Australian
Competition &
Consumer
Commission

Co-operative Bulk Handling Limited

Port Terminal Services Access Undertaking

Further Draft Decision

23 September 2009

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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 genuinely and verifiably 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 (i.e. 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 Publication of Information 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 state of the industry and the possibility that any ring-fencing measures that were implemented at this point in time may need to be revised in the medium term 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

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 and no hindering access clauses does not ensure that they will protect against CBH discriminating in favour of its own trading business.

The ACCC has made recommendations about changes that could be made to the non-discrimination 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 (i.e. whether it was stored in CBH's up-country storage and handling network, a third party storage network or on-farm).

Further, in order for the ACCC to be able to monitor compliance with the non-discrimination clause, the ACCC considers it would be appropriate for CBH's proposed Undertaking to allow the ACCC to request an audit be undertaken to assess compliance with the non-discrimination clause (but no more than twice in every twelve months).

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), 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 state of the industry and the possibility that any ring-fencing measures that were implemented at this point in time may need to be revised in the medium term in accordance with any regulatory changes (either to extend or reduce the regulation to which CBH is

Such reporting (on CBH's website) 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. However, the ACCC does not intend this to be an onerous obligation. In the context of a newly liberalised industry, the obligation should not (in this particular context) require the collation of data that CBH does not already collect, have on hand or have access to as part of its normal commercial practice.

Conclusion

In relation to the proposed Undertaking given to the ACCC by CBH on 14 April 2009, the ACCC's further draft view is that, having regard to the matters listed in s.44ZZA(3) of the TPA, it would not be appropriate to accept the proposed Undertaking.

As a result, the ACCC's further draft decision is that it should not accept the proposed Undertaking in its current form.

The ACCC has provided the reasons for its further draft decision throughout this document, including views on provisions that would not be appropriate, and alternatives that would likely be appropriate.

- a bundled receival, storage, handling, logistics and transport service;
- flexible and effective receival conditions;
- efficient Outturning of grain at defined Destination Sites, including ports;
- transparent freight, storage and handling fees for Growers and Exporters;
- transparent queuing and shipping arrangements;
- clarified grain entitlements of Growers and Exporters;
- quality management services to derive value from information; and
- an extensive Grower services call centre.

Under Grain Express, CBH negotiated agreements to acquire bulk grain haulage services from ARG and road haulage carriers. CBH use the freight services it acquires to move grain in its system between the Receival Point and, depending upon the requirements of the Grower and Exporter:

- one of 10 larger grain storage and loading facilities, where grain may be Outturned by the Grower or Exporter (Destination Sites);
- 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.

CBH submits that Section 19 of the Bulk Handling Act is especially relevant in relation to port access. This section provides that:

> Subject to this Act and the regulations, the Company shall allow a person, on payment of the prescribed charges, the use of any bulk handling facilities and equipment controlled by it at ports in the State.

The ACCC considers that this will not cause any issues for CBH because, despite clause 3.1(b)(ii), its Port Schedules do not appear to include any specific terms or conditions.

5.6.3.2 Using 'reasonable endeavours' to procure (clause 3.3)

The ACCC considers that if another body was required to act (or not act) in a certain manner by the proposed Undertaking, then that party should be a party to the proposed Undertaking.

However, the ACCC considers that inclusion of the obligation to procure clause is nonetheless appropriate in the unlikely case that it is required.

However, an obligation to use 'reasonable endeavours' does not appropriately balance the legitimate business interests of CBH with the interests of access seekers, who require more certainty that the terms of the proposed Undertaking will be carried out.

It is the ACCC's view that the words 'use reasonable endeavours to' should be removed from this clause to strengthen the obligation to procure.

CBH has proposed are merely indicative of what CBH may do in seeking an extension, and in no way fetter the discretion of the ACCC in relation to those matters as provided under the TPA.

