



Australian
Competition &
Consumer
Commission

**Co-operative Bulk Handling Limited
Port Terminal Services Access Undertaking**

Decision to accept

29 September 2011



© Commonwealth of Australia 2011

This work is copyright. Apart from any use permitted by the *Copyright Act 1968*, no part may be reproduced without permission of the Australian Competition and Consumer Commission. Requests and inquiries concerning reproduction and rights should be addressed to the Director Publishing, Australian Competition and Consumer Commission, GPO Box 3131 Canberra ACT 2601.

Contents

| | |
|--|------------|
| Contents | ii |
| Glossary | iii |
| Summary..... | v |
| ACCC view on key issues | vi |
| Overall approach | vi |
| Publish-negotiate-arbitrate | vi |
| Capacity management | vii |
| Variation to the Standard Access Terms..... | vii |
| Variation of Port Terminal Rules..... | viii |
| The ACCC's role under the Proposed 2011 Undertaking | viii |
| Approach to pricing | ix |
| Decision | x |
| 1 Background | 1 |
| 1.1 Process leading to the Revised Undertaking..... | 1 |
| 1.2 Public consultation process..... | 3 |
| 1.3 Timeline | 5 |
| 1.4 Further information | 6 |
| 2 Decision making framework | 7 |
| 2.1 Legal test for assessment | 7 |
| 2.2 Access test..... | 9 |
| 3 Submissions on Draft Decision | 11 |
| 3.1 CBH submission | 11 |
| 3.2 Third party submissions | 11 |
| 4 ACCC view on CBH's Revised Undertaking | 13 |
| 4.1 Term, expiry and continuity arrangements | 13 |
| 4.2 Publish-negotiate-arbitrate framework | 13 |
| 4.3 Publication of information and ring fencing..... | 15 |
| 4.4 Negotiation..... | 19 |
| 4.5 Arbitration..... | 19 |
| 4.6 Capacity management..... | 20 |
| 4.7 Standard Access Terms..... | 28 |
| 4.8 Port Terminal Rules | 30 |
| 4.9 ACCC role under the Revised Undertaking..... | 32 |
| 4.10 Approach to pricing | 36 |
| 5 Decision | 38 |
| Appendix A: Bulk wheat export markets analysis..... | 39 |

Glossary

| | |
|----------------|--|
| ABA | Australian Bulk Alliance Proprietary Limited |
| ABARES | Australian Bureau of Agricultural and Resource Economics and Sciences |
| ACCC | Australian Competition and Consumer Commission |
| the Act | <i>Competition and Consumer Act 2010 (Cth)</i> (previously the <i>Trade Practices Act 1974 (Cth)</i>) |
| AQIS | Australian Quarantine and Inspection Service |
| AGEA | Australian Grain Exporters Association |
| BHC | bulk handling company |
| CBH | Cooperative Bulk Handling Limited |
| draft revision | Draft revised version of the Proposed Undertaking provided by CBH on 16 August 2011 |
| Emerald | Emerald Group Australia Pty Ltd |
| ETA | estimated time of arrival |
| FCFS | ‘First come, first served’ system of capacity allocation |
| FLCWA | Freight and Logistics Council of Western Australia |
| Gavilon | Gavilon Grain Australia Pty Ltd |
| GrainCorp | GrainCorp Operations Limited |
| IAA | The Indicative Access Agreement attached to the Revised Undertaking at Schedule 1 |
| Louis Dreyfus | Louis Dreyfus Commodities Australia Pty Ltd |
| mmt | million metric tonnes |
| MPT | Melbourne Port Terminal |

| | |
|----------------------------------|---|
| PGA | Pastoralists' and Graziers' Association of Western Australia |
| PC | Productivity Commission |
| Plum Grove | Plum Grove Pty Ltd |
| Port Terminal Services Agreement | CBH's port terminal services agreement, which has been submitted as the Indicative Access Agreement to the Revised Undertaking at Schedule 1 |
| Proposed Undertaking | The access undertaking received from CBH on 31 March 2011 |
| PTR | Port Terminal Rules as attached at Schedule 3 of the Revised Undertaking |
| Revised Undertaking | The revised access undertaking received from CBH on 20 September 2011 |
| Shipping Stem | as defined in section 2.2 |
| Tribunal | Australian Competition Tribunal |
| QRNF | Queensland Rail National Freight |
| Viterra | Viterra Operations Limited |
| WEA | Wheat Exports Australia |
| WEAS | Wheat Export Accreditation Scheme 2008 |
| WEMA | <i>Wheat Export Marketing Act 2008</i> (Cth) |
| 2009 Undertakings | Access undertakings for GrainCorp Operations Limited, AusBulk Ltd (now Viterra Operations Limited) and Co-operative Bulk Handling Limited accepted by the ACCC on 29 September 2009 |

Summary

On 28 September 2011, the Australian Competition and Consumer Commission (ACCC) made a decision pursuant to s. 44ZZA(3) of the *Competition and Consumer Act 2010* (Cth) (**Act**) to accept a proposed access undertaking lodged by Co-operative Bulk Handling (**CBH**) on 20 September 2011 (**Revised Undertaking**). The reasons for the ACCC's decision are set out in this document.

The Revised Undertaking relates to the provision of access to services for the export of bulk wheat at four grain terminals operated by CBH in Western Australia. These terminals are: Albany, Esperance, Geraldton and Kwinana.

CBH has submitted the Revised Undertaking to meet the access test provisions of the *Wheat Export Marketing Act 2008* (Cth) (**WEMA**), required for it or an associated entity to be accredited as a bulk wheat exporter.

The ACCC is also issuing final decisions on proposed undertakings from Australian Bulk Alliance Proprietary Limited (**ABA**) regarding its operations in Victoria and Viterra Operations Limited (**Viterra**) regarding its operations in South Australia. On 22 June 2011, the ACCC accepted an undertaking from GrainCorp Operations Limited (**GrainCorp**) regarding its operations on the east coast of Australia.

CBH, GrainCorp and Viterra each have in place an access undertaking accepted by the ACCC in 2009 (**2009 Undertakings**), while ABA is providing an undertaking to the ACCC for the first time. The ACCC considers that the 2009 Undertakings are a relevant matter in the assessment of CBH's Revised Undertaking, in accordance with s. 44ZZA(3)(e) of the *Competition and Consumer Act 2010* (Cth) (**Act**). This is discussed further in section 2.1.1.

The ACCC has considered each undertaking on its own merits and notes that, while undertakings accepted by the ACCC from each bulk handling company (**BHC**) reflect the particular circumstances of that company, there are certain aspects of the undertakings for which the ACCC has sought a consistent approach across the bulk wheat export industry.

CBH initially submitted a Proposed Undertaking on 31 March 2011 (**Proposed Undertaking**) pursuant to Division 6 of Part IIIA of the Act. In order to address ACCC concerns with aspects of the Proposed Undertaking, CBH made changes which are reflected in the Revised Undertaking submitted on 20 September 2011. It is this undertaking that the ACCC is making a decision on in this document.

ACCC view on key issues

Overall approach

The overall approach of the Revised Undertaking continues that contained in the 2009 Undertaking. This approach includes the following mechanisms for the provision of access:

- a publish-negotiate-arbitrate model for price and non-price terms of access
- obligations to provide non-discriminatory access and not to engage in conduct with the purpose of hindering access
- obligations to negotiate access in good faith
- provisions for arbitration of access disputes
- an auction system of capacity allocation, and
- requirements to publish key port information.

The ACCC is of the view that the overall approach to access provision as provided in the publish-negotiate-arbitrate arrangements of the Revised Undertaking is appropriate and that prescriptive ex ante price regulation is not necessary in the case of CBH's Revised Undertaking. Further, it is the view of the ACCC that it is not necessary to strengthen the publish-negotiate-arbitrate arrangements with ring-fencing rules for CBH at this time, given that CBH has provided for increased transparency of its port operations in the Revised Undertaking, as discussed in Section 4.3. The experience during the term of CBH's 2009 Undertaking and the ACCC's reasons for reaching these views are set out in Chapter 4 of this Final Decision.

The ACCC also is of the view that the three-year term of the Proposed 2011 Undertaking is appropriate.

Publish-negotiate-arbitrate

The ACCC has reviewed the publish-negotiate-arbitrate provisions of the Revised Undertaking and considers that, on balance, they are adequate to provide the transparency necessary for access seekers to obtain fair access to CBH's port terminal services. It is therefore the ACCC's view that more prescriptive provisions, such as pricing or ring-fencing rules, are not required. The changes made in the Revised Undertaking include:

- a requirement for CBH to provide to the ACCC a copy of any port terminal services access agreement entered into with its own trading division
- a requirement for CBH to publish detailed information on the available and remaining capacity at each of its port terminal facilities and information on stocks at port (i.e. tonnage and type of all commodities as well as the top three wheat grades at each port).

These issues are discussed in Section 4.2, 4.4 and 4.5 of this Final Decision.

Capacity management

It is the ACCC's view that the auction arrangements for allocating port terminal capacity established in CBH's 2009 Undertaking and retained in CBH's Revised Undertaking have provided an effective basis for management of capacity at CBH's port terminals. In particular, the ACCC notes:

- the high level of transparency provided by the auction system
- the high level of flexibility available to exporters through the ability to transfer to other exporters any port terminal capacity that they are not able to utilise
- the allocation of port terminal capacity to those exporters that value a given shipping slot most (i.e. via the auction premium mechanism).

The ACCC considers that these auction arrangements promote economic efficiency at peak times when demand for port terminal capacity exceeds available port terminal capacity. The ACCC notes that the auction system has widespread industry support.

While CBH originally proposed a two-tiered capacity allocation system, incorporating a base load arrangement and auction arrangements, following concerns expressed by industry and the ACCC CBH has removed the two-tiered system from its Revised Undertaking. It is open to CBH to propose a variation to an accepted undertaking under s. 44ZZA(7)(b) of the Act and it may in future, following consultation with industry, wish the ACCC to consider a revised version of its existing capacity allocation system.

These issues are discussed in Section 4.6 of this Final Decision.

Variation to the Standard Access Terms

Each of the 2009 Undertakings accepted by the ACCC applying to GrainCorp, CBH and Viterra contain provisions that enable the port operator to vary their standard terms for access to port terminal services.

The Standard Access Terms, which include the Reference Prices and the Standard Port Terminal Terms for port terminal services, provide a clear starting point for negotiations between access seekers and CBH. The Standard Access Terms are critical in ensuring access seekers can effectively negotiate with CBH and also assist in ensuring that the costs of negotiation and/or arbitration are not excessive.

The ACCC considers that while all elements of the Standard Access Terms are subject to negotiation between CBH and access seekers, the Standard Access Terms represent an important starting point for those negotiations and provide an appropriate level of certainty and clarity for the parties seeking to access port terminal services.

In its Draft Decision released on 23 August 2011 (**Draft Decision**), the ACCC was of the view that it would not be appropriate for CBH to be able to unilaterally vary the Standard Port Terminal Terms because this would result in a significant reduction in the clarity and certainty provided to customers through the provision of the Standard

Port Terminal Terms in their negotiations with CBH for access to port terminal services.

In response to this concern, the Revised Undertaking contains amended subclauses 6.1(a), (c) and (d) to provide that CBH will not be able to unilaterally vary its Standard Port Terminal Terms without ACCC approval.

This is discussed further in Section 4.7 of this Final Decision.

Variation of Port Terminal Rules

Each of the 2009 undertakings accepted by the ACCC applying to GrainCorp, CBH and Viterra contain a version of the Port Terminal Rules (**PTR**), with a process for their variation. These differ to some extent between the different undertakings. Each port operator has varied its PTRs since acceptance by the ACCC and different issues have arisen with these variation processes.

In assessing the PTRs submitted by CBH and the PTR variation process, the ACCC has taken into consideration the experience of each of the port operators' variation processes because it considers that a consistent approach across the industry is appropriate in order to ensure an efficient, meaningful and transparent consultation process. Section 4.8 of this Final Decision sets out the minimum standards the ACCC considers necessary for an effective PTR variation process.

The PTR variation process provisions included in CBH's Revised Undertaking fulfil these minimum standards and are appropriate.

This is discussed further in Section 4.8 of this Final Decision.

The ACCC's role under the Proposed 2011 Undertaking

The Revised Undertaking provides for certain powers and functions of the ACCC. These include a mechanism allowing the ACCC to object to a proposed variation by CBH, a specific information gathering provision, an approval power acknowledging that decision making functions under the undertaking may be undertaken by particular Commissioners, and inclusion of an explicit reference to the ACCC's monitoring role. The ACCC considers that these powers and functions should be consistent across the Undertakings of all the port operators.

The Revised Undertaking includes an objection notice power for the ACCC, which the ACCC considers to be appropriate. The ACCC objection notice provisions included in CBH's Revised Undertaking have been amended to remove the mechanism allowing CBH to seek arbitration should it dispute an objection notice issued by the ACCC with regard to a proposed variation of the PTRs. The ACCC considers that this is appropriate given that regulatory decisions of an independent regulator should not be appealed through private arbitration. Rather, this is the proper role of the Court.

