Australian
Competition &
Consumer
Commission

Co-operative Bulk Handling Limited

Port Terminal Services Access Undertaking

Draft Decision

6 August 2009

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appropriate at a time when the industry is newly liberalised and in transition, the ACCC considers that it is appropriate pursuant to section 44ZZA(3) of the TPA that the scope of the proposed Undertaking be limited to services at port.

The ACCC notes, however, that providing access at the port creates incentives for other parts of the supply chain to be as efficient as possible, as access to the port would facilitate dissatisfied customers taking the option of bypassing CBH's upcountry facilities.

General approach to pricing and other terms and conditions

Given the circumstances in which CBH has submitted its proposed Undertaking, the ACCC is of the view that a prescriptive regulatory approach including ex ante price setting is not warranted at this time, and that a less prescriptive publish-negotiate-arbitrate approach is appropriate.

However, in order for the publish-negotiate-arbitrate framework to be appropriate, the ACCC is of the view that it needs to be underpinned by a robust set of mechanisms giving effect to the publication, negotiation and arbitration procedures. Clarity about the terms and conditions for access that are on offer by CBH is an important consideration in this respect. Further, given that CBH is vertically integrated, adequate non-discrimination obligations and appropriate transparency measures are also appropriate.

The ACCC is of the view that appropriate non-discrimination measures should prohibit CBH discriminating in favour of itself except to the extent that the cost of providing access to other operators is higher, as per section 44ZZCA of the TPA. As a transparency measure to support this, appropriate measures would require CBH to publish a single set of prices for port terminal services, which may include differentiated prices for different circumstances (ie. for different processes for testing of grain depending on where it has been stored – but only where these processes are justifiable with regard to hygiene, quality or associated factors), provided those circumstances are transparently stated and the pricing differences are justified on the basis of different costs.

The ACCC is of the view that these underpinning measures would allow access seekers to commercially negotiate with CBH in a framework where both parties know that prices, terms and conditions may be subject to arbitration by the ACCC or a private arbitrator, applying the pricing principles in section 44ZZCA of the TPA and general non-discrimination requirements.

It is also relevant to note that CBH’s proposed Undertaking is for a limited duration, and should the publish-negotiate-arbitrate framework prove not to be effective, the ACCC may adopt a more prescriptive method in any future access undertaking assessments.

The ACCC also notes the Port Terminal Rules, which are not terms of access but rather general procedures for operational management of the ports, including how capacity allocation/nomination of shipping slots occurs. The ACCC is of the view that it is in the legitimate business interests of CBH, and indeed in the interests of

efficiency in the overall supply chain, that CBH has sufficient flexibility to run its day-to-day operations without unduly prescriptive oversight. The ACCC also notes that it is in the interests of the access seekers, and of competition in downstream markets, that these operations are conducted on a non-discriminatory basis, in a manner that is clear and transparent, and with recourse to adequate and swift dispute resolution procedures in the event of dispute between CBH and access seekers. It is therefore the ACCC's view that any changes to the Port Terminal Rules occur with adequate notice and consultation – but not necessarily be subject to the variation procedures in section 44ZZA(7) of the TPA. The ACCC notes that should such processes prove unsatisfactory, the port terminal protocols may in future need to be the subject of more prescriptive processes.

In relation to ring-fencing, the ACCC notes that CBH is already subject to ring-fencing arrangements arising from the ACCC's decision not to revoke a 'notification' from CBH relating to a component of its Grain Express product in 2008. CBH's ring-fencing rules in its proposed Undertaking differ in some respects from the ring-fencing arrangements which form part of CBH's Grain Express exclusive dealing notification. For instance, the Grain Express ring-fencing policy provides for a more robust complaints handling/resolutions process than the process provided in its proposed Undertaking.

The ACCC is therefore of the view that the ring-fencing rules in CBH's proposed Undertaking would not, in their current form, serve as an effective safeguard against anti-competitive discrimination in the provision of port terminal services.

However, ring-fencing is just one tool that can be used to protect against anti-competitive discrimination.

Were CBH's proposed Undertaking amended to contain robust non-discrimination and no hindering access clauses, fair and transparent port terminal protocols and an indicative access agreement (as well as measures to deal with the potential for information about port terminal services to be used to the advantage of CBH's wheat exporting arm – such as the publication measures described in the Other Issues chapter), then, in the circumstances, it would not be necessary for CBH to include ring-fencing measures in its undertaking at this particular point in time.

