



The Rice Marketing Board

FOR THE STATE
OF NEW SOUTH
WALES

Dear NSW Rice Growers,

Overview of Determination by the New South Wales Civil & Administrative Tribunal in relation to information request of the Rice Marketing Board for the State of New South Wales under the *Government Information (Public Access) Act 2009*

On 16 January 2020, the NSW Civil & Administrative Tribunal (“NCAT”) issued a determination in relation to a request made by a Victorian-based company, Forbidden Foods Pty Ltd, to the Rice Marketing Board for the State of New South Wales (“the RMB”) under the *Government Information (Public Access) Act 2009* (“GIPA Act”). Given this determination has already attracted media comment, the purpose of this overview is to provide NSW rice growers with an accurate account of the circumstances leading up to the NCAT determination. If the description of the process leading to NCAT’s determination that is provided in this overview seems somewhat lengthy, it is because the RMB considers that rice growers deserve a proper explanation of the process.

Background Information: The RMB is constituted under the *Rice Marketing Act 1983 (NSW)* (“the Act”). Under Section 52 of the Act, rice is divested from NSW rice producers to the RMB and the RMB is responsible for ensuring an orderly marketing arrangement and one which optimises returns to NSW rice growers. There are no trade restrictions applied to the importation of rice into Australia but many of the countries that import rice impose significant restrictions – there is no global rice market and Australian exporters of rice have to deal with different requirements in each of the markets into which they wish to sell Australian-grown rice.

NSW is overwhelmingly the largest producer and exporter of Australian-grown rice. In the absence of a global rice market, the RMB considers that the interests of NSW rice growers are best served by having NSW-grown rice marketed by a single agent. Accordingly, the RMB has issued a Sole and Exclusive Export Licence (“the SEEL”), to Ricegrowers Limited, trading as SunRice (“SunRice”). The RMB also oversees the domestic marketing of NSW-grown rice and does this through what are

currently 11 licenced authorised buyers (the RMB issues these licences and there is no restriction on the number of domestic authorised buyer's licences that can be issued).

Background to the NCAT Judgement: As a statutory Board, the RMB is bound by a range of laws, acts and regulations, one of which is the *GIPA Act* – this Act dictates that unless there is an overriding public interest against disclosure of information requested of Government entities (and the RMB is such an entity) such requests should be met.

In 2018, the RMB received an application for information under the *GIPA Act* from Forbidden Foods Pty Ltd. Forbidden Foods requested all documents held by the RMB in relation to any decisions or considerations taken by the RMB between 1 January 2013 and 28 February 2018 that related to the RMB's decision/s to grant the SEEL to SunRice. The RMB sought legal advice from the NSW Department of Industry's Governance and Information Requests Unit and responded to Forbidden Foods' legal advisors by indicating that it thought the request was unreasonable because of the extent of documentation being requested. Forbidden Foods subsequently narrowed the scope of its request. However, the amended request still included documents/information provided by SunRice to the RMB on a confidential or commercial-in-confidence basis. Further, it included requests for reports commissioned by the RMB regarding SunRice's performance under the SEEL – these reports were also identified as confidential.

The RMB's review of Forbidden Foods' original and amended applications was undertaken by the nominated (Government appointed) Members of the Board because the Board took the view that the involvement of the elected directors, who also sit on the SunRice Board, might be seen as a conflict of interest. After the review of the amended application, the RMB indicated it was willing to release some of the requested information but that it remained unwilling to release documents that were identified as confidential or considered to be commercially sensitive. The Privacy Commissioner subsequently advised the RMB that because its decision had not been taken by its Principal Officer (the Chair), the decision was invalid. As the then Chair of the RMB was one of the nominated Members of the Board who had been involved in the decision to withhold some of the documents requested by Forbidden Foods, she could not exercise the responsibility of a Principal Officer (nor could any other of the RMB's nominated Members) and the responsibility for the GIPA matter thereafter was delegated to the RMB's Board Secretary.

Upon assuming responsibility for the GIPA request by Forbidden Foods, the RMB's Board Secretary considered each document that was requested and subsequently advised Forbidden Foods that she was unwilling to release information provided to the RMB, or to the NSW Government by the RMB, where the information had been provided under conditions of confidentiality, or where she considered the release of the information would compromise the commercial interests of third parties. Forbidden Foods then referred the matter to NCAT. Subsequently, Forbidden Foods, SunRice and the RMB made submissions to and appeared before NCAT. The NSW Crown Solicitor's Office acted as the RMB's legal counsel in the lead-up to and at the NCAT hearing. The RMB Board Secretary also gave evidence at the NCAT hearing.

In its submission to NCAT, Forbidden Foods acknowledged that it wanted to export NSW-grown rice and that it would use information that might be provided to it as a result of its GIPA request to challenge the vesting construct when it was next reviewed by the NSW Government.

NCAT's determination is lengthy and complex (it can be found at <http://www.caselaw.nsw.gov.au/>) and more time will be required to fully comprehend all aspects of the legal basis for NCAT's determination - in essence, my understanding is that NCAT acknowledges that some of the documents that the RMB was unwilling to disclose were identified as confidential but contends that on balance, it is in the public interest that they be released to the public. Further, that NCAT also acknowledges that there is some commercial sensitivity attached to the information that the RMB was withholding, but not as much as the RMB and SunRice have claimed and that, on balance, the public interest is also best-served by it being released to the public.

Conclusion: There may be more media commentary about NCAT's determination to follow and if there is, there may be references to the RMB being the last remaining single-desk in Australia; past Productivity Commission Reports that recommend the removal of vesting; and assertions that the presence of dual directors on the RMB compromises vesting and that vesting is limiting the potential of the rice industry – such propositions are not new and are, of course, contested by the RMB e.g. vesting is subjected to a review by the NSW Government every five years and NSW growers have overwhelmingly indicated their support for the arrangement during each of the reviews; a recent independent review of the RMB's governance commissioned by the NSW Government confirmed that there are proper arrangements in place to ensure that the three elected directors on the RMB, and the Board itself, are not placed in situations where they/it could potentially be conflicted; and that the potential for further growth of the rice industry in NSW beyond the Riverina was the subject of a recent independent review. As a NSW rice grower, you would also know that the RMB undertakes an annual assessment of SunRice's performance under the SEEL and that the resulting determination of the financial benefit arising from having a single export agent is made known to you - I encourage you to keep all of these things in mind if you come across negative media commentary in response to the NCAT determination.

If you have any further enquiries in relation to this matter, you are encouraged to contact the RMB's Board Secretary (Ms Carol Chiswell) on 02 6953 3200 or email to secretary@rmbnsw.org.au.

John Culleton
Chair, Rice Marketing Board for the State of New South Wales

22nd January 2020