The Revised Undertaking also includes an information gathering power, which the ACCC considers to be appropriate, in response to the ACCC's view that such a power would be necessary to enable it to properly discharge the functions required by the Revised Undertaking. This is an issue for which the ACCC considers a consistent approach across the industry is appropriate.

These issues are discussed in Section 4.9 of this Final Decision.

Approach to pricing

Each of the 2009 undertakings accepted by the ACCC applying to GrainCorp, CBH and Viterra contain provisions requiring the port operator to publish reference prices for the supply of port terminal services. As the proposed 2011 undertakings of each of the port operators do not include ex ante pricing, the ACCC has not assessed the appropriateness of particular prices for port terminal services. Additionally, the ACCC is of the view that a relatively 'light-handed' approach to pricing be maintained in the Revised Undertaking.

The ACCC has considered the prices under the 2009 Undertakings in order to determine whether the publish-negotiate-arbitrate approach to determining access pricing has been effective. The assessment of prices in this context was particularly important in the case of CBH given the concerns that were raised by third parties in relation to CBH's pricing methodology. These concerns focused mainly on the following related issues:

- the level of transparency provided by CBH's pricing (e.g. the extent to which prices are provided on an itemised basis)
- the ability for exporters to determine the reasonableness of CBH's pricing on a cost basis.

The ACCC is of the view that CBH's approach to pricing under the Revised Undertaking is appropriate as it provides a sufficiently transparent baseline or starting point for effective negotiations between CBH and access seekers.

In this regard, CBH has committed to provide additional information on the range of services covered by the reference prices and the criteria required to qualify for those prices by including a new clause 12.5 requiring that CBH will publish the required details on its website. This will provide an enhanced level of transparency around the baseline prices and therefore provide a greater level of certainty and clarity for access seekers in negotiations. Access seekers wanting to use non-CBH supply chain arrangements to bring grain to port will also be in a better position to assess the reasonableness of any price differentials they are charged by CBH for access to port terminal services compared to those that utilise CBH's up-country supply chain services. Access seekers who are unable to negotiate prices will be able to use the arbitration provisions in the undertaking.

These issues are discussed in Section 4.10 of this Final Decision.

Decision

As set out in Chapter 4, the ACCC decided on 28 September 2011 to accept the Revised Undertaking submitted by CBH on 20 September 2011.

In reaching its decision the ACCC has had regard to all matters listed in s. 44ZZA(3), and is of the view that the Revised Undertaking is appropriate to accept having regard to each of those matters.

The ACCC has considered the views of stakeholders in reaching its decision to accept the Revised Undertaking.

1 Background

Under Division 6 of Part IIIA of the Act, the ACCC may accept an undertaking from a person who is, or expects to be, the provider of a service, in connection with the provision of access to that service.

The ACCC received the Revised Undertaking from CBH on 20 September 2011. The Revised Undertaking relates to the provision of access to services for the export of bulk wheat at four grain terminals operated by CBH in Western Australia. These terminals are: Albany, Esperance, Geraldton and Kwinana.

CBH submitted the Revised Undertaking in accordance with legislative requirements under the WEMA, as set out in Chapter 2.

1.1 Process leading to the Revised Undertaking

In the Draft Decision, the ACCC took the view that the Proposed Undertaking submitted by CBH on 31 March 2011 was not likely to be appropriate.

In the lead up to the ACCC releasing a Draft Decision, the ACCC engaged in discussions with CBH regarding concerns with CBH's Proposed Undertaking. Based on these discussions, CBH submitted a draft revision of its Proposed Undertaking (**draft revision**) with a view to addressing the ACCC's concerns.¹ The draft revision was provided to the ACCC on 16 August 2011, and while it largely addressed the ACCC's concerns, a number of minor issues remained outstanding. CBH made further changes to address these outstanding issues in the Revised Undertaking.

On 20 September 2011, CBH withdrew the Proposed Undertaking and submitted its Revised Undertaking, in line with the ACCC's suggested amendments, which the ACCC is accepting pursuant to s. 44ZZA(3).

1.1.1 Proposed Undertaking – 31 March 2011

CBH's Proposed Undertaking was based on the general approach of the 2009 Undertakings with some differences:

- the inclusion of a 'two-tiered' capacity allocation system under which up to 60 per cent of port terminal capacity would be offered on a take-or-pay basis to access seekers fulfilling specific eligibility criteria and a minimum of 40 per cent offered via auction to all access seekers
- a provision that would specifically enable CBH to unilaterally vary its Standard Access Terms for the provision of port terminal services
- a provision requiring CBH to provide the ACCC with a copy of any access agreement executed with its Trading Business

¹ The draft revision is available on the ACCC website:
<http://www.accc.gov.au/content/item.phtml?itemId=1003894&nodeId=d405cc836c045d1a6a91308ae46f88b8&fn=CBH%20Draft%20Revised%20Undertaking%20-%202016%20August%202011.pdf>

- provisions that provide the ACCC with information gathering powers upon the issue of a written notice conforming to specific criteria
- the imposition of a 15 September deadline for the completion of negotiations in relation to the provision of port terminal services by CBH to access seekers
- transitional arrangements relating to the timing of negotiations and the resolution of disputes under the Proposed Undertaking
- provisions dealing with CBH's ability to vary the PTR in 'exceptional circumstances'
- provisions that provide the ACCC with an ability to issue an 'objection notice' in the event that it objects to a variation to the PTRs proposed by CBH, with an ability for CBH to seek arbitration should it dispute the ACCC's objection.

In its Draft Decision, the ACCC found that the Proposed Undertaking was not appropriate, but that it would be likely to be appropriate if certain changes were made.

With respect to the proposed capacity management arrangements, the ACCC formed the preliminary view in its Draft Decision that the approach was not appropriate in the form proposed. The ACCC considered that base load capacity contracts may have operational efficiency benefits and may promote efficient investment in up-country supply chains. However, the ACCC considered that the two-tiered approach was not appropriate as it raised concerns in regard to the interests of access seekers not eligible for base load capacity and competition in markets including the market for wheat produced in Western Australia and the wheat export marketing industry.

1.1.2 Revised Undertaking – 20 September 2011

On 20 September 2011, following consultation on the Draft Decision and the 16 August 2011 Revised Draft, CBH gave the ACCC a Revised Undertaking. Subject to minor typographical changes the Revised Undertaking is unchanged from the Revised Draft.

Significant changes from the Proposed Undertaking to the Revised Undertaking include:

- the amendment of clause 12 of the Revised Undertaking to address issues relating to the sharing of information between CBH and its trading arm, by:
 - the inclusion of a new clause 12.4: relating to the publication of information on capacity at each port terminal and including the amount of capacity that remains available for customers
 - the amendment of clause 12.1: relating to information on stock at port, including tonnage and type of all commodities as well as the top three wheat grades at each port
- the amendment of the objection notice provision at clause 10.6 of the Revised Undertaking to remove the mechanism allowing for CBH to seek arbitration

should it dispute the issuing of an objection notice by the ACCC in relation to a proposed variation by CBH

- the amendment of rule 4 of the PTRs to remove all references to the base load capacity allocation system proposed by CBH in its Proposed Undertaking and to retain its existing auction system for the allocation of port terminal capacity
- amendment of rule 3 of the PTR to provide that core available port terminal capacity be determined independent of any up-country supply chain elements utilised to bring grain to port
- the amendment of clause 10.1 of the Revised Undertaking, which provides that the PTRs must be, and continue to be, a comprehensive statement of CBH's policies and procedures for managing demand for the port terminal services
- the amendment of subclauses 6.1(a), (c) and (d) of the Revised Undertaking to provide that:
 - the Standard Port Terminal Terms can only be varied with the approval of the ACCC in accordance with the procedure in Division 6 of Part IIIA of the Act and an obligation to publish notice of any such variation within three business days of the ACCC's approval
 - the Reference Prices can be varied from time to time provided CBH publishes the revised Reference Prices on its website 30 days before the revised prices take effect and gives a copy of the revised prices to the ACCC within three business days of publication
- the inclusion of a new clause 12.5, to provide that CBH will publish on its website the specific services to which the Reference Prices relate and the criteria (if any) that must be satisfied in order to qualify for any charges set out in the Reference Prices.

1.2 Public consultation process

The Act provides that the ACCC may invite public submissions on an access undertaking application.²

The ACCC published an Issues Paper on 21 April 2011 inviting submissions on the Proposed Undertaking (**Issues Paper**). The ACCC directly advised approximately 80 stakeholders, including accredited wheat exporters, grain growers, farming organisations and state regulatory bodies of the public consultation process.

The ACCC published its Draft Decision on 23 August 2011, in which it considered that CBH's Proposed Undertaking would be likely to be appropriate if amended in accordance with the ACCC's suggested amendments. Submissions on the ACCC's Draft Decision were invited.

² *Competition and Consumer Act 2010* s. 44ZZBD(1).

1.2.1 Submissions received

The ACCC received submissions from CBH and third parties on its Issues Paper and Draft Decision. CBH also provided submissions in support of its Proposed Undertaking.

1.2.1.1 Submissions from CBH

CBH has provided the following information in respect of the Proposed Undertaking and Revised Undertaking:

- initial supporting information on 31 March 2011
- a response to an ACCC s. 44ZZBCA request for information issued on 6 May 2011, provided 13 May 2011
- a submission in response to the ACCC's Issues Paper on 20 May 2011
- a submission in response to third party submissions on 14 June 2011
- a response to an ACCC s. 44ZZBCA request for information issued on 30 June 2011, provided 5 July 2011
- a response to an ACCC s. 44ZZBCA request for information issued on 7 July 2011, provided 12 July 2011
- a submission following a meeting with the ACCC on 7 July 2011, provided on 18 July 2011
- a draft revision to the PTRs on 9 August 2011
- a draft revision to the Proposed Undertaking and Port Terminal Services Agreement on 16 August 2011
- a submission in response to the ACCC's Draft Decision on 12 September 2011.

CBH has also referred to information it submitted in relation to the 2009 Undertaking, provided on 14 April 2009.

1.2.1.2 Submissions received from other interested parties

The ACCC received public submissions from the following parties in relation to CBH's Proposed Undertaking and Revised Undertaking:

- Australian Grain Exporters Association (**AGEA**) on 20 May 2011 and 15 September 2011
- Emerald Group Australia Pty Ltd (**Emerald**) on 26 May 2011 and 12 September 2011
- Freight and Logistics Council of Western Australia (**FLCWA**) on 20 May 2011

- Gavilon Grain Australia Pty Ltd (**Gavilon**) on 20 May 2011 and 13 September 2011
- Louis Dreyfus Commodities Australia (**Louis Dreyfus**) on 27 May 2011 and 13 September 2011
- Pastoralists' and Graziers' Association of WA (**PGA**) on 27 May 2011 and 13 September 2011
- Plum Grove Pty Ltd (**Plum Grove**) on 20 May 2011 and 5 September 2011
- Queensland Rail National Freight (**QRNF**) on 27 May 2011 and 13 September 2011
- Wheat Exports Australia (**WEA**) on 20 May 2011.

1.3 Timeline

The following timeline sets out the key stages in the ACCC's assessment of CBH's Revised Undertaking. All relevant documents are available on the ACCC website, www.accc.gov.au.

Timeline

| | |
|-------------------------|---|
| 31 March 2011 | Proposed Undertaking submitted to the ACCC for assessment under Part IIIA of the Act |
| 21 April 2011 | Release of the ACCC Issues Paper |
| 21 April to 20 May 2011 | Public consultation on the Proposed Undertaking |
| 6 May 2011 | ACCC sent request for information to CBH under s. 44ZZBCA of the Act |
| 30 June 2011 | ACCC sent request for information to CBH under s. 44ZZBCA of the Act |
| 7 July 2011 | ACCC sent request for information to CBH under s. 44ZZBCA of the Act |
| 9 August 2011 | CBH provided revised PTRs to address ACCC concerns |
| 16 August 2011 | CBH provided revised draft undertaking and Port Terminal Services Agreement to address ACCC concerns |
| 23 August 2011 | ACCC issues Draft Decision on CBH's Proposed Undertaking. The preliminary view was to reject the Proposed Undertaking |
| 20 September 2011 | CBH provides Revised Undertaking |
| 28 September 2011 | ACCC accepts CBH's Revised Undertaking |

1.4 Further information

CBH's accepted Revised Undertaking and other relevant materials, including supporting submissions from CBH and public submissions by interested parties, are available on the ACCC's website at www.accc.gov.au by following the links to 'For regulated industries' and 'Wheat Export,' or via the following link: [Wheat Exports: Port Terminal Services Access Undertakings](#).

If you have any queries about any matters raised in this document, please contact:

General Manager
Transport & General Prices Oversight Branch
Australian Competition and Consumer Commission

GPO Box 520
Melbourne Vic 3001

Phone: 1300 302 502
Email: transport@acc.gov.au
Fax: +61 3 9663 3699

2 Decision making framework

This chapter details:

- the legal test the ACCC must apply in assessing an access undertaking application under Part IIIA of the Act
- the regime for regulation of bulk wheat exports established under the WEMA.