In forming this view, the ACCC has taken into account the transitional nature of the industry and the possibility that any ring-fencing measures that were implemented at this point in time could need to be revised in the near future in accordance with any regulatory changes (either to extend or reduce the regulation to which CBH is subject). The ACCC considers that this would be an undesirable outcome in that it could impose unnecessary regulatory costs during a time of industry transition.

The ACCC has also taken into account the short duration of CBH's proposed Undertaking and will closely monitor the effectiveness of its undertaking in ensuring against anti-competitive discrimination during its operation.

The ACCC 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.

Variation of an Indicative Access Agreement

CBH's approach of retaining discretion to unilaterally vary its "Standard Terms" (i.e. which are likely to be similar to an Indicative Access Agreement) is not appropriate (even with the requirement that variations be consistent with clauses 2 and 6.4 of the proposed Undertaking). It results in a lack of certainty and clarity for potential access seekers and undermines the benefits of inclusion of an Indicative Access Agreement in the proposed Undertaking.

It would be more appropriate for the variation provisions in section 44ZZA(7) of the TPA to apply to variations of the Indicative Access Agreement. This does not preclude parties from negotiating non-standard terms that vary from those in the Indicative Access Agreement.

Non-discrimination

It is appropriate that CBH's proposed Undertaking includes non-discrimination and no hindering access clauses.

However, the precise non-discrimination and no hindering access clauses proposed by CBH are not appropriate given the lack of clarity about their interpretation. Further, the drafting of the non-discrimination clauses does not ensure that they will prohibit CBH from discriminating in favour of its own trading business.

The ACCC has made recommendations in the Non-Discrimination chapter about changes that could be made to the non-discrimination clauses and no hindering access clauses to make them sufficiently robust to protect against anti-competitive self-preferential treatment by CBH. For the avoidance of doubt, the non-discrimination clause should protect against (amongst other matters) the ability of CBH to anti-competitively discriminate between wheat exporters on the basis of where grain was stored (ie. whether it was stored in CBH's up-country storage and handling network, a third party storage network or on-farm).

The ACCC seeks submissions on whether it would be appropriate for CBH's proposed Undertaking to provide for an annual audit procedure of compliance with the proposed Undertaking's non-discrimination clause.

Ring-fencing

In relation to ring-fencing, the ACCC notes that CBH is already subject to ring-fencing arrangements arising from the ACCC's decision not to revoke a 'notification' from CBH relating to a component of its Grain Express product in 2008. CBH's ring-fencing rules in its proposed Undertaking differ in some respects from the ring-fencing arrangements which form part of CBH's Grain Express exclusive dealing notification. For instance, the Grain Express ring-fencing policy provides for a more robust complaints handling/resolutions process than the process provided in its proposed Undertaking.

The ACCC is therefore of the view that the ring-fencing rules in CBH's proposed Undertaking would not, in their current form, serve as an effective safeguard against anti-competitive discrimination in the provision of port terminal services.

However, ring-fencing is just one tool that can be used to ensure against anti-competitive discrimination.

Were CBH's proposed Undertaking amended to contain robust non-discrimination and no hindering access clauses, fair and transparent port terminal protocols and an indicative access agreement (as well as measures to deal with the potential for information about port terminal services to be used to the advantage of CBH's wheat exporting arm – such as the publication measures described in the Other Issues chapter), then, in the circumstances, it would not be necessary for CBH to include ring-fencing measures in its undertaking at this particular point in time.

In forming this view, the ACCC has taken into account the transitional nature of the industry and the possibility that any ring-fencing measures that were implemented at this point in time could need to be revised in the near future in accordance with any regulatory changes (either to extend or reduce the regulation to which CBH is subject). The ACCC considers that this would be an undesirable outcome in that it could impose unnecessary regulatory costs during a time of industry transition.

The ACCC has also taken into account the short duration of CBH's proposed Undertaking and will closely monitor the effectiveness of its undertaking in ensuring against anti-competitive discrimination during its operation.

The ACCC 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.

It is important to note that the ACCC's approach taken to ring-fencing in assessing this particular access undertaking is not indicative of the approach to ring-fencing that the ACCC would be likely to take in relation to other regulated industries. The approach taken on this occasion reflects the factors outlined above, and in particular, that the industry is still transitioning from having a single desk responsible for the export of wheat in mid 2008 to the current situation of having 23 wheat exporters accredited to export wheat from Australia, and that the arrangements can be revisited in two years.

