



Cooperative Bulk Handling Limited

Public Submission to the Australian Competition &
Consumer Commission

Port Terminal Services Undertaking

Dated: 1 April 2011

1 Introduction

Purpose of submission

1.1 Cooperative Bulk Handling Limited (**CBH**) makes this submission in support of its Port Terminal Services Undertaking (**Proposed Undertaking**) submitted to the Australian Competition and Consumer Commission (**ACCC**) under section 44ZZA of the *Competition and Consumer Act 2010* (Cth) (**CCA**).

1.2 The Proposed Undertaking is intended to replace CBH's existing undertaking for port terminal services, which expires this year (**Current Undertaking**). The Proposed Undertaking retains much of the structure and content of the Current Undertaking. This approach was taken because CBH wishes to minimise disruption to an industry that has already incurred substantial costs from changes in the regulatory landscape in recent years. As the Productivity Commission (**PC**) commented in its Final Report:

"In the draft report, the Commission expressed the view that the access undertakings should be unchanged between now and 30 September 2014, unless all parties agree proposed changes are beneficial. However, the Commission now considers such a condition could unnecessarily limit the ability of parties to improve the current undertakings, or the ACCC's capacity to act where necessary to promote competition (box 5.5). Rather, changes should be made where there are strong reasons for doing so. (For example, to allow the use of auctions to allocate capacity where this is seen as desirable, or to improve an existing auction system). It is still important to avoid 'unnecessary' changes to the undertakings to prevent parties incurring additional future compliance and administrative costs in relation to the undertakings. Should the ACCC wish to make significant changes to the undertakings, it should provide stakeholders with plenty of advance notice.¹

1.3 The Proposed Undertaking includes a number of changes to:

- (i) improve the clarity and utility of the document;
- (ii) address concerns or implement suggestions of the ACCC, the PC and market participants; and
- (iii) enable the Proposed Undertaking to replace the Current Undertaking without undue uncertainty of disruption to business.

1.4 CBH does not propose to repeat its original submission in relation to many aspects of the Proposed Undertaking that remain unchanged. Rather, this submission:

- (i) reviews the basic structure and principles underlying the Proposed Undertaking;
- (ii) explains any substantial changes to the Proposed Undertaking, the Port Terminal Rules or the Standard Access Terms;

¹ Productivity Commission 2010, *Wheat Export Marketing Arrangements*, report No. 51, Canberra (**PC Report**), page 191.

- (iii) addresses certain issues raised by the ACCC in correspondence and consultation during late 2010 and early 2011; and
- (iv) explains why the Proposed Access Undertaking satisfies the criteria for acceptance by the ACCC set out in section 44ZZA of the CCA.

Structure of submission

- 1.5 This submission is divided into 7 parts:
 - (i) **Part 1** contains introductory information and a summary of the main conclusions in the submission;
 - (ii) **Part 2** reports on the provision of access to Port Terminal Services in 2010/2011;
 - (iii) **Part 3** reviews and briefly explains the features of the Undertaking that remain substantially unchanged;
 - (iv) **Part 4** addresses pricing issues raised by the ACCC and explains CBH's improvements to pricing transparency in the Proposed Undertaking;
 - (v) **Part 5** explains CBH's changes to its capacity allocation system;
 - (vi) **Part 6** explains CBH's changes to the Port Terminal Rules amendment process; and
 - (vii) **Part 7** addresses ringfencing issues raised by the ACCC.
- 1.6 Schedule 1 sets out an explanation of the main changes to the terms of the Proposed Undertaking compared to the Current Undertaking.
- 1.7 Unless stated otherwise, the submission employs defined terms consistently with the Current Undertaking and Proposed Undertaking.

2 Report on access and operations

2.1 CBH considers that:

- (i) users were able to obtain access to CBH's Port Terminal Services on acceptable terms for the 2009/2010 and 2010/2011 seasons without formal disputes or substantial complaints of breaches of the Undertaking or the Port Terminal Rules
- (ii) CBH Port Terminal Operations have worked efficiently in the 2009/2010 and 2010/2011 seasons and there has been no recurrence of the congestion issues that arose in 2009.