2.1 Legal test for assessment

The test the ACCC applies in deciding whether to accept an access undertaking is set out in s. 44ZZA(3) of the Act. If the ACCC accepts the undertaking, the provider is required to offer third party access in accordance with the undertaking. An access undertaking is binding on the access provider and can be enforced in the Federal Court upon application by the ACCC. The ACCC may accept an access undertaking if it thinks it appropriate to do so, having regard to the following matters set out in section 44ZZA(3) of the Act:

- the objects of Part IIIA of the Act, which are to:
 - promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets
 - provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry
- the ‘pricing principles’ specified in s. 44ZZCA of the Act (see further below)
- the legitimate business interests of the provider of the service
- the public interest, including the public interest in having competition in markets (whether or not in Australia)
- the interests of persons who might want access to the service
- whether the undertaking is in accordance with an access code that applies to the service
- any other matters that the ACCC thinks are relevant.

The ACCC has considered each port terminal services access undertaking on its own merits, but within the broader context of the Australian wheat export industry (having regard to sections 44ZZA(3)(aa) and (e) of the Act). There are some aspects of the undertakings where consistency is achieved by adopting the same approach for all undertakings and other aspects for which it is appropriate that the undertakings contain different provisions. Where consistency in the provisions contained in the undertakings is considered appropriate, the ACCC has noted this in the Final Decision.

In relation to the pricing principles, s. 44ZZCA of the Act provides that:

- regulated access prices should:
 - be set so as to generate expected revenue for a regulated service that is at least sufficient to meet the efficient costs of providing access to the regulated service or services
 - include a return on investment commensurate with the regulatory and commercial risks involved.
- access price structures should:
 - allow multi-part pricing and price discrimination when it aids efficiency; and
 - not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and
- access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.

2.1.1 Other matters

2.1.1.1 WEMA

The ACCC considers that the regulatory scheme established by the WEMA, and the rationale for the inclusion of the access test in the statute are, under s. 44ZZA(3)(e) of the Act, matters relevant to the current decision.

In particular, the ACCC acknowledges Parliament's intention in introducing the access test, which was to ensure that accredited exporters provide fair and transparent access to their facilities to other accredited exporters. As the Explanatory Memorandum states, the WEMA access test is:

...intended to ensure that accredited exporters that own or operate port terminal facilities provide fair and transparent access to their facilities to other accredited exporters. The test aims to avoid regional monopolies unfairly controlling infrastructure necessary to export wheat in bulk quantities, to the detriment of other accredited exporters.³

Further, in the second reading speech, the minister stated that 'unless all exporters can obtain access to these critical facilities on fair and reasonable terms then one of the major objectives of the policy could be frustrated.'⁴

The ACCC acknowledges that Parliament's intention to promote competition in the export of bulk wheat has various dimensions, including:

- the promotion of competition between marketers for the acquisition of bulk wheat from growers

³ Explanatory Memorandum, Wheat Export Marketing Bill 2008, p. 31.

⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 29 May 2008, 3860 (Tony Burke, Minister for Agriculture).

- the promotion of competition between exporters for the export of wheat from Australia
- the concomitant promotion of competition for associated products and services, such as supply chain services and grower services.

The ACCC acknowledges Parliament's recognition that the promotion of competition in the form described may potentially be limited by anti-competitive conduct associated with port terminal facilities, and that the inclusion of the access test demonstrates a clear intention to legislate measures to mitigate the possibility of such conduct undermining the broader intent of the legislation.

WEMA and the accreditation scheme are discussed further in section 2.2.

2.1.1.2 2009 Undertakings

The ACCC considers that the 2009 Undertakings are a relevant matter under s. 44ZZA(3)(e) in the assessment of CBH's Proposed Undertaking. Through the operation of the 2009 Undertakings the ACCC has gained insight as to the effect of Part IIIA access undertakings across the wheat export industry in practice. The ACCC considers that this experience is relevant to the assessment of CBH's Proposed Undertaking and Revised Undertaking, as well as the proposed 2011 undertakings of the other port terminal operators.

2.2 Access test

The WEMA came into effect on 1 July 2008. The WEMA and associated transitional legislation replaced the Export Wheat Commission with a new statutory body, Wheat Exports Australia (WEA), which has the power to develop, administer and enforce an accreditation scheme for bulk wheat exports, including the power to grant, vary, suspend or cancel an accreditation.⁵

Under the WEMA, parties without WEA accreditation are prohibited from exporting wheat in bulk from Australia. Parties seeking accreditation as bulk wheat exporters must be deemed by the WEA to be 'fit and proper' having regard to certain criteria. The WEMA further provides that parties seeking bulk wheat export accreditation that also provide 'port terminal services' (Port Terminal Operators) must satisfy an additional 'access test'.

Part of the 'access test' is linked to Part IIIA of the Act. The relevant part of the access test will be satisfied if either:

- the ACCC has accepted from a person who owns or operates a port terminal facility used to provide a port terminal service an access undertaking under Division 6 of Part IIIA of the Act, and that undertaking relates to the provision to accredited wheat exporters of access to the port terminal service for purposes relating to the export of wheat; or

⁵ The relevant transitional legislation is the *Wheat Export Marketing (Repeal and Consequential Amendments) Act 2008* (Cth).

- there is in force a decision under Part IIIA of the Act that a State or Territory regime is an ‘effective access regime’ and that regime provides for access to the port terminal service for purposes relating to the export of wheat.

Under the ‘access test’ providers of port terminal services must also comply with ‘continuous disclosure rules’ set out in subs. 24(4) of the WEMA. In summary, the continuous disclosure rules require the Port Terminal Operators to publish on their website:

- their policies and procedures for managing demand for port terminal services (generally known as Protocols)
- a statement, updated each business day, setting out, amongst other things, the name of each ship scheduled to load grain using port terminal services, the estimated date on which grain will be loaded into the ship, the date on which the ship was nominated and the date on which the nomination was accepted (this statement is commonly termed the **Shipping Stem**).⁶

CBH has submitted its Proposed Undertaking, and subsequent Revised Undertaking, to the ACCC pursuant to Part IIIA of the Act for the purpose of satisfying the access test.

⁶ See subs.24(4) of the WEMA for detail about the continuous disclosure rules.

3 Submissions on Draft Decision

The ACCC received a submission from CBH and seven submissions from other interested parties on its Draft Decision which are summarised below.⁷

3.1 CBH submission

CBH noted the ACCC's Draft Decision that base load capacity (**BLC**) allocation had merits and that CBH was considering whether it would submit a revised proposal. CBH also noted the Draft Decision call for submissions on the auction system and submitted that, in the absence of the BLC allocation, the auction arrangements as refined in response to experience, are the most appropriate system.

CBH also supported the Draft Decision position that ring fencing and price regulation were not required. On these issues CBH submitted that the publication of more detailed information on stocks at port, as suggested in the Draft Decision, would remove arguments that there is an information asymmetry. CBH submitted that its prices are competitive and reflect the efficient operation of its port terminals.

CBH indicated that it was prepared to lodge a revised undertaking in the form of that provided on 16 August 2011.

3.2 Third party submissions

Plum Grove: supported the Draft Decision and noted its concerns that the proposed approach to capacity allocation would have favoured a select few large exporters and unfairly disadvantaged smaller exporters.

Emerald Group Australia: submitted that the BLC proposal had merit and that a two tiered system of BCL and auction allocation is preferable to auction only. Emerald stated that BLC would enable the sharing of the risk arising from seasonal variability. Emerald stated that it expects that a BLC system would lead to a more efficient charging regime that would ultimately benefit growers and that accumulation certainty would encourage investment, and hence competition, in the landside supply chain.

Emerald considered that the auction rebate system is imperfect because it does not rebate the actual premium paid and that the possibility of one player 'cornering' the auction slot market is a concern with an auction system.

Emerald stated that it is more of a concern that CBH holds a dominant position in up-country freight and logistics than that it would pursue self-preferential treatment under BLC. Emerald submits that allocations under any future BLC system need to reflect a pro-competitive future rather than being heavily based on historic volumes CBH has shipped in the past under monopoly conditions.

Gavilon: supported the Draft Decision and submitted that its current view is that it is highly unlikely that a BLC allocation system would promote appropriate competition

⁷ Submissions received to the ACCC Issues Paper and to the Draft Decision are available on the ACCC website.

for grain growers' grain or allow new grain exporters to freely enter and compete in the Western Australian grain market.

Louis Dreyfus Commodities (Louis Dreyfus): supported the Draft Decision and submitted that the BLC allocation system did not offer efficiencies that outweighed its shortcomings. Louis Dreyfus submitted that the CBH auction allocation system has proved to be a method that meets all the major criteria for fairness and therefore it supported the Revised Undertaking excluding the BLC proposal.

Pastoralists' and Graziers' Association of WA (PGA): reiterated previously submitted concerns regarding competition in the grain industry in Western Australia and concerns with the BLC proposal. PGA also noted the specific concerns with the revised draft proposal. These are: reservations over the lack of independent and objective assessment of core, additional and surge capacity; concerns that the potential for CBH to favour its own trading division is significant; concerns that CBH will have significant leeway to determine the information on stocks at port it will publish and that publication of information on variations to capacity will not be sufficiently timely.

QRNF: submitted that the Standard Access Agreement and the PTR should be amended to ensure that a minimum 21 days for bulk wheat receivals is guaranteed. QRNF also submitted that parties other than CBH are expected to provide grain supply chain services over the term of the undertaking and that determination of capacity should include consultation with industry. QRNF stated its view that the non-discrimination and no-hindering access provisions contained in the undertaking should also be included in the Standard access Agreement and the PTR.

AGEA: submitted that:

- it does not believe that CBH needs to be involved in or manage the secondary market for the transfer of slots and that a more efficient approach would be to allow the industry to manage this
- it expects the revocation in relation to CBH notified conduct would require some variation to reference prices and that there should be provision for a review of reference prices and other relevant issues in the event the Australian Competition Tribunal affirms the ACCC decision⁸
- consistent with its submissions on the Viterra and GrainCorp undertakings, shipping stem fees should be paid into a trust account. In the case of CBH, AGEA submitted that the auction premiums should be held in a trust account and that there should be independent management to ensure capacity allocation and management occurs in a competitively neutral way.

⁸ See section 4.9.1 for discussion of N93436.

4 ACCC view on CBH's Revised Undertaking

4.1 Term, expiry and continuity arrangements

4.1.1 Term

CBH has proposed an undertaking end date of 30 September 2014 in its Revised Undertaking.

The ACCC considers that the term of an access undertaking should allow sufficient time for access seekers to negotiate the terms of an agreement and for that agreement to apply for a reasonable period prior to the expiry of the undertaking.

The ACCC considers that the proposed expiry date balances the interests of CBH and the interests of access seekers in having sufficient certainty having regard to ss. 44ZZA(3)(a) and (c) of the Act. Importantly, the expiry date ensures that the Revised Undertaking, once in place, will not expire mid-season. The ACCC therefore considers that the expiry date of 30 September 2014 is appropriate.

4.1.2 Early expiry provisions

Section 44ZZA(7)(b) of the Act provides that an undertaking which has been accepted by the ACCC may be withdrawn or varied by the provider at any time but only with the consent of the ACCC. The ACCC considers that it would not be consistent with the requirement for ACCC approval in s. 44ZZA(7)(b) for an access provider to have the ability to withdraw an accepted undertaking at its own discretion without the consent of the ACCC.

In the Revised Undertaking, CBH has provided that the Undertaking may only expire on the date it is replaced in accordance with the Act and on the day that the ACCC consents to the withdrawal of the Undertaking in accordance with Part IIIA of the Act. The ACCC considers that these early termination provisions are appropriate as they are consistent with s. 44ZZA(7)(b) of the Act.

4.2 Publish-negotiate-arbitrate framework

4.2.1 General approach of the publish-negotiate-arbitrate framework

CBH has proposed to roll forward the 'publish-negotiate-arbitrate' model from the 2009 Undertaking to the Revised Undertaking. In brief, this model provides that:

- CBH will offer to supply the standard port terminal services to access seekers on standard published non-price terms and conditions (**Standard Port Terminal Terms**). In providing access to port terminal services, CBH must not discriminate between access seekers in favour of its own trading arm, CBH Grain.
- CBH must, for access to each standard port terminal service, publish the Standard Port Terminal Terms and Reference Prices (collectively referred to as the **Standard Access Terms**) on the CBH website.

- CBH will enter into negotiations with access seekers for the provision of access to port terminal services on terms that vary from the Standard Port Terminal Terms and/or reference prices. Both parties must negotiate in good faith in accordance with the terms of the Revised Undertaking. The negotiations will be finalised by the execution of an access agreement.
- any dispute, except those in relation to executed access agreements, the PTRs or price variations to reflect CPI changes, will be resolved in accordance with clause 8 of the Revised Undertaking. Clause 8 provides a process whereby disputes may be escalated from negotiation to mediation to arbitration.

In addition to the above elements, key features of the 2009 undertaking include the non-discrimination and no-hindering access provisions, which have been rolled forward into the Revised Undertaking. In summary:

- the non-discrimination provision (clause 6.2) stipulates that CBH must not discriminate in favour of its own trading business or differentiate between customers except to the extent that the cost of providing services to a customer is higher than the cost of providing the same services to other customers
- the no hindering provision (clause 10.8) stipulates that CBH shall not engage in conduct for the purpose of preventing or hindering access to port terminal services by existing customers or applicants.