Finally, it is also important to note that the ACCC's approach to CBH's ring-fencing measures in this draft decision has no bearing on the need for CBH to continue compliance with the ring-fencing arrangements it agreed to adhere to in conjunction with the ACCC's decision not to revoke the 'notification' relating to a component of the Grain Express product.

CBH's agreement to comply with these ring-fencing measures formed an important part of the ACCC's decision not to revoke the notification. Accordingly, the ACCC does not accept CBH's position that ring-fencing measures provided to the ACCC in conjunction with the current access undertaking assessment can apply in substitution for those arrangements referred to in CBH's Grain Express notification to the ACCC.

Publication of key port terminal information

As set out in the Ring-Fencing chapter, the ACCC considers that it is appropriate that arrangements be provided for in the proposed Undertaking to address the potential for CBH's marketing arm to misuse port terminal information to its advantage.

The ACCC considers that the appropriate approach to dealing with this issue would be for the proposed Undertaking to require publication of key port terminal information (such as cargo nomination applications) on the shipping stem a short time after its receipt by CBH. This would increase transparency of nominations that have been made and lessen the opportunity for CBH's marketing arm to misuse key port terminal information. It is important to note that any such discriminatory conduct would be prohibited by a robust non-discrimination clause, such as that recommended by the ACCC in the Non-Discrimination chapter.

Publication of key service standards

It is not appropriate that CBH's proposed Undertaking does not include an obligation to report on a number of key service standards.

Such reporting would provide a degree of transparency around the level of service being provided to wheat exporters and assist potential access seekers in assessing the appropriateness of the price offered for a service.

Conclusion

The ACCC's draft decision is that it should not accept the proposed Undertaking proffered by CBH on 16 April 2009 in its current form.

The ACCC has provided its draft views throughout on provisions that would not be appropriate, and alternatives that might be more appropriate.

is uneconomical to duplicate the particular facility. Therefore, even absent the existence of the WEMA, the ACCC considers it is not its role in assessing an undertaking provided under Division 6 of Part IIIA to determine whether the facility to which the undertaking relates is uneconomical to duplicate, nor whether the facility would otherwise meet the requirements for declaration under Division 2.

The ACCC therefore does not consider that its role in the current context is to thoroughly assess the state of competition in the bulk wheat export industry and evaluate whether access undertakings are justified (such as by reason of the port terminal facilities being uneconomical to duplicate). Instead, the ACCC considers that Parliament has expressed a clear intention to require port terminal operators to provide access undertakings to mitigate the potential for anti-competitive harm, and it is in that context that the ACCC must consider the appropriateness of those undertakings as provided.

The ACCC nonetheless considers it appropriate, in having regard to the matters in section 44ZZA(3)(aa) and (b) of Part IIIA, to have some regard to the competitive environment in which the services the subject of the undertaking are provided. That is, section 44ZZA(3)(aa), by referring to the objects of Part IIIA, recognises the promotion of the economically efficient operation of, use of and investment in infrastructure, thereby promoting competition in upstream and downstream markets, while section 44ZZA(3)(b) refers to the public interest, including the public interest in having competition in markets (whether or not in Australia).

Objects of Part IIIA – a consistent approach to access regulation

Section 44AA(3)(b) of the TPA states that an object of Part IIIA is to provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

In this particular instance, the ACCC notes that the undertaking provided by CBH is one of three undertakings that have been proposed by three bulk handling companies that, taken together, cover services provided by means of facilities at seventeen grain export terminals around Australia. Further, the undertakings have been proffered to the ACCC pursuant to a Commonwealth scheme designed to introduce competition into the bulk wheat export industry.

In this context, the ACCC acknowledges differences in the circumstances of each bulk handler, including differences in the services provided by means of a particular facility, and the extent to which such differences may influence the ACCC's consideration of the appropriateness of the undertaking proposed by that bulk handler.

The ACCC also acknowledges, however, the desirability of encouraging a consistent approach to access regulation, as recognised in section 44AA(b) of the TPA, and considers that, to the extent possible and appropriate, the Undertaking proposed by CBH ought to maintain consistency with the undertakings proposed by the other bulk handlers.

• the MGC (which is also an Destination Site), where grain may be loaded into containers or Outturned for domestic supply;

• one of the four port storage and loading facilities (which are also Destination Sites).

CBH provides grain receival, storage and handling services to Growers and Exporters on the condition that, CBH will arrange for haulage of that grain to the point where it is Outturned from CBH's custody, which may be done at any of the 5 Destination Sites selected by Growers or Exporters.

This condition is implemented in CBH's contracts with both Growers (who acquire receival and storage services from CBH) and Exporters (which acquire storage and handling services) under Grain Express.

