Contract.
- In accordance with Clause 7 of the Contracts, the Respondent had a legitimate right to call the Claimant in default as a result of the notification by the Claimant that it would shortly enter voluntary liquidation. Even if the Respondent had not called the Claimant in default in accordance with Clause 7, the appointment of the receivers would constitute a default at Clause 7 and not an insolvency event as required by the GTA Trade Rules.

Award:

The Claim was dismissed and the Claimant was ordered to pay the Respondent's arbitration and legal fees.

Take out:

Do not make assumptions regarding your position in existing contracts when insolvency occurs.

NATIONAL MEASUREMENT INSTITUTE

On 1 July 2010, trade measurement will become the responsibility of the Commonwealth and the National Measurement Institute (NMI) will become the regulatory body.

The NMI is Australia's peak measurement organisation, a division of the Department of Innovation, Industry, Science and Research. NMI brings together physical, chemical, biological and legal measurement into the one organisation. NMI was formed in 2004 through the amalgamation of the National Measurement Laboratory, (then part of CSIRO), the National Standards Commission and the Australian Government Analytical Laboratories.

With the amalgamation of trade measurement, NMI will represent a unique institutional model – a genuine 'one stop shop' for measurement around the country.

Trade measurement, or weights and measures as it was traditionally known, has a long history. In fact, trade measurement is as old as trade itself. Units of measurement themselves have had an interesting development. The international metric system was first established in 1875 with the signing of the Treaty of the Metre (or Convention du Mètre). Australia became a signatory in 1947. It was not until 1960, with the establishment of the International System of Units (or le Système international d'unités) that the modern metric system was born.

In Australia, weights and measures were the responsibility of the colonies. With federation in 1901, the Commonwealth was nominally responsible for trade measurement. However, for the last 108 years, the Commonwealth chose not to enact comprehensive trade measurement legislation.

All this changed when the Council of Australian Governments (COAG) agreed in April 2007 to the introduction of a national system of trade measurement. Since that time, the NMI has been working towards a smooth transition of trade measurement responsibilities from the states and territories.

The most significant advantage for the grain industry is that under national trade measurement legislation, there will be one system replacing eight current systems. Although throughout the 1990's, the states and territories enacted Uniform Trade Measurement Legislation (UTML), many of the jurisdictions had different interpretations of the legislation and different administrative processes and all the jurisdictions had differing licensing arrangements. For companies with servicing licences, the new national system will remove the need to hold multiple licenses across state borders.

Dr Valérie Villière, General Manager of Legal Metrology, is keen to emphasise that the only significant change to trade measurement legislation, aside from going national, is the introduction of the Average Quantity System (AQS). "Most of the legislative transition has been focused on minimising impact on business. As a result, we have sought to translate the already established framework in the state and territory jurisdictions of the Uniform Trade Measurement Legislation (UTML) into the Commonwealth regulations. The new regulations will allow businesses to adopt AQS or remain with their current process sampling and quantity and packing procedures."

AQS is a method based on internationally set statistical sampling techniques. AQS uses the measure of the average quantity, together with the 'scatter' or standard deviation around the average of a sample of prepackaged articles in order to gauge regulatory compliance. It is a packaging practice that puts Australia on an equal footing with international competitors. The advantage of the AQS is that it may allow businesses to avoid 'over-filling'.

There have been in the past two years, four consultation processes centring on amendments to the National Measurement Act 1960 (Cth) and the establishment of the National Trade Measurement Regulations 2009 (Cth).

In speaking of the challenges in the project, Dr Villière states: "Obviously, a key focus for the NMI has been to establish a good rapport with our industry stakeholders. The consultation processes have been part of that process but that is not all that we are doing. We will be initiating a new trade measurement industry consultation group that will meet on a biannual basis. In formalising the dialogue with a broad cross-section of industry, we hope to maintain the flow of information, issues and ideas. For us to engender fairness and transparency in the market place, we have to demonstrate that in our own consultative ethic."

The consultation mechanisms have been streamlined with legal metrology policy, pattern approval and trade measurement functions all centralised into the one body. As a result decision making and implementation strategies around such key issues as national test procedures and quality measurement associated with grain can be achieved in a more timely way.

The National Trade Measurement Project is now in its final count down to the transition date of 1 July 2010.

Dr Villière acknowledges that the next four months will be a very busy time for the National Trade Measurement Transition team: "Our focus will be on consolidating the trade measurement work force planning so that our new staff are trained, equipped and capable of meeting the challenge of building the new national system as well as rolling out the necessary communications material to keep business and consumers alike fully informed."

For more information on trade measurement, visit the National Measurement Institute website www.measurement.gov.au

TELL US YOUR NEWS!

GTA publishes NewsInGrain three times each year – the next edition will be in July. Copies will be distributed at the Australian Grains Industry Conference in Melbourne.

GTA is always pleased to receive articles which are informative and of interest to those involved in the grain industry. As such we invite you to forward any Industry news, notices or relevant information to GTA. Send your news to *admin@graintrade.org.au* in word format and ensure any images are sent as high resolution jpegs.

NewsInGrain is distributed without cost to an extensive network across the grain industry including GTA members, Government, national/international contacts and friends of GTA and as such it is an effective communication tool.

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

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