To assist the ACCC in determining whether access has been provided to access seekers on a non-discriminatory basis, CBH has included in its Revised Undertaking a clause at 6.2(c) that stipulates that:

Within five Business Days of executing an Access Agreement with its own Trading Business, the Port Operator must provide to the ACCC a copy of that Access Agreement.

The ACCC notes that a similar clause was included in GrainCorp's accepted 2011 Undertaking. The ACCC takes the view that this is a common issue across industry and considers a consistent regulatory approach to be appropriate in order for the ACCC to be able to effectively monitor compliance with the non-discrimination provision, having regard to s. 44AA(aa) and (e) of the Act. The ACCC therefore considers that CBH's Revised Undertaking is appropriate in this regard.

The ACCC considers that this publish-negotiate-arbitrate framework balances the business interests of CBH (refer s. 44ZZA(3)(a)) with the interests of access seekers (refer s. 44ZZA(3)(c)). This is because the framework enables CBH to negotiate terms and conditions that allow for the efficient operation of its business of providing port terminal services, while also promoting fair access to port terminal services for access seekers. The publish-negotiate-arbitrate model achieves this balance by providing a framework within which:

- an appropriate level of information is provided via publication to enable access seekers to negotiate from a sufficiently informed position (see 4.3 below)
- a defined process is set out for the conduct of negotiations (see 4.4 below)

- parties can seek mediation or arbitration should any disputes arise during the negotiation process (see 4.5 below).

For the reasons above, the ACCC considers that the publish-negotiate-arbitrate approach adopted in the Revised Undertaking, as supported by robust non-discrimination and no-hindering access provisions, is appropriate.

Given that the overall approach to access provision as provided in the publish-negotiate-arbitrate arrangements of the Revised Undertaking is appropriate, the ACCC therefore considers that prescriptive ex ante price regulation is not necessary in the case of CBH's Revised Undertaking. Further, it is the view of the ACCC that it is not appropriate to strengthen the publish-negotiate-arbitrate arrangements with ring-fencing rules for CBH at this time, given that CBH has provided increased transparency of its port operations under the Revised Undertaking, as discussed at 4.3 below.

4.3 Publication of information and ring fencing

Under the publish-negotiate-arbitrate approach, the Revised Undertaking provides that CBH will publish:

- the Standard Access Terms (which includes Reference Prices and Standard Port Terminal Terms) on which it will provide access to its port terminal services
- other information in relation to the operation of CBH's port terminals, including key port information and performance indicators.

The Standard Access Terms are addressed at 4.7 below. In relation to the other information that CBH is obliged to publish, the Revised Undertaking provides that:

- CBH is required to publish on a weekly basis the total amount of bulk wheat and other grain situated at each of its port terminal facilities under clause 12.1(a). Under clause 12.1(b) CBH is not obliged to publish information that would enable particulars relating to a person to be ascertained or that would adversely affect the interests of a user or the port operator.
- CBH is required to publish an updated shipping stem on a daily basis under Clause 12.1(b) (this provision reflects the continuous disclosure rules contained in the WEMA)
- CBH is required to publish on its website a range of key performance indicators, on a quarterly basis. The indicators that will be published include:
 - average number of days between the estimated time of arrival (ETA) (as defined in the PTRs) on original vessel nomination and the date of the presentation of the Notice of Readiness (as defined in the PTRs)
 - average number of days between presentation of a Notice of Readiness and Commencement of Loading (as defined in the PTRs) for vessels that arrive within their contracted Shipping Window (as defined in the PTRs)

- average number of days between presentation of a Notice of Readiness and Commencement of Loading for vessels that arrive outside their contracted Shipping Window
- number of vessels rejected in the year to date
- number of vessels presenting a Notice of Readiness outside of the contracted Shipping Window in the year and month to date
- quantum of tonnes of wheat exported in the year and month to date
- number of vessels loaded in the year and month to date.

The ACCC considers that the broad approach of the obligations under the Revised Undertaking relating to the publication of other information is appropriate having regard to s. 44ZZA(3)(c). This is mainly on the basis that the publication of the relevant other information, particularly in relation to the overall operation of the port and service standards, provides access seekers with an appropriate level of clarity and certainty in their negotiations with CBH.

However, in its Draft Decision the ACCC noted its view that the obligations concerning publication of information needed to be strengthened in some respects to further assist access seekers in their negotiation of the terms of access and to increase the transparency of CBH's port terminal service operations. In response to third party submissions, the ACCC also raised the concern that there was a potential for the vertically-integrated nature of CBH's businesses (including port terminal operations and up-country supply chain services) to confer an information advantage within the CBH Group to the anti-competitive detriment of other grain traders.

In response to this concern, CBH has included in the Revised Undertaking a requirement to provide greater transparency of information to all exporters in relation to both available port terminal capacity and disaggregated stock at port information. Imposing a formal obligation on CBH to make such information available to all stakeholders is likely to be an effective mechanism to prevent CBH from obtaining any unfair competitive advantage it possesses by virtue of its vertical integration and is therefore appropriate having regard to the interests of access seekers in obtaining fair and transparent access to port terminal services (refer ss. 44ZZA(3)(c) and (e)).

In summary, the additional information that CBH is required to publish under the Revised Undertaking includes:

- information on total available capacity at each of its port terminals (clause 12.4), which is to be determined on the basis of each port's ability to load grain onto vessels and not on the up-country supply chain's ability to bring grain to port (rule 3.2 of the PTR). The ACCC considers that port terminal capacity information forms a part of the benchmark for the commencement of negotiations around port terminal access, service pricing and performance. The ACCC therefore considers that the publication of total available port capacity information would provide an appropriate level of clarity and certainty for access seekers.

The ACCC notes that this information is currently provided by CBH on a voluntary basis but may be withdrawn at any time. Accordingly, the Revised Undertaking imposes a formal obligation on CBH to publish information on total and remaining available capacity on a weekly basis at each of its port terminals.

In response to this issue, the Revised Draft contains a new clause 12.4, which provides for the following:

12.4 Capacity

- (a) The shipping stem will provide information about the total capacity in relation to the shipping windows available at each Port Terminal Facility and the amount of Capacity currently allocated at each Port Terminal Facility.
 - (b) Where the Port Operator varies capacity in relation to a shipping window available at a Port Terminal Facility by more than + / - 5% from the previously published capacity, it must publish the revised Capacity on the shipping stem within 2 Business Days together with a brief explanation for the variation.
- information on stock at port at each of its port terminals. In line with concerns raised by the Productivity Commission,⁹ the ACCC expressed concern that access to such information, while other exporters do not, confers a commercial advantage on CBH's vertically integrated operations.

The ACCC considers that imposing a formal obligation under the Proposed 2011 Undertaking requiring CBH to publish disaggregated information on stocks at port for each of its port terminals (as well as the other key port information required for publication) would be an appropriate means of reducing the opportunity for CBH's marketing arm to misuse information it possesses by virtue of being vertically integrated. In particular, the publication of this information on the tonnage and type of all commodities, as well as the top three wheat grades, at each port will provide an appropriate level of transparency to access seekers for whom access to such information would be of assistance in their business planning.

In response to this issue, the Revised Undertaking includes an amended clause 12.1, which provides for the following:

12.1 Stocks at port

- (a) Subject to clause 12.1(b), each week during the term of the Undertaking, the Port Operator will publish in a prominent place on its website a statement of:
 - (i) the total amount of Bulk Wheat situated at each of the Port Terminal Facilities;
 - (ii) the total amount of grain other than Bulk Wheat situated at each of the Port Terminal Facilities; and
 - (iii) the three grades of Bulk Wheat contributing the largest tonnage at each of the Port Terminal Facilities.

The Port Operator must use reasonable endeavours to ensure that the statement is accurate within +/- 5%.

⁹ Productivity Commission, *Wheat Export Marketing Arrangements – inquiry report no.51*, 1 July 2010, p.294

- (b) The Port Operator will not be obliged to publish any of the information referred to in clause 12.1(a) where the Port Operator, acting reasonably, considers that the disclosure of such information may:
 - (i) enable particulars relating to any person to be ascertained; or
 - (ii) adversely affect the interests of a User or the Port Operator.

The ACCC acknowledges that any concerns relating to the sharing of information on total available capacity between CBH and CBH Grain are in part alleviated by the operation of the auction system itself, which provides a high level of transparency in relation to the capacity made available by CBH for allocation.

Additionally, in assessing the Revised Undertaking, the ACCC notes that no formal disputes or substantial complaints have been raised in relation to the potential sharing of information between CBH and its trading arm. Having regard to CBH's legitimate business interests, as required under s. 44ZZA(3)(a), the ACCC also acknowledges the substantial costs involved in implementing more onerous obligations such as ring-fencing arrangements between CBH and its trading business, CBH Grain, and does not consider that such arrangements are required at this point in time.

The ACCC notes that the ring fencing arrangements introduced by CBH at the time of the Notification of the exclusive dealing conduct in 2008 are between CBH Grain and other CBH businesses, including both port and up-country (Grain Express) operations. In the event that the Australian Competition Tribunal affirms the revocation of the Notification, it is unclear whether CBH would continue to adopt these ring fencing arrangements.

The ACCC is cognisant of calls by a number of interested parties during consultation on the ACCC's Issues Paper for robust ring-fencing measures to be included in the Revised Undertaking and notes that, once the regulatory framework to which CBH is subject is more certain, any future undertaking submitted by CBH may need to include robust ring-fencing rules which cover CBH's port operations.

In addition to the further information publication obligations imposed under the Revised Undertaking, the ACCC notes that the Revised Undertaking contains robust non-discrimination and no-hindering access clauses and fair and transparent PTRs (as published on the CBH website).

For the reasons above, the ACCC considers that the obligation under the Revised Undertaking on CBH to publish additional information on total available capacity, including the quantum of capacity that remains available for customers, at each of its port terminals, and disaggregated information on stock at port (i.e. tonnage and type of all commodities as well as the top three wheat grades at each port) addresses the ACCC's concerns and is appropriate. In coming to this view, the ACCC has had particular regard to s. 44ZZA(3)(b), which relates to the public interest, including the public interest in having competition in markets, and s. 44ZZA(3)(c) relating to the interests of access seekers.

4.4 Negotiation

Clause 7 of the Revised Undertaking provides that access seekers may agree to acquire port terminal services from CBH on the Standard Access Terms (under clause 7.5) or negotiate for terms and conditions that vary from the Standard Access Terms (under clause 7.6). The Standard Access Terms act as a 'default' set of terms and conditions for the supply of port terminal services by CBH.

Clause 7 of the Revised Undertaking further provides that each of CBH and the access seeker must negotiate in good faith for the access seeker's access to port terminal services or in relation to a request by CBH to vary an access agreement in accordance with clause 7.6.

Clause 7 also prescribes the process that negotiations must follow. In brief, the process requires the access seeker to make a Preliminary Inquiry followed by the lodgement of a formal Access Application. The access seeker and CBH then enter into a formal period of negotiation which culminates in the execution of an Access Agreement.

If the parties are not able to reach agreement on the terms of the Access Agreement, then pursuant to clause 7.6(e), the matter will constitute a Dispute which CBH or the access seeker may refer to arbitration under clause 8.4.

The negotiation process in the Revised Undertaking contains a number of material changes to that in the 2009 Undertaking, including:

- the addition of clause 7.6(e)(ii), which effectively states that where an applicant has negotiated in good faith but does not consider CBH has negotiated in good faith, the matter will constitute a Dispute under the provisions of the Revised Undertaking
- the inclusion of clause 7.7, which imposes a 15 September deadline for any Access Agreements to be executed, otherwise the applicant must resubmit its application after the conclusion of the initial auction process (i.e. after the first auction of the season for port terminal capacity has been completed).

The ACCC is of the view that the provisions relating to the negotiation of Access Agreements that vary from the Standard Access Terms are appropriate as they provide a sufficient level of clarity and certainty for both CBH and access seekers (refer ss. 44ZZA(3)(a) and (c)).

4.5 Arbitration

Clause 8 of the Revised Undertaking contains the dispute resolution mechanism relating to any 'dispute' which is defined in the Revised Undertaking to exclude any disputes that are raised in relation to:

- executed Access Agreements
- the terms of the initial Standard Port Terminal Terms or the Standard Port Terminal Terms applying at the time of the Access Application

- a decision by CBH to vary the prices at which Port Terminal Services are provided to reflect changes to the Perth (All Groups) Consumer Price Index.

The Port Terminal Services Agreement (or Indicative Access Agreement as contained in the Revised Undertaking at Schedule 2) and the Port Terminal Rules include internal dispute resolution procedures.

The Revised Undertaking is a roll forward of the dispute resolution procedures as they appear in the 2009 Undertaking with some changes, including:

- the inclusion of additional text at clause 8.4(e), which provides that the ACCC may not make a determination which would have the effect of setting the terms and conditions of access to Port Terminal Services in respect of any period following the expiry of the Proposed 2011 Undertaking
- the inclusion of clause 8.5(g), which stipulates that the *Commercial Arbitration Act 1985* (WA) will apply to any arbitrations conducted by a private arbitrator
- the inclusion of clause 8.6(c), which provides that a private arbitrator may not make a determination which would have the effect of setting the terms and conditions of access to Port Terminal Services in respect of any period following the expiry of the Revised Undertaking.