Under Grain Express, Growers are not required to make a nomination immediately at the Receival Point. Rather, grain will be received by CBH and the Grower will subsequently nominate its chosen acquirer and marketing arrangement at the time of its choice.

That choice is usually made electronically, via CBH's LoadNet® system, which lists each of the marketing options offered by the various grain Exporters. The various marketing options will include different estimates of transport costs and marketing returns for grain, depending upon the point at which the Exporter expects to Outturn grain or load it onto a vessel for export. For example, a marketing option may be offered for grain at the nearest Destination Site, or at the relevant downstream port.

Under Grain Express, transfer of grain entitlement to Exporters does not necessarily occur at the moment grain is delivered at the Receival Point. Instead, each marketing choice on LoadNet® provides for a specific point at which the Exporter will Outturn the grain. When the Grower nominates a choice of marketing option and Outturn point, the Exporter becomes entitled to Outturn grain at the nominated Destination Site at that time.

There are 5 export Destination Sites (including the 4 port terminals and the MGC). While Growers are able to Outturn grain from a Receival Point where they have warehoused grain, Exporters are only be able to Outturn their grain entitlements at a Destination Site. Domestic Users will be able to outturn at relevant up-country receival sites after harvest and CBH will rebate 100% of the freight differential between the nomination site and the outturn site (except in the case of movements from MGC to Kwinana where the exporter will still bear the costs of transport between MGC and Kwinana).

Under Grain Express, once a Grower has nominated a marketing option, CBH arranges transport to the nominated Destination Site and invoices the Grower for its services (including a distinct and transparent freight charge) to that point. CBH does not add a profit margin to freight costs. The Exporter is charged storage and handling fees for the grain in relation to the Destination Site where it is Outturned.

CBH performs a range of tests of grain at the Receival Point and at other stages in the Supply Chain. The information obtained through the testing process is valuable in understanding the quality and other attributes of grain in CBH's system. Testing of grain at the Receival Point provides Growers with a detailed record of the grain they have delivered and also provides Exporters with a quality profile of:

• quality profile of their grain entitlement; and

• the total quality profile of all stocks of grain acquired.

The value provided from grain quality information is an important matter for Growers, CBH and Exporters. Exporters seek to match quality and specification of grain with particular markets.

CBH has a significant investment in quality management by establishing:

• the Australian Grain Centre in 2003 which is a nationally accredited testing laboratory; and

• a farm integrated quality program, which is an on-farm quality assurance program built to meet the internationally recognised SQF code, and is fully HACCP compliant.

CBH recognises that Exporters want site level quality information for marketing purposes. However, it does not necessarily follow that it is appropriate for an Exporter to assert control over specific grain parcels or to "mine" co-mingled stacks in order to obtain a greater share of high quality grain than the Exporter has paid for.

To effectively manage the stack access and quality issues and balance logistics efficiency with marketing value derivation, an important component of Grain Express is a quality management plan with the following elements:

Exporters will be provided with:

• full quality (as tested at receival), grade and quantity information for each parcel of grain delivered to their entitlement;

• weighted average quality of that Exporter's stock by grain and grade at each Destination Site, that will be adjusted based on all transactions in and out of Destination Sites.

Stakeholders are provided with total tonnes received (on a zone and whole-State basis) by grain and grade and its weighted average quality profile.

Exporters may request further testing data (not tested at receival), subject to payment of a fee and CBH's information flow policy, which prohibits CBH from disclosing Exporters' confidential stock information.

Under Grain Express, CBH delivers at the nominated Destination Site (most commonly, at port) grain to a specification nominated by a Exporter, provided that the Exporter has sufficient stock of equivalent grain and provided sufficient time before the Outturn is required. In order to achieve this, CBH maintains a rolling profile of the Exporter's grain entitlement, updating the profile as grain is acquired by that Exporter and Outturned to that Exporter's specification. Unless it does so under the reservation policy referred to below, Exporters will not generally be able to request the movement of particular parcels of grain under Grain Express. However, they will be able to use information about the quality profile of their grain entitlements to derive value in niche markets.

Exporters are able to request the movement of particular qualities of grain if engaging in the quality management plan process under Grain Express. Exporters may request CBH to provide a particular quality of grain which will result in CBH reserving internally a stack of grain in order to meet the quality requirements of an Exporter. This ensures that the grain in the reserve stack is then delivered to that Exporter at the Destination Site.

CBH endeavours to meet quality requests in accordance with Exporters' pro rata entitlement to grain of that quality.