2.2 The following table provides summary data concerning Port Terminal Operations in 2009/2010 and the start of 2010/2011

SHIPPING SUMMARY FOR PERIOD OCT - DEC 2009

Average Days Where Nominated ETA > NOR Presented	3
Average Days Where Nominated ETA < NOR Presented	5
Average Days NOR Presented - Commencement of Loading within the Contracted Window	1
Average Days NOR Presented - Commencement of Loading Outside Contracted Window	2
Cumulative Number of Vessels Failed Survey For Period	7
Number of Vessels Presenting NOR outside the contracted Window For the Period	4
Number of Vessel - Presenting NOR outside the contracted Window To Date	4
Total Tonnes Exported Oct - Dec	1,623,890
Total Tonnes Exported Year to Date	1,623,890
Number of Vessels Loaded Oct - Dec	68
Number of Vessels Loaded Year to Date	68

SHIPPING SUMMARY FOR PERIOD JAN - MAR 2010

Average Days Where Nominated ETA > NOR Presented	2
Average Days Where Nominated ETA < NOR Presented	4
Average Days NOR Presented - Commencement of Loading within the Contracted Window	4
Average Days NOR Presented - Commencement of Loading Outside Contracted Window	4
Cumulative Number of Vessels Failed Survey For Period	4
Number of Vessels Presenting NOR outside the contracted Window For the Period	27
Number of Vessel - Presenting NOR outside the contracted Window To Date	31
Total Tonnes Exported Jan - Mar	4,045,217
Total Tonnes Exported Year to Date	5,669,107
Number of Vessels Loaded Jan-Mar	132
Number of Vessels Loaded Year to Date	200

SHIPPING SUMMARY FOR PERIOD Apr - Jun 2010

Average Days Where Nominated ETA > NOR Presented	1
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Average Days Where Nominated ETA < NOR Presented	2
Average Days NOR Presented - Commencement of Loading within the Contracted Window	1
Average Days NOR Presented - Commencement of Loading Outside Contracted Window	2
Cumulative Number of Vessels Failed Survey For Period	3
Number of Vessels Presenting NOR outside the contracted Window For the Period	10
Number of Vessel - Presenting NOR outside the contracted Window To Date	41
Total Tonnes Exported Apr - Jun	2,200,590
Total Tonnes Exported Year to Date	7,869,697
Number of Vessels Loaded Apr-Jun	81
Number of Vessels Loaded Year to Date	281

SHIPPING SUMMARY FOR PERIOD Jul- Sep 2010

Average Days Where Nominated ETA > NOR Presented	1
Average Days Where Nominated ETA < NOR Presented	4
Average Days NOR Presented - Commencement of Loading within the Contracted Window	1
Average Days NOR Presented - Commencement of Loading Outside Contracted Window	0
Cumulative Number of Vessels Failed Survey For Period	6
Number of Vessels Presenting NOR outside the contracted Window For the Period	10
Number of Vessel - Presenting NOR outside the contracted Window To Date	52
Total Tonnes Exported Jul - Sep	2,075,418
Total Tonnes Exported Year to Date	9,598,616
Number of Vessels Loaded Jul - Sep	66
Number of Vessels Loaded Year to Date	347

SHIPPING SUMMARY FOR PERIOD Oct- Dec 2010

Average Days Where Nominated ETA > NOR Presented	1
Average Days Where Nominated ETA < NOR Presented	3
Average Days NOR Presented - Commencement of Loading within the Contracted Window	1
Average Days NOR Presented - Commencement of Loading Outside Contracted Window	3
Cumulative Number of Vessels Failed Survey For Period	3
Number of Vessels Presenting NOR outside the contracted Window For the Period	10
Number of Vessel - Presenting NOR outside the contracted Window To Date	10
Total Tonnes Exported Oct - Dec	1,514,926
Total Tonnes Exported Year to Date	1,514,926
Number of Vessels Loaded Oct - Dec	48
Number of Vessels Loaded Year to Date	48

Note that these are total tonnes not Bulk Wheat Tonnes.