Furthermore, it is the ACCC's view that clause 4.6(a) of the proposed Undertaking is not appropriate pursuant to section 44ZZA(3). This clause refers to CBH submitting a statement regarding whether or not it intends to submit a new undertaking at least three months before the expiry of the proposed Undertaking. The ACCC considers that, in light of the statutory obligation in section 44ZZBC of the TPA for the ACCC to use reasonable endeavours to make a decision on an access undertaking application within 6 months of receiving the application, or such longer period, the reference to 3 months in clause 4.6(a) creates confusion and is not appropriate. The ACCC also notes that it is not possible to foresee whether CBH will wish to submit a different undertaking in the future, or the length of time it would take for the ACCC to consider such undertaking, and it is therefore not appropriate to attempt to anticipate such time frames in the current proposed Undertaking.

services supplied under the agreement uses port terminal facilities in relation to bulk wheat. CBH submits that this, in effect, is regulation of the port terminal facility, not the port terminal service.

2 Multiple services may be supplied by the same facilities but bundled services using additional (unregulated) infrastructure may be excluded from an undertaking

2.1 As is clear from the decision in BHP Billiton v NCC, a single facility may be used to provide several services. BHPBIO's rail lines, together with other facilities, were used to supply BHPBIO an integrated transportation, blending and stockpiling service. Fortescue Metals Group (FMG) did not seek access to that service. Instead it sought access to run its rolling stock on BHPBIO's rail lines.

2.2 As a thought experiment, the ACCC could ask itself whether, if BHPBIO had offered an undertaking for the above-rail service sought by FMG, and also offered a bundled haulage service, would the ACCC have refused BHPBIO's undertaking because it did not apply to the integrated haulage service?

2.3 CBH's approach to the Undertaking was to offer a stand-alone port terminal service, giving customers a choice between the CBH integrated service and making their own arrangements to port. That is the appropriate solution if it is accepted that port terminal facilities (and not up-country storage facilities) meet the criteria for economic regulation in Part IIIA of the TPA. The Grain Express service is an alternative, voluntary service that uses additional, duplicable facilities to provide a complete country to vessel solution.

3 Regulating part of the bundle reduces efficiency

3.1 Importantly, under Grain Express, grain in storage at port terminals is part of the integrated supply chain that enables CBH to satisfy outturn requests by customers without moving grain in an ad-hoc manner. This core efficiency of Grain Express would be substantially eroded if CBH's port storage was unbundled from the up-country supply facilities.

3.2 CBH understands the ACCC's view that enabling Grain Express customers to use the negotiation and arbitration process under the Undertaking would not unbundle the Grain Express service. That view does not align with the way Grain Express services are actually performed. It appears that the ACCC has assumed that Grain Express stops at the port terminal. This is not the case. In fact, grain in storage at port is available for immediate out-turning for a customer that may have just acquired an entitlement at an up-country storage site in that port zone. CBH may load equivalent grain to satisfy that customer's requirements. This enables CBH to flexibly out-turn customers' entitlements, while simultaneously moving grain in a coordinated fashion (often in efficient unit trains).

3.3 However, if a customer must have the ability to arbitrate the port terminal service component of the bundled service, CBH will need to create a distinct port terminal component of the bundled service to be arbitrated. In the case of a service that involves grain in any part of the system (both up-country and port terminal facilities) being treated as part of a single system, the only way

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176 (1998) 87 FCR 517.
177 [2008] HCA 45.

Undertaking to wheat reduces any potential risk of imposing regulation when the industry is newly liberalised and in transition.

In the present circumstances, it is appropriate that CBH's proposed Undertaking applies only to port terminal services (rather than including up-country services).

2.2 The PGA does not agree with the ACCC acceptance of the CBH submission that it is appropriate that the proposed Undertaking applies only to services offered at port, and not up-country.

2.3 Port terminal services are but one part of the services necessary for access to bulk wheat export markets. The upcountry activities of port operators are closely related and cannot feasibly be separated from port terminal services. CBH is the monopoly provider of both port terminal services and upstream services in Western Australia. The proposed Undertaking does not ensure that growers are not disadvantaged due to a lack of competition through the control of both services by CBH.