To ensure that the right balance is struck between Supply Chain efficiency and niche marketing requirements, CBH as part of its Grain Express service:

• has appointed a logistics quality manager, who is responsible for meeting quality specifications; and

• works with Exporters to develop quality management plans.

Under Grain Express, CBH is the head contractor for transport services required to transport grain in CBH's custody from country storage to port and between CBH sites. From the carriers'

CBH is vertically integrated, strong non-discrimination obligations and appropriate transparency measures would also be appropriate (see the Non-Discrimination chapter).

It should be noted that the ACCC has expressed the view elsewhere in this draft decision that appropriate non-discrimination measures should prohibit CBH discriminating in favour of itself except to the extent that the cost of providing access to other operators is higher, as per s.44ZZCA of the TPA. As a transparency measure to support this, appropriate measures would require prices to be transparently specified for a standard set of port terminal services to all parties, including CBH, with any special requirements due to different origin being separately enumerated and priced.

These underpinning measures would allow access seekers to commercially negotiate with CBH in a framework where both parties know that prices, terms and conditions may be subject to arbitration by the ACCC or a private arbitrator, applying the pricing principles in s.44ZZCA of the TPA and general non-discrimination requirements.

Third, the proposed Undertaking is for a limited duration. CBH is subject to the threat of more prescriptive regulatory requirements in any future Undertaking should the publish-negotiate-arbitrate framework not be effective. CBH will have a strong incentive to ensure that prices are commercially reasonable and non-discriminatory to avoid more costly and intrusive regulation in future (such as cost modelling for all its port terminals, ex ante pricing and prescriptive ring-fencing).

Finally, the proposed Undertaking covers six port terminals, and the proposed Undertakings of all three bulk handlers cover 17 port terminals altogether. Given the transitional state of the industry, it would be a significant cost burden on the industry to require ex ante cost modelling of 17 port terminals if only a few may prove the subject of an arbitration that would warrant cost modelling.

Therefore the ACCC considers it is likely to be appropriate for the proposed Undertaking to adopt a publish-negotiate-arbitrate approach rather than an ex ante regulated price approach, provided that the mechanisms giving effect to the publish-negotiate-arbitrate approach are robust. In this regard the ACCC reiterates its previous comments regarding the need for the proposed Undertaking to be certain and clear, and to provide for 'fair and transparent access' to access seekers. The ACCC considers that it is in the interests of access seekers, and consistent with the WEMA, for the publish-negotiate-arbitrate mechanism to be robust.

The ACCC wishes to emphasise that in reaching this view it is not suggesting that the absence of ex ante regulation of prices for port terminal services is likely to be appropriate in all circumstances. The ACCC is instead acknowledging that it is appropriate for the proposed Undertaking not to provide for ex ante pricing regulation given the circumstances at this particular time. The ACCC wishes to expressly recognise the possibility that ex ante price regulation may be appropriate for port terminal services in certain circumstances, and takes no view on what may be appropriate in relation to any subsequent undertaking proposed by CBH following the expiry of the current proposed Undertaking.

unless those different terms are:

(C) consistent with the objectives of this Undertaking set out in clause 2; and

(D) commercially justifiable taking into account the matters set out in clause 6.5; and

(E) offered on an arms length commercial basis.

The non-discriminatory access clause set out above is expressed to be subject to the price and non-price terms provisions outlined in clause 6.5 of CBH's proposed Undertaking. Clause 6.5 sets out the basis upon which the price and non-price terms for the provision of access to Port Terminal Services might differ between different access seekers. The following is the list of matters CBH will have regard to in determining the price and non-price terms it offers:

For the purposes of this Undertaking, the price and non-price terms for the provision of access to Port Terminal Services to different Applicants or Users will be determined having regard to:

(a) the economically efficient operation of the Port Terminal Facilities and the Port;

(b) the Port Operator's legitimate business interests and investment in the Port Terminal Services, Port Terminal Facilities and the Port;

(c) all costs that the Port Operator incurs or may incur in providing access, including any costs of extending the Port Terminal Services, but not costs associated with losses arising from increased competition in upstream or downstream markets;

(d) the economic value to the Port Operator of any additional investment that the Applicant or Port Operator has agreed to undertake;

(e) the interests of all persons who have rights to use the Port;

(f) the operational and technical requirements necessary for the safe and reliable operation of the Port Terminal Services, the Port Terminal Facilities and the Port;

(g) any differences in the costs of providing access to Port Terminal Services to different Applicants or Users;