In brief, the Revised Undertaking requires parties to trigger the dispute resolution mechanism by issuing a dispute notice. The parties are then required to negotiate in good faith in an attempt to reach resolution.

If the parties are not able to reach resolution through informal negotiation, the parties may then agree to either or both informal and formal mediation. If mediation is unsuccessful, then the parties can elect to have the dispute escalated to arbitration. If a dispute is escalated to arbitration, the ACCC must be advised and may elect to arbitrate the dispute.

The ACCC is of the view that the dispute resolution mechanism contained in the Revised Undertaking, as well as the dispute resolution mechanisms contained in the Port Terminal Services Agreement and the Port Terminal Rules, are appropriate as they provide a sufficient level of clarity and certainty for both CBH and access seekers (refer ss. 44ZZA(3)(a) and (c)).

4.6 Capacity management

This section outlines conditions in the Western Australian wheat export market and the capacity management arrangements in the Revised Undertaking. The particular circumstances of access providers and the characteristics of the markets in which they operate are particularly relevant to capacity management arrangements. Appendix A provides information on the characteristics of the three wheat export regions—the east coast, South Australia and Western Australia—considered by the ACCC when forming a view regarding appropriate capacity management arrangements.

CBH's Revised Undertaking retains the capacity management provisions of the 2009 Undertaking, including capacity allocation via auction. These provisions are set out in the PTRs.

4.6.1 CBH port capacity and the Western Australian wheat export market

In forming its view regarding the capacity management arrangements proposed by CBH, the ACCC considered that the following factors regarding the extent that capacity is constrained are relevant:¹⁰

- CBH's port terminals are subject to peak periods of excess demand driven by seasonal movements in the supply and demand for wheat and other grains (a shifting peak demand problem) as evidenced by the auction premiums
- the duration and extent of the periods in which there is excess demand vary depending on annual production
- while capacity constraint is an issue at certain times at ports operated by CBH, the overall level of capacity is sufficient to meet annual demand by grain exporters in Western Australia; CBH states that, under normal operating conditions, port terminal services capacity at its port facilities is 14 million metric tonnes (mmt) while tonnes shipped over the past three years are 10.6 mmt in 2008/09, 9.8 mmt in 2009/10 and an estimated 6 mmt in 2010/11.¹¹

Nevertheless, seasonal peak periods, during which capacity is constrained relative to demand at CBH ports, can extend over a number of months in years of high production and exports. In addition, as discussed below, CBH has limited the capacity available to exporters during periods when demand is low.

In regard to the incentive for self preferential treatment at port, CBH has a dominant position in the Western Australian grain supply chain. CBH's grain supply chain assets include:

- all four grain export terminals located in Western Australia
- all 193 up-country bulk grain receival, storage and handling sites in Western Australia (excluding the port receival sites)
- a grain receival, storage and distribution complex at Forrestfield, which also offers grain container loading services; and
- recently acquired above-rail assets to be used to transport grain in Western Australia from April 2012.

CBH controls around 90 per cent (in excess of 20 million tonnes) of total grain storage capacity in Western Australia. The remaining 10 per cent (2 million tonnes) is on farm storage. However, a substantial proportion of on-farm storage is for farm use (saved seed and on-farm livestock feeding) and is not available for the storing of grain for commercial sale. The ACCC considers that CBH has a cost advantage over

¹⁰ See Appendix A for bulk wheat export markets analysis.

¹¹ CBH, *Submission to the ACCC*, 1 April 2011, p. 12.

on-farm storage options for bulk export grain, which accounts for around 90 per cent of grain harvested in Western Australia each year.¹² The ACCC also considers that there are high barriers to entry for alternative off-farm storage services for bulk export grain in Western Australia.¹³

The ACCC acknowledges a CBH statement regarding the potential for investment in grain storage and elevation capacity at existing or new port facilities that enables wheat exporters to bypass its port terminal facilities. However, the ACCC also notes that suggested developments have not proceeded to date and considers that effective competition from facilities that bypass those of CBH is weak at this time. This contrasts with the situation on the east coast where, for example, Louis Dreyfus has commissioned storage facilities enabling it to bypass GrainCorp's Carrington port facility in Newcastle.

In forming its view on the Revised Undertaking, the ACCC recognises that CBH has market power in relation to the provision of port terminal services to wheat exporters and an incentive to advantage its bulk handling activities upstream of port, and the wheat export activities of its Trading Business downstream.

CBH also has significant market power in the provision of up-country grain storage and handling services, and competition to its grain logistics and freight services is restrained by conduct that is the subject of Notification to the ACCC (N93439). The Notification relates to exclusive dealing conduct by CBH that requires growers that use CBH's grain storage and handling services to also use transport services supplied by CBH to transport grain to port. On 29 June 2011 the ACCC revoked the Notification, effective from 1 May 2012. In revoking the notification the ACCC concluded that the notified conduct allowed CBH to prevent competition in the supply of transport services for bulk export grain. CBH has sought a review of that decision by the Australian Competition Tribunal (Tribunal). CBH is able to continue to engage in the notified conduct while the application for review is considered but will not be able to engage in the conduct if the Tribunal affirms the ACCC's decision to revoke the notification.

In summary, the ACCC considers that CBH ports are subject to capacity constraint at peak times. Further, as a vertically integrated monopolist, CBH has incentive for self-preferential treatment to advantage its upstream logistics and freight activities and its downstream export activities.

4.6.2 Determination of available capacity

Clause 3.2 of the PTR set out provisions in relation to the criteria and processes for estimating available capacity. Core Capacity at a port terminal facility is determined on the basis of a conservative estimate of its theoretical average capability of the Port Terminal Facility to load vessels in any given half month period with regard to:

- historical performance of the port terminal facilities in loading vessels under usual operating conditions

¹² ACCC Notice, 29 June 2011 para. 7.1.3

¹³ *ibid.*

- efficient deployment of labour and other resources over the year based on standard resourcing levels
- availability of quarantine inspection services
- the number of rainy days normally expected in a month
- the amount of berth time lost due to vessels failing survey and either being cleaned or pushed off the berth
- average vessel deballasting rate
- the likely mix of grain types at the port facility
- the ability of the port authority to provide relevant services.

The PTR provide that CBH may, in its discretion, determine additional capacity to be allocated as part of Core Capacity, having regard to:

- estimates of harvest size and characteristics
- likely shipping requirements of customers and supply arrangements likely to be used to get grain to the port terminal facility
- the distribution of the transport task between road and rail in each port zone
- the optimal deployment and utilisation of the available rail and road resources
- the amount of planned maintenance downtime in a month
- the number of segregations that may be required.

In addition, CBH may determine Surge Capacity in response to assessment that supply chains will deliver grain at an accelerated pace relative to normal conditions.

The methodology to be used to determine the total available capacity differs from the arrangements under the 2009 Undertaking which enabled CBH to determine available port terminal capacity having regard to demand and supply chain factors. Thus, in past years this has meant in practice that, in years of poor harvest—such as experienced in 2010/11—CBH restricted the capacity offered to align with estimated demand for it. In contrast, in years of high production, CBH considered whole of supply chain factors in determining capacity made available as otherwise ‘customers may acquire capacity that they are unable to utilise’.¹⁴

Under the Revised Undertaking CBH will determine Core Capacity independently of harvest and supply chain factors but can provide additional Core Capacity if, at its sole discretion, CBH considers that is warranted by, amongst other factors, the estimated size and characteristics of the harvest, customers’ likely shipping requirements and supply chain factors. As in the past, CBH will determine Surge Capacity from time to time as needed.

¹⁴ CBH, *Submission to the ACCC*, 1 April 2011, p.11.

Importantly, the ACCC recognises that all capacity, however it is defined or determined by the port operator, will be allocated via the auction mechanism in the first instance.

The ACCC notes the submissions on its Draft Decision from QRNF¹⁵ and PGA¹⁶ regarding capacity determination. QRNF noted that other parties are expected to participate in the Western Australia supply chain in the future and that CBH should therefore consult with industry when determining capacity while PGA expressed reservations over the lack of independent and objective assessment of core, additional and surge capacity.

The ACCC considers that it is in the interests of access seekers to have certainty regarding the port terminal capacity that is available for the export of grain, separate to information regarding integrated supply chain services that CBH may offer, and also that it is in the legitimate business interests of CBH that it operate its port in an efficient and cost effective manner. The ACCC considers that the Revised Undertaking appropriately balances these competing interests.

4.6.3 CBH capacity allocation arrangements

The Revised Undertaking removes the BLC and two-tiered proposal of the Proposed Undertaking and reverts to the capacity management arrangements in place under the 2009 Undertaking. The ACCC noted in its Draft Decision that it considers there is in-principle merit in BLC allocation arrangements and that it is open to considering a future proposal that addresses its concerns with the two-tiered approach of the form contained in the Proposed Undertaking. CBH states in its submission to the Draft Decision that it is considering ACCC and industry comments and will make a decision in the near future as to whether it will pursue a base load approach to capacity allocation.

4.6.3.1 Submissions to Draft Decision

Capacity allocation arrangements are the principal focus of submissions to the Draft Decision received from interested parties. Of the seven submissions from third parties,¹⁷ three note concerns regarding the fairness to smaller and new exporters of the BLC proposal and support retaining the auction capacity allocation arrangements¹⁸ and a fourth provides implicit support for the Draft Decision.¹⁹ Conversely, Emerald submitted that the BLC would encourage investment and competition in the landside supply chain and expressed a view that the auction system is not fair in the manner in which premium rebates are made or in the scope for players with deep pockets to ‘corner’ the slot market.²⁰

AGEA submitted on the Draft Decision that all parties should incur ‘real costs’ for capacity booked and not executed and that this should be achieved by holding all shipping stem payments received by port operators in a trust account until slots are

¹⁵ QRNF, *Submission to ACCC*, 13 September 2011.

¹⁶ PGA, *Submission to ACCC*, 13 September 2011.

¹⁷ See chapter 3 for a summary of submissions to the Draft Decision.

¹⁸ Plum Grove, 5 September 2011; Gavilon, 13 September 2011; Louis Dreyfus Commodities, 13 September 2011.

¹⁹ PGA, 13 September 2011.

²⁰ Emerald Group Australia, 11 September 2011.

executed or the fees forfeited. In the case of fees forfeited by an operator, AGEA submits that these should be redistributed to shippers. AGEA submits that, in the case of CBH, these arrangements should apply to the auction premium.

4.6.3.2 CBH auction arrangements

CBH's PTRs provide that capacity is allocated in the first instance by auctions conducted throughout the shipping season. Any residual port terminal capacity that is not booked by exporters via the auction mechanism is subsequently offered to exporters as 'spare capacity' on a first-come first-served basis. Only exporters who have an executed Port Terminal Services Agreement are able to participate in auctions or acquire spare capacity.

A secondary market operates for the transfer of capacity acquired at auction or through the spare capacity system. Although CBH indicated that around 63 transfers occurred in the 2009/10 season,²¹ none appear to have taken place during the 2010/11 year largely due to low overall demand for port terminal capacity resulting from the poor harvest.

The auction timetable is published on the auction website no later than 31 August and may be varied after its first publication in accordance with the auction rules.

The CBH auction rules are set out in Schedule 1 to the PTRs and provide an ascending clock auction format under which the price of capacity in a lot rises incrementally until demand is equal to total supply. Access seekers pay an 'auction premium' above a base amount depending on how highly a particular shipping slot is valued; the base amount auction starting price is \$3 (referred to as a marketer fee) in the case of core lots and \$3 plus surge charges in the case of surge lots. The auction premium is rebated to exporters that ship through CBH's ports at the end of the season on a pro rata basis (less CBH's administration costs). If demand is less than the tonnage offered in a particular slot, the auction premium is zero and capacity not taken may be reoffered at a later auction or become spare capacity in the shipping window.

Once a winning bidder is identified, a booking is placed onto the Shipping Stem. The successful bidding exporter is currently charged a base fee of \$17.10 per tonne (which comprises the upfront \$3.00 per tonne marketer fee and \$14.10 per tonne export fee) and the final auction premium amount.

The reference prices found in the *Bulk Export Capacity & Port Outloading Service Charges* specify that a non-refundable 'lost capacity' fee of \$7 per tonne is charged in the event that the booked capacity is not utilised.²²

Bookings accepted by CBH may be transferred to other exporters on the secondary market under rule 5.1 of the PTRs. The PTRs specify that exporters must obtain CBH approval for any such transfers to occur. Exporters are also provided some flexibility to reposition capacity under the conditions specified at rule 5.2.

²¹ CBH, *Submission to the ACCC*, 1 April 2011, p. 11.

²² CBH, *Port Terminal Services Agreement*, Schedule 1.

4.6.3.3 ACCC assessment

As discussed in the Draft Decision²³ the ACCC considers that the determination of port capacity made available by CBH should be determined without reference to factors not related to port operations such as the size of the harvest and up-country supply chain factors. On this issue, the ACCC acknowledges PGA's submission that there is a lack of independent and objective assessment of available capacity and QRNF's submission that capacity determination should be subject to industry consultation.²⁴

CBH has made changes to the criteria and process for estimating available core capacity which will be determined on the basis of normal resourcing and operating conditions for each port and shipping window and will not be tied to any supply chain.