It is not appropriate that CBH's proposed Undertaking only applies to port terminal services when they are not bundled with other CBH services.

2.4 The PGA agrees with the ACCC's non-acceptance of CBH's submission that the proposed Undertaking applies only to those customers who wish to acquire port terminal services on a stand alone basis, and that it would not apply to those customers who acquire port terminal services as part of a bundled service.

2.5 CBH offers a consolidated or bundled wheat export supply chain logistics service under an exclusive dealing notification provided to the ACCC, known as Grain Express. Under Grain Express CBH supplies grain and handling services, grain supply co-ordination services, and grain transport services to growers while the grain remains in CBH's custody. When the grain is marketed the storage and handling fees are charged to the marketer.

2.6 The CBH Grain Express notification only relates to the bundling of upcountry storage and handling services with transportation to port, while the grain remains in the system. It does not cover the bundling of CBH's port services with its upcountry storage, handling and transportation services.

2.7 CBH controls 197 receival sites through out the Western Australian grain belt. Typically, wheat is unloaded at receival sites, sampled, analysed, weighed, graded and sorted. Wheat may also be warehoused for varying periods of time at a site by growers before being sold (where title is transferred to another person). If grain requires fumigation, this is carried out prior to being loaded for transport from a receival site.

2.8 Wheat is transported from upcountry receival and storage sites to port by rail or road. Under Grain Express, CBH arranges transport to port, using rail and road service operators which are determined by CBH. Access to port terminal …services is essential to export bulk wheat from Australia. In Western Australia all grain for export is allocated to Grain Express, so Western Australian growers have no option but to utilise Grain Express in marketing their wheat.

2.10 The absence of alternative upcountry receival sites and port terminal facilities in Western Australia means that it is unlikely that growers who wish to acquire port terminal services on a stand alone basis would be able to due so, as currently these services can only be accessed as part of a bundled service.

It is not appropriate that CBH's proposed Undertaking expressly excludes "fumigation of grain as a preventative measure."

immunity from legal action for exclusive dealing conduct by lodging a 'notification' with the ACCC. The ACCC can only remove the immunity if it decides that the conduct substantially lessens competition and is not in the public interest.

CBH lodged a notification in June last year.

The notified conduct covers the requirement under the Grain Express system that, while grain is in CBH's custody, its transportation will be arranged and coordinated by CBH. CBH uses both road and rail freight services to move grain in its system.

In the ACCC's Draft Decision on CBH's proposed Undertaking, the ACCC stated that CBH's Grain Express notification only relates to the bundling of up-country storage and handling services with transportation to port, while the grain remains in its system. The ACCC stated in its Draft Decision that the notified conduct does not cover the bundling of CBH's port services with its up-country storage, handling and transportation services.

The ACCC notes the assertion in CBH's letter of 24 August 2009 to the ACCC that CBH's Grain Express notification relates to, among other things, CBH bundling storage and handling services at all four of its ports with supply chain coordination services and transport services (while the grain remains in its system).

In response, the ACCC notes that it would appear that the differing interpretations about the scope of the conduct covered by the Grain Express notification is a result of differing understandings about the meaning of 'storage and handling services' as these services relate to port terminals.

The focus of the notified conduct and supporting submission was the bundling of grain transport services to one of 15 Destination Sites within CBH's storage and handling service provided through its storage and handling network. The ACCC considers that it is not clear in the notification Form G or in CBH's supporting submission that storage and handling services, as they relate to ports, were intended to include port terminal services such as ship loading.

The ACCC also notes that its public assessment statement in relation to the notification focused on the potential efficiencies to be gained by CBH being able to coordinate movements of grain (via road and rail) in its system to Destination Sites. CBH was made aware of the basis of the ACCC's assessment of the notification in the public assessment statement and made no attempt to correct any possible misunderstanding about the extent of the notified conduct.