(h) the opportunity cost of accommodating the requirements of one Applicant or User compared to the requirements of one or more other Applicants or Users;

(i) the provision of quality related services reasonably required by the Port Operator in respect of some Applicants or Users but not others, including security of Bulk Wheat integrity, testing of Bulk Wheat or Bulk Wheat classification, fumigation and protection requirements for Bulk Wheat;

(j) the relative risk related to storing and handling different Bulk Wheat segregations for Applicants and Users;

(k) available port capacity, including receival, handling, storage and cargo accumulation capacity;

(l) differences in types and grades of Applicants' or Users' Bulk Wheat;

(m) differences in Applicants' or Users' Bulk Wheat volumes;

(n) differences in periods of time during which access to Port Terminal Services is required by Applicants or Users;

11 Ring-Fencing

Ring-fencing is one tool that can be used, in conjunction with robust non-discrimination and no hindering access clauses, fair and transparent port terminal protocols and an indicative access agreement to protect against anti-competitive discrimination.

The ACCC notes that CBH is already subject to ring-fencing arrangements arising from the ACCC's decision not to revoke a 'notification' from CBH relating to a component of its Grain Express product in 2008. CBH's ring-fencing rules in its proposed Undertaking differ in some respects from the ring-fencing arrangements which form part of CBH's Grain Express exclusive dealing notification. For instance, the Grain Express ring-fencing policy provides for a more robust complaints handling/resolutions process than the process provided in its proposed Undertaking.

The ACCC is therefore of the view that the ring-fencing rules in CBH's proposed Undertaking would not, in their current form, serve as an effective safeguard against anti-competitive discrimination in the provision of port terminal services.

However, were CBH's proposed Undertaking amended to contain robust non-discrimination and no hindering access clauses, fair and transparent port terminal protocols and an indicative access agreement (as well as measures to deal with the potential for information about port terminal services to be used to the advantage of CBH's wheat exporting arm – such as the publication measures described in the Other Issues chapter), then, in the circumstances, it would not be necessary for CBH to include ring-fencing measures in its undertaking at this particular point in time.

In forming this view, the ACCC has taken into account the transitional nature of the industry and the possibility that any ring-fencing measures that were implemented at this point in time could need to be revised in the near future in accordance with any regulatory changes (either to extend or reduce the regulation to which CBH is subject). The ACCC considers that this would be an undesirable outcome in that it could impose unnecessary regulatory costs during a time of industry transition.

The ACCC has also taken into account the short duration of CBH's proposed Undertaking and will closely monitor the effectiveness of its undertaking in ensuring against anti-competitive discrimination during its operation.

The ACCC 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.

It is important to note that the ACCC's approach taken to ring-fencing in assessing this particular access undertaking is not indicative of the approach to ring-fencing that the ACCC would be likely to take in relation to other regulated industries. The approach taken on this occasion reflects the factors outlined above, and in particular, that the industry is still transitioning from having a single desk responsible for the export of wheat in mid 2008 to the current situation of having 23 wheat exporters accredited to export wheat from Australia; and that the arrangements can be revisited in two years.

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The ACCC has also taken into account the short duration of CBH's proposed Undertaking and will closely monitor the effectiveness of its undertaking in ensuring against anti-competitive discrimination during its operation.

The ACCC 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.

It is important to note that the ACCC's approach taken to ring-fencing in assessing this particular access undertaking is not indicative of the approach to ring-fencing that the ACCC would be likely to take in relation to other regulated industries. The approach taken on this occasion reflects the factors outlined above, and in particular, that the industry is still transitioning from having a single desk responsible for the export of wheat in mid 2008 to the current situation of having 23 wheat exporters accredited to export wheat from Australia; and that the arrangements can be revisited in two years.

Finally, it is also important the note that the ACCC's approach to CBH's ring-fencing measures in this draft decision has no bearing on the need for CBH to comply with the ring-fencing arrangements it agreed to adhere to in conjunction with the ACCC's decision not to revoke the 'notification' relating to a component of the Grain Express product.

CBH's agreement to comply with these ring-fencing measures formed an important part of the ACCC's decision not to revoke the notification. Accordingly, the ACCC does not accept CBH's position that ring-fencing measures provided to the ACCC in conjunction with the current access undertaking assessment can apply in substitution for those arrangements referred to in CBH's Grain Express notification to the ACCC.

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[335] For example, the ACCC notes the planned Productivity Commission review of the WEMA and statements by the Federal Government that it will monitor developments in the up-country stages of the grain supply chain