However, CBH will be able to make additional core capacity available in consideration of factors including harvest size and characteristics and likely shipping requirements. CBH will continue to provide surge capacity in response to supply chains delivering grain to port at an accelerated pace relative to normal conditions.

The ACCC considers that these changes to the PTRs in respect of the determination of capacity have addressed its concerns that available port terminal capacity should not be tied to the up-country supply chain's ability to bring grain to port and have introduced some objectivity to the determination of capacity made available. The ACCC considers that these capacity determination arrangements, together with capacity publication provisions (see 4.3 above) and the fact that all capacity goes through the auction system, provides an appropriate level of clarity and certainty for shippers regarding the port terminal services capacity made available by CBH.

With respect to the auction arrangements, the ACCC notes that submissions received from stakeholders on the ACCC's Issues Paper and Draft Decision were generally supportive of the auction system operated by CBH and a number were strongly opposed to a move away from that arrangement.

The ACCC is of the view that the auction system under the 2009 Undertaking has been effective in achieving economically efficient outcomes and has enabled exporters to obtain access to port terminal services on fair and reasonable terms. In particular, allocation of capacity through auction arrangements ensures that it goes to its highest valued use which is a necessary condition for allocative efficiency when capacity is limited relative to the demand for it.

In forming this view, the ACCC notes that, while there were some difficulties when CBH introduced the auction system, these appear to have largely been transitional and have not persisted once exporters gained an understanding of the operation of the system and CBH made some adjustments in response to industry needs. This is reflected in widespread endorsement from access seekers and industry as detailed in

²³ ACCC, Co-operative Bulk Handling Limited Port Terminal Services Access Undertaking Draft Decision, 23 August 2011, pp. 47-51.

²⁴ Op. cit.

the Draft Decision. Support was also expressed by access seekers to the PC during its inquiry into Wheat Export Marketing Arrangements.²⁵

As set out in its Decision to Accept an undertaking from GrainCorp, the ACCC is of the view that auctions and transferability are appropriate mechanisms on economic efficiency grounds to allocate capacity, particularly when capacity is constrained relative to demand and administered approaches—such as a first come, first served (FCFS) system—are unlikely to result in economically efficient outcomes.²⁶ Auctions and transferability promote economic efficiency by ensuring that capacity is used by those that value it most highly at times when demand for port terminal services exceeds capacity.

In addition, auctions are transparent, fair and provide non-discriminatory access to services, and hence promote competition within markets.

The ACCC acknowledges comments from AGEA regarding concerns that port operators may not face the same pecuniary disincentive to overbook capacity as other exporters but notes that overbooking by CBH was not raised as a concern by interested parties. Further, the experience during the term of the 2009 Undertaking appears to have resulted in efficient capacity allocation outcomes.

The ACCC therefore considers that the auction system operated by CBH is an appropriate mechanism for the allocation of capacity in Western Australia.

The ACCC also acknowledges AGEA's submission that CBH does not need to be involved in the secondary market for the transfer of slots and that a more efficient approach is for industry to manage this subject to an established set of rules. However, the ACCC notes that no specific concerns have been raised in submissions regarding CBH's management of slot transfers. The ACCC considers that, in the absence of concerns with the operation of the existing arrangements, it is appropriate that CBH maintain its current involvement in the secondary market for the slots on its shipping stem.

The ACCC considers that the port terminal capacity management arrangements based on auction and transferability as established by CBH are, therefore, appropriate having regard to:

- the objects of Part IIIA that include promotion of the economically efficient operation of, use of and investment in infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets (s. 44ZZA(3)(aa))
- the public interest, including the public interest in having competition in markets, including the bulk wheat export market and the wheat production market (s. 44ZZA(3)(b))

²⁵ Productivity Commission, *Wheat Export Marketing Arrangements – inquiry report no.51*, 30 June 2010.

²⁶ ACCC, *GrainCorp Operations Limited Port Terminal Services Access Undertaking - Decision to Accept*, 22 June 2011, p. 8.

- the interests of persons who might want access to port terminal services to have a system of allocating access to port terminal services that is transparent and non-discriminatory (s. 44ZZA(3)(c))
- other matters to which the ACCC may have regard, including the rationale for the access test in the WEMA to ensure integrated bulk handlers provide fair and transparent access and avoid regional monopolies unfairly controlling infrastructure necessary to export wheat in bulk quantities to the detriment of other accredited exporters²⁷ (s. 44ZZA(3)(e)).

In summary, the ACCC has formed a view that, having regard to the matters listed in s. 44ZZA(3) of the Act, the capacity management arrangements of the Revised Undertaking are appropriate.

4.7 Standard Access Terms

Under clause 5.4(b)(ii) of the Revised Undertaking, CBH is obliged to offer port terminal services to access seekers on the ‘Standard Access Terms’. The Standard Access Terms comprise:

- the published References Prices at which port terminal services are offered
- the published Standard Port Terminal Terms, which are set out at Schedule 2 of the Proposed 2011 Undertaking.

The Standard Access Terms on which CBH will offer to provide access are to be published on its website no later than 31 August of each year in accordance with subclause 6.1(a) and will apply for the season commencing that year, unless varied under subclause 6.1(b). Where CBH varies its Standard Access Terms, it must provide copies to the ACCC within two business days of publication.

The Standard Access Terms provide a clear starting point for negotiations between access seekers, which is critical in ensuring access seekers can effectively negotiate with CBH. The inclusion of Standard Access Terms also assists in ensuring that the costs of negotiation and/or arbitration are not excessive. In essence, the Standard Port Terminal Terms act as a default access agreement in the event that parties are unable to reach a negotiated agreement.

The ACCC considers that while all elements of the Standard Access Terms are subject to negotiation between CBH and access seekers, the Standard Access Terms represent an important starting point for those negotiations.

In this regard the ACCC notes concerns expressed by QRNF²⁸ in its submission on the Draft Decision in relation to cargo accumulation timeframes in the Indicative Access Agreement. The ACCC considers that this element of the Standard Access Terms provides an appropriate starting point for negotiations and that the PTRs do not

²⁷ Explanatory Memorandum, *Wheat Export Marketing Bill 2008* –, p. 31; Commonwealth, Parliamentary Debates, House of Representatives, 29 May 2008, 3860 (Tony Burke, Minister for Agriculture)

²⁸ QRNF, *Submission to the ACCC*, 13 September 2011.

create an effective limit on a negotiated variation to the cargo accumulation periods in the Indicative Access Agreement.

Accordingly, the ACCC is of the view that it is necessary for the Standard Access Terms to ensure the following:

- any ability of CBH to unilaterally vary the terms of an executed Indicative Access Agreement can only be exercised in appropriate circumstances
- the terms and conditions of the Indicative Access Agreement provide for sufficient certainty and clarity in their terms, effect and operation.

In its Draft Decision, the ACCC expressed the concern that CBH should not be allowed to unilaterally vary the Standard Port Terminal Terms, as permitted under clause 6.1(c) of the Proposed Undertaking. In response to this concern, CBH has removed clause 6.1(c) of the Proposed Undertaking and replaced it with an amended clause 6.1(b) in the Revised Undertaking, which provides that:

6.1 Obligation to publish standard access terms

- (b) The Port Operator may vary the Standard Port Terminal Terms with approval from the ACCC in accordance with the procedure in Division 6 of Part IIIA of the CCA. The Port Operator must publish notice of any approved variation on its website within three Business Days of the ACCC's approval.

The ACCC is of the view that clause 6.1 of the Revised Undertaking addresses the ACCC's concerns and is appropriate as it provides an enhanced level of clarity and certainty to access seekers in relation to the Standard Port Terminal Terms (and therefore the Standard Access Terms) relating to the provision of port terminal services.

The ACCC notes QRNF's submission that clause 5.1 of the Standard Port Terminal Terms (or the Indicative Access Agreement attached to the Revised Undertaking at Schedule 2) should be amended to impose a requirement on CBH to guarantee a minimum availability of 21 days to provide bulk wheat receipt services. In this regard, the ACCC reiterates its view that all elements of the Standard Access Terms (and therefore Standard Port Terminal Terms) are subject to negotiation between CBH and access seekers. The ACCC considers that the provisions of the Standard Access Terms represent a clear and certain starting point for negotiations to take place. Furthermore, the ACCC notes that:

- there is nothing preventing access seekers from requesting an extended period should they require it, subject to constraints at the port
- the operation of rules 8.1 and 8.2 of the PTRs, which stipulate a minimum 21 days for the provision of bulk wheat receipt services, do not prevent access seekers from negotiating an extended shipping window (i.e. more than 21 days), should they require it.

The ACCC therefore does not consider it appropriate that clause 5.1 of the Standard Port Terminal Terms be amended as QRNF suggests.

The ACCC further notes QRNF's submission that non-discrimination and no-hindering provisions, such as those at clauses 6.2 and 10.8 of the Revised Undertaking 'should be included in both the [Indicative Access Agreement] and [PTRs] given their standalone nature once an agreement is executed to ensure resolution of any dispute under the same'.²⁹ In this regard, the ACCC considers that the Indicative Access Agreement and PTRs form part of the Revised Undertaking itself and that the provision of access to Port Terminal Services (which parties get through an Indicative Access Agreement or some other terms they negotiate, and in accordance with the PTRs) is subject to the terms of the undertaking (including the non-discrimination and no-hindering provisions). Accordingly, the ACCC does not consider it necessary to replicate the non-discrimination and no-hindering provisions of the Revised Undertaking in either the Indicative Access Agreement or PTRs.

4.8 Port Terminal Rules

4.8.1 Comprehensive nature of the Port Terminal Rules

In its Draft Decision, the ACCC considered that clause 10.1 of the Proposed Undertaking, which imposed an obligation on CBH to comply with the PTRs, requires the published PTRs to be comprehensive. This is because the PTRs provide the rules and processes for access to port terminal services and therefore, to provide an appropriate level of clarity and certainty for access seekers, should be located in the one comprehensive document (i.e. the PTRs).

In response to this issue, the Revised Undertaking contains a new clause 10.1(a), which provides that:

10.1 Compliance with Port Terminal Rules

- (a) The Port Terminal Rules must be, and continue to be, a comprehensive statement of the Port Operator's policies and procedures for managing demand for Port Terminal Services.

The ACCC is of the view that the inclusion of a new clause 10.1(a) in the Revised Undertaking is appropriate having regard to the criteria in s. 44ZZA(3).

4.8.2 Variation of the Port Terminal Rules

Clause 10 of the Revised Undertaking outlines the manner in which the PTRs are able to be varied. The Proposed 2011 Undertaking specifies that the PTRs are able to be varied by CBH without a formal variation of the undertaking in accordance with s. 44ZZBC(7) of the Act. Before varying the PTRs, CBH must consult with industry participants and provide adequate notice of the variation.

The variation procedure in the Revised Undertaking has been materially changed from the 2009 Undertaking. In summary, the PTR variation procedure in the Revised Undertaking provides for three distinct processes for the variation of the PTRs, including:

- variations to fix 'typographical, formatting or grammatical errors (clause 10.3)

²⁹ QRNF, *Submission to the ACCC*, 13 September 2011.

- variations to institute ‘standard amendments’ (clause 10.4). Under this provision, CBH is provided with the ability to amend the substance of variation notices without having to restart the variation process altogether
- variations under ‘exceptional circumstances’ (clause 10.5). ‘Exceptional circumstances’ is defined at clause 1.1. of the Revised Undertaking to mean:

...circumstances in which urgent variation/s to the Port Terminal Rules are necessary to prevent or reduce systemic or technical deficiencies or errors in the process or rules for the conduct of capacity auctions.

Each of the above processes for variation of the PTRs imposes different obligations on CBH in terms of the required consultation and notice.

In considering each of these processes, the ACCC has had regard to the factors listed in s. 44ZZA(3) of the Act. In relation to the PTRs, of particular relevance are s. 44ZZA(3)(a) and CBH’s legitimate business interests to have the port terminals operating efficiently and s. 44ZZA(3)(c) and access seekers’ interests in understanding the rules and processes affecting the export of their bulk wheat. In its Draft Decision, the ACCC noted that the rules and processes must be clear and comprehensive so that both CBH and access seekers understand how access to the port terminal services is governed.

The ACCC recognises that the model accepted for the variation of the PTRs in the Revised Undertaking carries some risks as the ACCC would likely not review all proposed amendments to determine their appropriateness. However, the ACCC notes that this risk is effectively mitigated by:

- the inclusion of a robust consultation mechanism (at clause 10.4)
- the inclusion of a provision that any variation to the PTRs is consistent with the Undertaking and in particular clauses 6.2 (non-discrimination) and 10.8 (no-hindering access).

In assessing the appropriateness of the variation process contained in the Revised Undertaking, the ACCC considers that there are a number of minimum standards that should apply to a variation process, to ensure a fair, meaningful and transparent consultation process in the legitimate interests both of access providers and access seekers (refer s. 44ZZA(3)(a) and (c)). The ACCC also notes that the industry wide approach it is taking with regard to the PTR variation process is consistent with s. 44AA(b), which will promote consistency in access regulation across the industry (refer s. 44ZZA(3)(aa) and (e)).