The ACCC is considering this issue further in assessing whether to review the notified arrangements.

However, it is important to note that the process for considering an application for immunity for the exclusive dealing provisions of the TPA is separate and distinct from any access undertaking arrangements under Part IIIA. Notification only provides immunity for exclusive dealing conduct and is not directly relevant to the consideration of issues in relation to Part IIIA access undertakings. This was clearly noted in the ACCC's public assessment statement about the notification.

For the reasons set out above, the ACCC considers that it is not appropriate that the proposed Undertaking does not cover all bulk wheat exporters acquiring port terminal services from CBH—regardless of what other services they may acquire from CBH, and in what form the services are acquired.

The ACCC notes that, as set out in CBH's submission dated 24 August 2009, CBH now intends any further proposed undertaking to cover all port terminal services, regardless of whether they are bundled with other services.

The ACCC notes that the requirement for all port terminal service users to be covered by the access undertaking does not necessitate the breaking up of any bundled offer, and that there are several ways in which CBH could give effect to this requirement under a revised undertaking. Firstly, the indicative access agreement attached to the undertaking could apply to both the bundled offer and the stand alone port terminal service. Alternatively, the indicative access agreement attached to the undertaking could apply to the stand alone port terminal service and make it clear which components of the bundled offer are port terminal services. Users would also need to be made aware of the ability to negotiate and arbitrate on the port terminal service components of the bundled offer. CBH has informed the ACCC that its revised undertaking will adopt the former approach.

7.5.1.4 Fumigation of grain as a preventative measure

The ACCC considers that it is not appropriate to expressly exclude fumigation of grain as a preventative measure from the scope of its proposed Undertaking without specifying what type of fumigation measures will be subject to the proposed Undertaking.

The ACCC accepts submissions made by AGEA and the PGA that fumigation is an essential part of port terminal services. While it may be the case that not all fumigation of grain is appropriate at port, it is unclear precisely how the term "preventative measure" would be interpreted in this context without further specification about what type of fumigation would be included within the scope of the proposed Undertaking.

As noted above, CBH provided a further submission in relation to fumigation on 20 August 2009 which noted that fumigation as a preventative measure is not usually provided at port for several reasons including the time taken to fumigate and the impact it would have on the efficiency of the export terminal.

7.5.1.5 Drafting of the scope lacks clarity

Aside from proposing that its proposed Undertaking not apply to bundled services, the ACCC recognises that CBH has attempted to draft the scope of its proposed Undertaking to be consistent with the service definition in the WEMA. Nevertheless the ACCC considers that the drafting of the scope of CBH's proposed Undertaking lacks clarity and is therefore not appropriate pursuant to section 44ZZA(3).

The definition of Port Terminal Service in the WEMA is:

the ACCC notes that a failure of CBH to allow an accredited wheat exporter to bring an employee of a superintendence company into the port terminal area could be an issue dealt with by negotiation or arbitration under the proposed Undertaking (see the Publish, Negotiate, Arbitrate chapter).

The ACCC further notes that failure to allow access to an employee of a superintendence company may, in some circumstances, have the potential to breach the non-discrimination obligations that the ACCC considers necessary for inclusion in a revised undertaking.

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.

The ACCC notes as a general comment that the publish-negotiate-arbitrate clauses in the proposed Undertaking are to a large extent modelled on clauses contained in the access undertaking submitted by the Australian Rail Track Corporation (**ARTC**), and accepted by the ACCC on 30 July 2008. The ACCC considers the fact that it accepted as appropriate particular clauses in the ARTC access undertaking provides little

CBH's dispute resolution process and the two areas requiring improvement above are discussed in detail below.

