



Australian
Competition &
Consumer
Commission

**Co-operative Bulk Handling Limited
Port Terminal Services Access Undertaking
Decision to consent to variation**

5 December 2012



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Background

Co-operative Bulk Handling (**CBH**) operates four bulk grain port terminals in Western Australia. Under the *Wheat Export Marketing Act 2008* (**WEMA**), CBH is required to satisfy an 'access test' in order to be able to export bulk wheat. On 28 September 2011, the Australian Competition and Consumer Commission (**ACCC**) accepted from CBH a Port Terminal Services Access Undertaking (**Undertaking**). This Undertaking was accepted under Part IIIA of the *Competition and Consumer Act 2010* (**CCA**) and relates to the provision of access to port terminal services for the export of bulk wheat for the purposes of satisfying the access test under the WEMA.

The *Wheat Export Marketing Amendment Act 2012* (**Amending Act**) varies the access test in the WEMA from 10 December 2012. The 'amended access test' requires Port Terminal Operators to have an access undertaking under Division 6 of Part IIIA of the CCA in operation that includes an obligation to comply with the Continuous Disclosure Rules (**CDRs**). The WEMA amendments also repeal the Wheat Export Accreditation Scheme (**WEAS**) on 10 December 2012, which requires bulk wheat exporters to be 'accredited'.

On 26 November 2012, CBH lodged an application to vary its Undertaking in order to:

- include an obligation for it to comply with the CDRs;
- vary the definition of 'Continuous Disclosure Rules';
- vary the definition of 'Accredited Wheat Exporter';
- insert a definition of 'Accredited Wheat Exporter' in the Port Terminal Services Agreement; and
- make changes to the Background section of the Undertaking.

CBH's application to vary its 2011 Undertaking and other relevant materials are available on the ACCC's website at www.accc.gov.au.

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

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ACCC assessment

The proposed variations

CBH's proposed variation to its Undertaking includes the addition of the following provision:

10.9 Continuous Disclosure Rules

The Port Operator must comply with the Continuous Disclosure Rules as they relate to the Port Terminal Services

CBH states in Schedule 1 to its application to vary (in which CBH sets out the reasons for its proposed variations) that this "proposed amendment is included to ensure that CBH passes the new access test set out in the Wheat Export Marketing Amendment Bill 2012."¹

CBH has also proposed varying the definition of 'Continuous Disclosure Rules' to read:

Continuous Disclosure Rules ~~means the continuous disclosure rules~~ *has the meaning as defined in subsection 24(4) of the WEMA, as amended or replaced by other legislation relating to the provision of Port Terminal Services by the Port Operator* [additional words in italics]

CBH states that this variation is to "ensure that the definition of continuous disclosure rules remains current as a result of the amendments proposed in the Wheat Export Marketing Amendment Bill 2012."²

CBH has sought to vary the definition of Accredited Wheat Exporter to "ensure that the amendment of WEMA proposed by the Wheat Export Marketing Amendment Bill to remove the accreditation requirement does not interfere with CBH's obligation to offer access to Port Terminal Services to wheat exporters."³ The new definition will read:

Accredited Wheat Exporter means a person having accreditation as an accredited wheat exporter under the WEAS *or, if the requirement to obtain accreditation under the WEMA and WEAS is removed at any time during the term of this Undertaking, means a person otherwise entitled to export Bulk Wheat* [additional words in italics]

CBH proposes to amend the Port Terminal Services Agreement to insert the same amended definition of Accredited Wheat Exporter.

In addition, CBH has made some administrative changes to background items D and E in the Undertaking, and removed background item F which set out the access test in the WEMA at the time the Undertaking was accepted.

The legal framework

The test the ACCC applies in deciding whether to consent to the variation of an undertaking is set out in subsection 44ZZA(7) of the CCA. This section provides that the ACCC may consent to a variation of an undertaking if it thinks it appropriate to do so having regard to the matters set out in subsection 44ZZA(3). The matters under this section are:

¹ CBH application to vary its Undertaking, 26 November 2012, p. 5.

² *ibid.*

³ *ibid.*

- the objects of Part IIIA of the CCA, 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 section 44ZZCA
- 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 had regard to the pricing principles specified in section 44ZZCA and considers that they are not relevant to CBH's application. CBH's port terminal services are not subject to an access code.

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 subsection 44ZZA(3)(e), matters relevant to the current decision. In particular, the ACCC acknowledges Parliament's intention in introducing the access test, which was to ensure that exporters provide fair and transparent access to their facilities to other exporters.⁴

ACCC assessment

The access test in the Amending Act provides that a port operator passes the access test at a particular time if: a) at that time, there is in operation, under Part IIIA of the CCA, an access undertaking relating to the provision to exporters of access to the port terminal service for purposes of exporting wheat; b) the access undertaking obliges the person to comply with the CDRs in relation to the port terminal service; and c) at that time, the person complies with the CDRs.

CBH's 2011 Undertaking currently does not contain a provision requiring it to comply with CDRs.

The ACCC considers that CBH's proposed variation to include a provision obliging CBH to comply with the CDRs is for the purposes of satisfying the amended access test. The ACCC also considers it appropriate that the definition of CDRs is varied to remain current. The

⁴ Explanatory Memorandum, Wheat Export Marketing Bill 2008, p. 31.

ACCC considers that it is in the legitimate business interests of CBH that its Undertaking is varied to contain an obligation to comply with the CDRs and that its definition is varied.

The ACCC notes that compliance with the CDRs remains part of the access test and complying with the CDRs is therefore consistent with Parliament's intention to ensure that exporters provide fair and transparent access to their facilities to other exporters. The ACCC therefore considers that this obligation to comply with the CDRs in the Undertaking is in the interests of access seekers and it is in the public interest for CBH to comply with the CDRs.

CBH has proposed a variation to the definition of 'Accredited Wheat Exporter' so that the definition also refers to a person 'otherwise entitled to export bulk wheat' if the requirement to obtain accreditation under the WEAS is removed at any time during the term of the Undertaking. The definition in the Undertaking currently provides that this term 'means a person having accreditation as an accredited wheat exporter under the WEAS'. CBH has also proposed inserting this varied definition of 'Accredited Wheat Exporter' into the Port Terminal Services Agreement. The ACCC accepts that CBH's proposed variations are to ensure that the amendments to the WEMA, in abolishing the WEAS, will not affect CBH's obligations in the Undertaking to offer access to port terminal services to wheat exporters. This is consistent with the interests of access seekers and the public interest of having competition in markets.

The ACCC considers the proposed variations to the background items are administrative changes and will have no practical effect on CBH's obligations and access seekers' rights under the Undertaking. These changes have been made to ensure that CBH's Undertaking is consistent with the WEMA as amended by the Amending Act.

The ACCC considers it appropriate to consent to the variations to the Undertaking which CBH has proposed for the purposes of the amendments to the WEMA.

Decision

On 5 December 2012, the ACCC decided to consent to CBH's application to vary its 2011 Undertaking, which was provided by CBH on 26 November 2012.

For the purposes of the CCA, the variation comes into operation if, within 21 days after the Commission publishes its decision, there is no application to the Australian Competition Tribunal for review.