The minimum standards that the ACCC considers are necessary for a fair, meaningful and transparent variation process are:

- a draft variation and an explanation for the changes, circulated to interested parties and the ACCC
- a reasonable consultation timeframe, which allows for meaningful consultation between industry participants and the port operator

- an obligation on the port operator to consider submissions in good faith, with submissions to be made publicly available
- an ability for the port operator to amend the draft variation based on consultation, without having to withdraw the draft variation and start another process
- a reasonable period of time following publication of a finalised variation before the variation takes effect.

The ACCC considers that these minimum standards should apply consistently across the industry as discussed above, while not necessarily resulting in identical variation processes.

The ACCC has assessed the variation process in the Revised Undertaking against these proposed minimum standards and is of the view that they are appropriate as they address the ACCC's concerns and meet each of the minimum standards considered above.

4.9 ACCC role under the Revised Undertaking

The ACCC notes that the Revised Undertaking provides for certain powers and functions of the ACCC. These include a mechanism allowing the ACCC to object to a proposed variation by CBH (an 'objection notice'), a specific information gathering provision, an approval power acknowledging that decision making functions under the undertaking may be undertaken by particular Commissioners of the ACCC, and inclusion of an explicit reference to the ACCC's monitoring role. The ACCC considers that these powers and functions are consistent across the undertakings of all the port operators. As such, the drafting in each has followed a similar format.

4.9.1 The ACCC's role in the process for varying the PTRs – the ACCC objection notice

In its Draft Decision, the ACCC noted that the PTRs are operational and, as such, a degree of flexibility is required to ensure operational efficiency at port having regard to s. 44ZZA(3)(a) and the legitimate business interests of CBH. However, it was also noted that the wide scope of the PTRs means that significant aspects of port operations, such as capacity allocation, can be altered through a PTR variation process without the ACCC having a role.

The ACCC remains of the view that port operators require sufficient flexibility to manage operations at port. However, in certain circumstances the ACCC considers that a lack of regulatory oversight would be inappropriate. Such circumstances include where the proposed variation is material and gives rise to concerns under either the non-discrimination (clause 6.2) and/or the no-hindering access (clause 10.8) provisions of the Revised Undertaking. If such concerns arise, then the ACCC considers it appropriate that it have the ability to object to the proposed variation. The ACCC also considers it necessary for the ACCC to be able to gather the necessary information in order to issue such a notice.

However, the ACCC considers that certainty, flexibility and timeliness regarding the operation of the PTRs are of critical importance to both CBH and access seekers,

given the PTRs set out how the port operates, an approval role in respect of each proposed variation would be inappropriate.

In response to this issue, the Revised Undertaking contains a new clause 10.6, which provides the ACCC with the right to issue an objection notice in relation to any PTR variations proposed by CBH. Under the Revised Undertaking, clause 10.6 states that:

10.6 Objection notice

- (a) If the Port Operator seeks to vary the Port Terminal Rules in accordance with clause 10.4 or clause 10.5, the ACCC may object to the proposed variation (or part thereof). If the ACCC objects to a proposed variation (or part thereof), it must issue a notice to the Port Operator stating that it objects to the proposed variation and providing reasons for its objection. The ACCC will publish any notice issued under this clause 10.6(a) on the ACCC's website.
- (b) Any notice issued under clause 10.6(a) must be issued at least ten Business Days prior to the date on which the variation is proposed to become effective.
- (c) At least five Business Days before issuing a notice under clause 10.6(a), the ACCC must provide the Port Operator with a draft notice stating that it objects to the proposed variation and providing reasons for its objection.
- (d) The ACCC may only issue a draft notice under clause 10.6(c) or a final notice under clause 10.6(a), where the ACCC considers, acting reasonably, that the proposed variation amounts to a breach of the anti-discrimination provision in clause 6.2 or the no hindering access provision in clause 10.8.
- (e) The ACCC may withdraw a draft notice under clause 10.6(c) or a final notice under clause 10.6(a) if in all the circumstances it becomes aware that the reasons specified in the draft notice issued under clause 10.6(c) or the notice issued under clause 10.6(a) no longer exist.
- (f) If the ACCC issues a notice under clause 10.6(a), the Port Operator will, within three Business Days:
 - (i) withdraw the proposed variation and commence a new variation process by placing a notice to that effect in a prominent place on the Port Operator's website and notifying the ACCC in writing; or
 - (ii) withdraw the proposed variation and confirm the status of the existing Port Terminal Rules by publishing a notice in a prominent place on the Port Operator's website and notifying the ACCC in writing.

Under the above provisions, where the ACCC has concerns with the port operator's proposed variations to the PTRs, it would raise those concerns with the port operator, and access seekers if appropriate, prior to issuing a notice.

In practice, the ACCC considers that the assessment and notification would be applied within the provided timeframe for variation. Clause 10.4(a)(vi) of the Revised Undertaking provides that consultation on the proposed variation must commence at least 30 days prior to the date it is to become effective (the effective date).

Under the Revised Undertaking, the ACCC would be required to issue the notice no less than ten days before the effective date, taking into account the overall period of

time specified for the variation process in the Revised Undertaking. Such a notice would include the ACCC's reasons.

The effect of the ACCC issuing an objection notice and the proposed variation to the PTRs not taking effect will depend on whether the notice relates to the entire variation or only part of it. If the notice relates to the entire variation, the variation cannot take effect and the port operator will be required to commence a new variation process (if it still wishes to vary the PTRs), as amended to address the ACCC's concerns. Correspondingly, if only part of the proposed variation is the subject of a notice, it will not prevent the variation of the PTRs that are not a subject of the notice. It will only be possible for the ACCC to disallow the variation in part where the proposed varied terms are not intrinsically related.

This increased oversight by the ACCC will deter CBH from making inappropriate changes to the PTRs, which are the key rules governing the operation of the port and the provision of port terminal services. Access seekers will therefore benefit from an enhanced level of clarity and certainty in relation to the PTRs and the ACCC's enhanced oversight over CBH's compliance with its obligations.

The ACCC considers that clause 10.6 of the Revised Undertaking fulfils the minimum requirements for an ACCC objection notice provision.

For the reasons outlined above, the ACCC is of the view that the inclusion of the objection notice under clause 10.6 of the Revised Undertaking, combined with the proposed ACCC information gathering power under clause 6.4 (see 4.9.2 below), addresses the ACCC's concerns and is appropriate having regard to s. 44ZZA(3)(c) and the interests of access seekers.

This approach to an ACCC role in the variation process is appropriate for all port terminal services access undertakings, particularly given that the same issues will be relevant to each of the different port operators in this context. In requiring this consistent approach in relation to the PTRs across the industry, the ACCC has had particular regard to s. 44ZZA(3)(aa) and (e) of the Act.

4.9.2 Information gathering power

The Revised Undertaking contains a new information gathering provision at clause 6.4, which provides that:

6.4 Request for information

(a) The ACCC may, by written notice to the Port Operator, require the Port Operator to provide information or documents that are required by the ACCC to enable it to exercise its powers or functions in relation to this Undertaking.

(b) The written notice must set out:

(i) in reasonable detail:

(A) the information or documents required by the ACCC; and

(B) the reasons why the ACCC requires the information or documents,

(ii) the form in which the information or documents must be provided; and

(iii) the deadline for the Port Operator to provide the information or documents, which must be no less than 14 days from the date of the Port Operator's receipt of the notice.

(c) The Port Operator is not required to provide information or documents:

(i) that the Port Operator considers, acting reasonably, would be onerous or oppressive to provide;

(ii) not within the Port Operator's possession or control;

(iii) that are the subject of a legitimate claim of privilege; or

(iv) that are not necessary for the ACCC to exercise its powers or functions in relation to this Undertaking including, but not limited to, information or documents related to the matters specified in **clause 5.3**.

The ACCC notes that since the information gathering power is included in the Revised Undertaking, a failure by the port operator to provide the information requested by the ACCC would result in a breach of the undertaking.

The ACCC considers that this information gathering power is necessary to increase the ACCC's current ability to obtain relevant information, in a timely manner, under the Revised Undertaking. The ACCC considers this to be appropriate as it will assist the ACCC in making effective and timely decisions when exercising its powers under the Revised Undertaking, for example, in issuing an objection notice (see 4.9.1 above).

Under the 2009 Undertaking, the ACCC can only obtain information from the port operator through an ACCC directed audit or on a voluntary basis. The ACCC considers that neither of these methods represents an appropriate way for the ACCC to obtain the relevant information it requires to exercise the objection notice power.

An ACCC directed audit assesses whether CBH has complied with clause 6.2 of the Revised Undertaking, which requires it not to discriminate between access seekers in favour of its own trading business, except to the extent that the cost of providing access to the other access seekers is higher. Assessing the port operator's performance against the non-discrimination clause may be a relevant consideration for the decision on whether to issue the objection notice; however, it does not encapsulate all the information that the ACCC would need in making the decision. For example, it does not provide information on the port operator's compliance with the no hindering access requirements in clause 10.8.

The ACCC further notes that, while an audit may provide the ACCC with relevant information on whether to issue an objection notice, it may not be possible for it to receive the information within the variation timeframe. The ACCC considers that any extension of the variation timeframe, even for the ACCC to investigate whether or not to issue an objection notice, may give rise to uncertainty regarding port operations and should be avoided if possible.

The ACCC is of the view that the information gathering powers contained in the Revised Undertaking will assist CBH in managing its operations in a timely and efficient manner and is therefore in its legitimate business interests (refer

s. 44ZZA(3)(a)), particularly given that an audit may be an onerous means by which to obtain information from CBH. The inclusion of clause 6.4 will also be in the interests of access seekers as it will enable the ACCC to assess CBH's compliance with its various obligations under the Revised Undertaking, in particular the non-discrimination and no-hindering provisions (refer s.44ZZA(3)(c)), and to thereby deter CBH from engaging in self-preferential treatment to the detriment of non-affiliated exporters.

For the reasons outlined above, the ACCC is of the view that clause 6.4 in the Revised Undertaking is appropriate.

4.9.3 Approval power and monitoring

The Revised Undertaking includes a new clause 1.3, which provides that:

1.3 ACCC

- (a) The ACCC monitors compliance of undertakings accepted under Part IIIA of the CCA.
- (b) The ACCC may approve a Member of the ACCC to exercise a decision making function under this Undertaking on its behalf and that approval may be subject to any conditions which the ACCC may impose.

The ACCC notes that clause 6.3(c) of the Revised Undertaking provides for the ACCC to approve a member of the ACCC to exercise its powers regarding audit of CBH's compliance with the non-discrimination provisions at clause 6.2. Additionally, clause 8.4(d) of the Revised Undertaking provides for the ACCC to approve a member of the ACCC to exercise its powers regarding the arbitration of disputes.

The ACCC considers that the introduction of a decision making role into the Revised Undertaking and the short timeframes attaching to that role, warrant an extension of the approval provisions under the 2009 Undertaking as contained in clause 1.3(b) of the Revised Undertaking.

Having regard to s. 44ZZA(3)(c) and the interests of access seekers, this approval mechanism will facilitate the ACCC's monitoring role in relation to CBH's compliance with the provisions of the Revised Undertaking, particularly the non-discrimination and no-hindering provisions (discussed at section 4.9.2 above), and will deter CBH from engaging in self-preferential treatment.

For the reasons above, the ACCC is of the view that the approval mechanisms contained in the Revised Undertaking, which extend to all ACCC functions under the Revised Undertaking are appropriate.

4.10 Approach to pricing

Each of the 2009 undertakings accepted by the ACCC applying to GrainCorp, CBH and Viterra contain provisions requiring the port operator to publish reference prices for the supply of port terminal services. As the proposed 2011 undertakings of each of the port operators do not include ex ante pricing, the ACCC has not assessed the appropriateness of particular prices for port terminal services. Rather, the ACCC is of the view that a relatively 'light-handed' approach to pricing be maintained in the

Revised Undertaking and that port terminal service pricing be subject to the publish-negotiate-arbitrate framework.

Accordingly, the ACCC has only considered the prices under the 2009 undertakings in order to determine whether the publish-negotiate-arbitrate approach to determining access pricing has been effective. The assessment of prices in this context was particularly important in the case of CBH given the concerns that were raised by third parties in relation to CBH's pricing methodology under the 2009 Undertaking. The concerns raised by third parties focused mainly on the following related issues:

- the level of transparency provided by CBH's pricing (e.g. the extent to which prices are provided on an itemised basis)
- the ability for exporters to determine the reasonableness of CBH's pricing on a cost basis.

In this regard, CBH has committed to provide in its Revised Undertaking additional information on the range of services covered by the reference prices and the criteria required to qualify for those prices by including a new clause 12.5 requiring that CBH will publish the required details on its website. This will provide an enhanced level of transparency around the baseline prices and therefore provide a greater level of certainty and clarity for access seekers in negotiations. Access seekers wanting to use non-CBH supply chain arrangements to bring grain to port will also be in a better position to assess the reasonableness of any price differentials they are charged by CBH for access to port terminal services compared to those that utilise CBH's up-country supply chain services. Access seekers who are unable to negotiate prices will be able to use the arbitration provisions in the undertaking.