The ACCC notes submissions from a number of interested parties raising concerns about whether a number of the terms of the indicative access agreement are acceptable, based on the commercial considerations and circumstances of those interested parties. The ACCC notes however, that the standard terms provided under the an indicative access agreement are intended to be the minimum terms and conditions of access to CBH's port terminal services, and that access seekers will have the ability to negotiate (or arbitrate) non-standard terms that vary from any of those standard terms that they consider to be unacceptable, based on their own particular commercial considerations and circumstances. Accordingly, in this further draft decision, the ACCC has not found it necessary to form views about whether the particular terms and conditions of the August Indicative Access Agreement would be acceptable to particular parties (given likely differences between the commercial considerations and circumstances of specific access seekers.

9.6.2.1 Dispute Resolution

A key feature of an effective indicative access agreement is a robust dispute resolution process. The ACCC is concerned with ensuring fair and transparent access to port terminal services and that includes ensuring that the dispute resolution process fairly balances the legitimate business interests of CBH with the interests of access seekers.

The dispute resolution process provided under clause 19 of CBH's August Indicative Access Agreement is set out below:

> **19 DISPUTE RESOLUTION**
>
> **19.1 Disputes**
>
> (a) Save for any dispute arising:
>
> (i) under the Auction Rules which shall be dealt with in accordance with the provisions of the Auction Rules; and
>
> (ii) under the Ring Fencing Rules which shall be dealt with in accordance with the provisions of the Ring Fencing Rules, all disputes arising out of or in connection with this Agreement or the Port Terminal Rules shall be dealt with in accordance with the provisions of this clause 19.
>
> (b) A dispute shall be referred to the Customer's Manager and the CBH Operations Manager - Logistics for resolution. The CBH Operations Manager - Logistics and the Customer's Manager shall meet or confer at least once within 24 hours of the notification of the dispute to discuss the dispute and attempt to resolve the dispute.
>
> (c) Where the dispute relates to invoiced Services, the Customer is to inform the CBH Operations Manager - Logistics immediately, and before the due date of that invoice.
>
> (d) Any dispute relating to a breach of the terms and conditions of this Access Agreement shall not, of itself, amount to a dispute relating to a breach of the Undertaking or the rules forming part of the Undertaking,

19.2 Escalation of Dispute – Executive Panel

If no resolution of the dispute can be reached in accordance with clause 19.1, within seven (7) days of the dispute being notified to the other party, each party shall refer the dispute to the General Manager - Operations of CBH and the CEO of the Customer (or such person designated by the Customer as having authority equivalent to that of a CEO) (the "Executive Panel"). The Executive Panel:

(a) will meet at least once at a time mutually convenient no later than 2 Business Days after the dispute has been referred to it; and

(b) may decide on the methods and procedure by which it will resolve the dispute, which may include the obtaining of expert advice.

19.3 Payment of invoices pending resolution of a dispute

Notwithstanding anything in this Agreement, the Customer is not entitled to withhold payment of the undisputed amount of any invoice. If the Customer cannot provide a reasonable estimate of the disputed amount the Customer will not be entitled to withhold any payment.

19.4 Arbitration

(a) Referral to arbitration

(i) If the Dispute is not resolved within ten Business Days after being referred to the Executive Panel under clause 19.2, either of the parties may give notice to the other party to refer the Dispute to Arbitration in Western Australia by a single arbitrator appointed by agreement of the parties or if they fail to agree within ten Business Days, an arbitrator appointed by the President of the Western Australian Chapter of the Institute of Arbitrators and Mediators of Australia (IAMA) acting on the request of either party.

(ii) CBH must notify the ACCC of the details of any Dispute which has been referred to arbitration. CBH must provide the arbitrator’s final determination to the ACCC.

(iii) If the Customer serves notice under clause 19.4(a)(i), that notice will also include an agreement by that Customer to:

A) pay any amounts determined in accordance with clause 19.4 (f); and

B) indemnify the arbitrator from any claims made against the arbitrator arising in connection with the performance by the arbitrator of its duties under this clause 19, such indemnity excluding circumstances where the conduct of the arbitrator constitutes wilful negligence, or is dishonest or unlawful conduct.