The ACCC is of the view that CBH's approach to pricing under the Revised Undertaking is appropriate as it provides a sufficiently transparent baseline or starting point for effective negotiations between CBH and access seekers. By providing an appropriate starting point for effective negotiations between CBH and access seekers, the ACCC considers that this approach strikes an appropriate balance between the legitimate business interests of CBH and the interests of access seekers (refer s. 44ZZA(3)(a) and (c)).

5 Decision

The ACCC decided on 28 September to accept the Revised Undertaking pursuant to s 44ZZA(3) of the Act, which was provided by CBH on 20 September 2011.

The ACCC reached its decision following consultation on its Draft Decision and considering the matters to which it must have regard pursuant to s. 44ZZA(3) of the Act. The ACCC is of the view that CBH's Revised Undertaking addresses the ACCC's concerns outlined in its Draft Decision and is appropriate.

Appendix A: Bulk wheat export markets analysis

CBH in the wheat export industry

In assessing the undertakings provided by each of the port operators to commence in 2011, the ACCC has considered each on its own merits. While undertakings accepted by the ACCC from each port terminal operator reflect the particular circumstances of that operator, there are certain aspects of the undertakings for which the ACCC has sought a consistent approach across the bulk wheat export industry. Where consistency is considered appropriate, the ACCC has noted this in the Final Decision.

There are several instances in which the ACCC has taken the view that it is appropriate that arrangements for CBH are different to those that may be required for other port terminal operators, due to the particular circumstances of CBH. In this regard, the ACCC considers that CBH has a significant degree of market power in the provision of port terminal services, has an incentive to use the market power it does have, and further to this point:

- CBH is the dominant provider of up-country storage in Western Australia
- there is little or no competition in the provision of Port Terminal Services in Western Australia
- should the ACCC's decision to revoke CBH's exclusive dealing notification be affirmed, there is no guarantee that the existing ring fencing measures that are currently in place between CBH and its trading arm, CBH Grain, will be maintained.

Notwithstanding the above, the ACCC considers that for large players such as CBH that do not face competition from competitors nearby, it may not generally be necessary to require significant changes to access arrangements that are already working well. In such circumstances, the ACCC's key concern is to ensure that arrangements meet certain minimum standards around transparency and other basic requirements for an effective undertaking.

Capacity allocation arrangements

The ACCC has assessed the differences across BHCs and the markets in which they operate so that its views are made on a consistent basis across undertakings. The analysis is of particular relevance in the ACCC's consideration of the capacity allocation and management arrangements proposed in the undertakings it is considering.

Capacity allocation arrangements include two main components:

- Primary allocation arrangements by which capacity is rationed between competing users and which are broadly categorised as either price or non-price rationing. Primary allocation arrangements currently operated by the BHCs include both non-price administered allocation (as in the case of the FCFS arrangements of GrainCorp, Viterro and ABA) and price rationing (as under the CBH auction system). Primary allocation systems of both types typically require exporters to make at least some capacity commitments before production outcomes, and hence export shipping requirements, are fully known.

- In-season arrangements that facilitate exporters adjusting to any divergence between actual outcomes and ex ante planning regarding demand for export capacity. These adjustment mechanisms include flexibility for shippers to move booked capacity between geographic and/or temporal locations (such as exists under GrainCorp's PTSP) and the ability for shippers to transfer bookings in a secondary market (as occurs under CBH's arrangements in WA). In-season response to changed, unforeseen or unplanned needs may also occur through grain trading or swapping along the supply chain, including by use of FOB purchases or sales.

Two key market characteristics relevant to the view formed on the appropriateness of particular capacity management arrangements in specific market circumstances are:

- the relationship between total port elevation capacity and average annual and seasonal demand for it
- the extent to which the incentive exists for vertically integrated BHCs to pursue self preferential treatment—including hindering access to port services by other exporters—as opposed to seeking to maximise returns from their terminals.

The following sections discuss the relevance of these factors to a decision regarding the appropriateness of capacity management arrangements proposed by a port operator. An assessment in particular cases will be informed also by the current arrangements the operator has in place and the effectiveness of those arrangements in achieving fair and efficient outcomes.

Extent of capacity constraint

As the PC stated in its Inquiry Report on Wheat Export Marketing Arrangements, auctions can play a significant role in efficiently allocating limited port capacity.³⁰ This general economic principle, that allocative efficiency is best achieved through a price mechanism, has greatest application when supply is limited relative to demand. When no binding capacity constraint exists the demands of all users can be met and the means by which allocation occurs is not critical to achieving allocative efficiency.

In all Australian states from which wheat is exported there are periods when port capacity is more highly valued. These periods occur when new season grain is available to be shipped and differ depending on harvest times in the production zones. In all years, even those of poor harvest, demand for shipping slots during these peak periods exceeds capacity to some extent. However the frequency and extent to which demand exceeds capacity varies between the ports operated by the BHCs.

On this basis, it might be considered appropriate for all port operators to use auction systems to allocate port capacity as all (with the possible exception of ABA) have limited capacity at least at some ports for some periods. This was the view of the PC which noted that port operators other than CBH might also consider adopting a similar [auction] system where there is a likelihood of excess demand for port capacity at certain points in time (effectively, a shifting peak demand problem driven by movements in the supply and demand for wheat).³¹

³⁰ Productivity Commission, *Wheat Export Marketing Arrangements*, 1 July 2010, p. 205.

³¹ *ibid.*

However, the ACCC considers that the mere likelihood of excess demand at some points during the wheat export year is not sufficient to warrant the ACCC taking the view that access arrangements employing a non-price system of allocating capacity are inappropriate. The ACCC's view has taken into account the degree of the capacity constraint evident and a judgement as to whether resultant inefficiencies warrant requiring the operator to employ an auction system for primary allocation arrangements. Also relevant is the extent to which allocative inefficiencies arising under the FCFS arrangements are mitigated by other measures such as transferability or greater flexibility to move capacity bookings.

In Western Australia capacity constraints typically occur during the harvest period which runs from November to January and this period is extended in high production years.

Incentive for self-preferential treatment

A vertically integrated operator may have an incentive to utilise bottleneck infrastructure it controls to hinder access by competitors in upstream or downstream markets in order to gain market share at the expense of access seekers. The strength of such an incentive will be influenced by the existence or threat of competition to the operator's position. Where actual or potential competition exists, the incentive to hinder competitors is moderated by the threat that the hindering behaviour may instead result in loss of throughput to an alternative supply chain or use.

However, where competition to the operator is weak and the incentive to hoard capacity and so hinder others from accessing export capacity is strong, this will inform an assessment as to the appropriateness of proposed capacity allocation arrangements. Where this incentive is strong, so too is the argument that allocation arrangements should incorporate measures to prevent such behaviour. Auctions can provide such a mechanism as they are a fair, transparent and efficient means of allocating capacity under which the incumbent faces the same limits on its ability to acquire capacity as other users.

It is also possible to design non-price allocation systems in such a way as to prevent or reduce anti-competitive behaviours by the operator. Such measures include use of an independent body to manage the shipping stem and requiring that the access provider faces the same financial disincentive to hoard as do access seekers.

In the context of the Australian wheat export industry competition to the bulk shipment of wheat through an operator's ports comes from a number of sources:

- extent of vertical integration and alternative up-country supply chains
- domestic uses for wheat
- competition from ports in other regions
- threat of bypass by customers
- containerised exports.

The extent of competition varies significantly across the markets in which the BHCs operate. A high level summary of the key features of each region (including the differences that exist) in terms of their existing supply chain characteristics and competitive dynamics is outlined below.

Up-country supply chains

The key up-country supply chain characteristics (and differences) that exist in each of the three regions is summarised in Table A.1 below:

Table A.1: up-country supply chain characteristics by region

| Region | Characteristics |
|-------------------|--|
| East Coast | <p>GrainCorp holds significant market share in the provision of wheat storage and handling services in New South Wales, Victoria and QLD. Two other bulk handling companies operating on the east coast, AWB GrainFlow and ABA, also operate a relatively small number of storage and handling facilities.</p> <p>Alternative options to storage and handling services provided by GrainCorp, GrainFlow and ABA are:</p> <ul style="list-style-type: none"> ▪ on-farm storage (which makes up a relatively greater proportion of total storage capacity than in other regions)³² ▪ a wider choice of independent storage and transport providers compared to other regions ▪ limited overlap of GrainCorp's and Viterra's up-country storage networks. |
| South Australia | <p>Viterra holds a significant market share in the provision of wheat storage and handling services in south Australia with some alternative options provided by:</p> <ul style="list-style-type: none"> ▪ on-farm storage ▪ independent bulk handlers. |
| Western Australia | <p>The provision of bulk wheat storage and handling services is dominated by CBH.</p> <p>There is some on-farm storage, a significant proportion of which is for on-farm use, but no competition from independent bulk handlers.</p> <p>Competition to CBH grain logistics and freight services is restrained by conduct that is the subject of Notification to the ACCC (N93439). The Notification relates to exclusive dealing conduct by CBH that requires growers that use CBH grain storage and handling services to also use transport services supplied by CBH to transport grain to port. The ACCC revoked the notification on 29 June 2011 from 1 May 2012 and CBH has sought a review of that decision by the Australian Competition Tribunal.</p> |

Source: Productivity Commission *Inquiry Report No. 51: Wheat Export Marketing Arrangements*, 1 July 2010, pp. 67-68.

As Table A.1 illustrates, there appears to be greater use of alternatives to the up-country wheat storage and transport services of the incumbent GrainCorp on the east coast as compared to both South Australia and Western Australia.

Domestic and non-bulk export wheat

The proportion of wheat that is supplied into the Australian domestic market relative to the proportion that is exported overseas varies significantly between the three regions, as illustrated in Table A.2 below:

³² The PC Report observed that the larger stock of on-farm storage in the East Coast may be attributable to the relative importance of the domestic market and longer history of choice in domestic marketing: Productivity Commission *Inquiry Report No. 51: Wheat Export Marketing Arrangements*, 1 July 2010, p. 68.

Table A.2: domestic and export wheat supply characteristics by region

| Region | Characteristics |
|-------------------|--|
| East Coast | <p>While a substantial volume of wheat is exported from the east coast, a significant proportion of wheat is also consumed domestically. The domestic market is therefore a significant alternative to bulk wheat export market for grain growers on the east coast.</p> <p>Also, containerised export wheat volumes on the East Coast have expanded in recent years. In particular, the Essential Services Commission (ESC) noted that containerised grain exports in Victoria and southern New South Wales expanded to represent all grain exports from those areas.³³</p> |
| South Australia | <p>Almost all wheat in South Australia is exported, with only a relatively small proportion supplied into the domestic market.³⁴ The domestic market is therefore a less significant alternative to the export market for SA growers than is the case for growers on the east coast.</p> <p>Almost all wheat exports from South Australia is exported in bulk with only limited export of wheat in containers and bags.</p> |
| Western Australia | <p>Almost all wheat in Western Australia is exported in bulk (90 per cent), with only a relatively small proportion supplied into the domestic market (5 per cent) and the balance exported in containers.</p> |

Source: Source: Productivity Commission *Inquiry Report No. 51: Wheat Export Marketing Arrangements*, 1 July 2010, pp. 56 and 68; ACCC Notice, 29 June 2011 para. 2.5.1

As Table A.2 illustrates, there is greater use of alternatives to the bulk wheat supply chain by growers on the east coast region, as compared to both South Australia and Western Australia.

Port terminal facilities

The relative proximity of port terminals operated by different bulk handlers in particular regions is a key determinant of the extent to which those ports terminals compete for the throughput of wheat. Table A.3 below provides an overview of the proximity of grain elevation ports.

Table A.3: proximity of port terminals by region

| Region | Characteristics |
|------------|--|
| East Coast | <p>Some port terminals in New South Wales, Victoria and the easternmost parts of South Australia operated by GrainCorp, ABA and Viterro are in relatively close proximity and may provide alternatives for some wheat throughput.</p> <p>The ESC, in its review of grain handling and storage arrangements in Victoria, also noted that there is a “significant degree of competitive substitutability” between the ports terminals operated by ABA and GrainCorp.³⁵ Also, by-pass of GrainCorp’s Newcastle facilities has resulted from recent construction of a facility to be used for cargo accumulation in order to utilise port loading facilities operated by POAGS at the K2 berth on Kooragang Island.</p> |

³³ Essential Services Commission, *Review of Victorian Grain Handling and Storage Access Regime Final Report*, May 2009, pp 39-40.

³⁴ Productivity Commission *Inquiry Report No. 51: Wheat Export Marketing Arrangements*, 1 July 2010, p. 56.

³⁵ Essential Services Commission, *Review of Victorian Grain Handling and Storage Access Regime, Final Report*, May 2009, p. 48.

| Region | Characteristics |
|-------------------|--|
| South Australia | Viterra operates all wheat port terminals in South Australia and is not likely to face competition in the short to medium term from any alternative port terminal operator for wheat throughput, with the possible exception of Port of Portland in far west Victoria. |
| Western Australia | CBH operates all wheat port terminals in Western Australia and the ACCC is unaware of any immediate alternative port terminal facility for use by grain exporters. |

Source: Productivity Commission *Inquiry Report No. 51: Wheat Export Marketing Arrangements*, 1 July 2010, p 68.