(iv) CBH must pay any amounts determined in accordance with clause 19.4 (f) and will indemnify the arbitrator from any claims made against the arbitrator arising in connection with the performance by the arbitrator of its duties under this clause 19, such indemnity excluding circumstances where the conduct of the arbitrator constitutes wilful negligence, or is dishonest or unlawful conduct.

(v) The arbitrator will not proceed with the arbitration unless and until the Customer has agreed to pay the arbitrator's costs as determined under clause 19.4(f).

(b) Arbitration procedure

(i) Unless CBH and the Customer agree otherwise, the arbitration must be conducted in private.

(ii) A party may appoint a person, including a legally qualified person, to represent it or assist it in the arbitration.

(iii) The arbitrator will when conducting the arbitration:

A) observe the rules of natural justice but is not required to observe the rules of evidence;

B) proceed as quickly as is possible and consistent with a fair and proper assessment of the matter;

C) while having the right to decide on the form of presentations, encourage a written presentation by each party with exchange and with rebuttal opportunities and questioning by the arbitrator;

D) call on any party the arbitrator believes necessary to give evidence;

E) decide how to receive evidence and consider the need to keep evidence confidential and the need to protect the confidentiality of the arbitration process;

F) present its determination in a draft form to the parties and hear argument from the parties before making a final determination; and

G) hand down a final determination in writing which includes all its reasons for making the determination and findings on material questions of law and fact, including references to evidence on which the findings of fact were based.

(iv) The arbitrator may at any time terminate arbitration (without making an award) if it thinks that:

A) the notification of the Dispute is vexatious;

B) the subject matter of the Dispute is trivial, misconceived or lacking in substance; or

C) the party who notified the Dispute has not engaged in negotiations in good faith.

(c) Matters which arbitrator must take into account

In deciding a Dispute the arbitrator will take into account the principles, methodologies and provisions set out in the Undertaking, in particular clauses 6.4 and 6.5;

(d) Confidentiality

(i) The arbitrator must take all reasonable steps to protect the confidentiality of information that a party has identified is confidential or commercially sensitive.

(ii) The arbitrator may require the parties to comply with rules and orders aimed at protecting the confidentiality of information provided by the parties, including:

A) requiring each party to give confidentiality undertakings to the other party and their external advisers; and

B) limiting access to confidential information to specified individuals subject to confidentiality undertakings provided by those individuals.

(iii) The arbitrator may make confidential and non-confidential versions of its determination and limit access to the confidential versions to specific individuals.

(iv) For the purpose of clarity, the entire dispute resolution process outlined in this clause 19 remains subject to clause 18.

(e) Effect of arbitrator's determination

(i) The determination of the arbitrator will be final and binding subject to any rights of review by a court of law.

(ii) Except where the determination or direction is subject to a review by a court of law, if a Customer does not comply with a determination or direction of the arbitrator, then CBH will no longer be obliged to provide services under this Agreement for that Customer.

(iii) Except where the determination or direction is subject to a review by a court of law, CBH will comply with the lawful directions or determinations of the arbitrator.

(f) Arbitrator's costs

The arbitrator's costs and the costs of the parties to the arbitration will be borne by the parties in such proportions as the arbitrator determines. Each party may make submissions to the arbitrator on the issue of costs at any time prior to that determination.

The ACCC considers that the dispute resolution provisions at clause 19 of CBH's August Indicative Access Agreement (set out above) are appropriate for inclusion in the Undertaking. This is because the relevant processes and timeframes that must be followed for the resolution of disputes have been drafted with a sufficient level of clarity and detail.

9.6.2.2 Unilateral variation of terms of an executed indicative access agreement

The ACCC is of the view that CBH's approach to the variation of agreed non-price related terms under an executed access agreement is appropriate. This is because, under the August Indicative Access Agreement, variations to agreed non-price related terms are only allowed to occur with the written agreement of both parties to that agreement under clause 20(b), which states that "[t]his Agreement may only be