3 Key features of the Undertaking

- 3.1 As the ACCC is aware, CBH provided a detailed submission with its Port Terminal Services Undertaking in 2009 (**Current Undertaking Submission**). Parts 2, 3 and 4 of that submission set out details of the industry structure, legislative and regulatory context, and the competitive dynamics in the export wheat industry. To avoid duplication, CBH has not reproduced that information in this submission, and refers to Parts 2, 3 and 4 of the Current Undertaking Submission for that information.

Publish – Negotiate - Arbitrate

- 3.2 The Undertaking maintains the publish-negotiate-arbitrate structure of the Current Undertaking. CBH maintains this approach because:
- (i) as the PC Report effectively concluded, the publish-negotiate-arbitrate structure of the Current Undertaking may have delivered some benefits in the transitional period as deregulation of marketing occurred, but these are likely to be outweighed by costs of even this lighter-handed approach in the longer-term. If this is correct, the case for adopting a heavier handed approach is weak, to say the least;
 - (ii) there is no evidence of access seekers being denied access to services provided by the use of CBH's Port Terminal Facilities. Access seekers have expressed some minor complaints in relation to operational performance but there have been no pricing disputes and relatively few negotiations. On this point, it is worth noting that the largest third party users of CBH Port Terminal Services are large, well resourced, experienced grain marketing companies that operate worldwide. These entities are unlikely to find the costs of arbitration prohibitive if they consider that CBH is not offering reasonable terms of access;
 - (iii) there is no evidence that CBH is discriminating in favour of its related marketing entity, CBH Grain;
 - (iv) the combined effect of factors including published reference prices for all Port Terminal Operators, the requirement to publish the shipping stem, CBH's non-profit cooperative structure and CBH's existing ringfencing arrangements ensures that CBH has neither the incentive nor the opportunity to derive monopoly rents or to preferentially self-deal.
- 3.3 The framework for access negotiations is substantially unchanged in the Proposed Undertaking, save for amendments made to improve clarity.
- 3.4 Importantly, the Proposed Undertaking requires the publication of Standard Access Terms (including reference prices), and enables an eligible access seeker to gain access on those terms unless the parties agree otherwise (Clause 7.5(a)). This provides certainty for access seekers, while preserving the flexibility for the parties to negotiate according to their needs if they so choose. The Port Operator is required to negotiate in good faith.

- 3.5 The dispute resolution provisions are substantially unchanged. Since they are modelled on similar processes used in other regulated industries and have not been used, they have been retained.

Non-discrimination.

- 3.6 The Proposed Undertaking maintains the robust non-discrimination provision in Clause 6.2, and Clause 6.3 empowers the ACCC to require the appointment of an auditor to examine compliance with that obligation.
- 3.7 In addition, the audit reviews undertaken as part of the Grain Express ring-fencing have not detected any discrimination on terms and conditions between the various customers of CBH in 2008, 2009 and 2010. Details of these reviews have been provided to the ACCC.

Term

- 3.8 CBH proposes that the Proposed Undertaking will commence on 1 October 2011 and will continue for 3 years. CBH considers that a 3 year period is appropriate because there are significant costs involved in reviewing, revision and implementing successive access regimes, even where the revisions do not substantially change the basic structure adopted in the existing regime.
- 3.9 The expiry date of the Proposed Undertaking is consistent with the PC's recommendations in relation to the appropriate timeframe for the "access test" to apply to Port Terminal Services.

4 Pricing

- 4.1 The ACCC's letter dated 10 March 2011 refers to concerns raised in the PC Review in relation to the incorporation of pricing principles and/or more itemised pricing in the Undertaking. For the reasons expressed below, CBH does not consider that it is necessary to substantially amend the Undertaking to provide for more prescriptive price regulation.

There is no need to impose greater pricing prescription

- 4.2 The ACCC must have regard to the pricing principles specified in section 44ZZCA of the CCA when deciding whether to accept an access undertaking. The purpose of the pricing principles is to create appropriate incentives for investment and innovation, and to ensure that access providers earn a reasonable return on their infrastructure investments.

- 4.3 The pricing principles provide that:

- (i) the regulated access prices should:
 - (A) be set 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; and
 - (B) include a return on investment equal to the regulatory and commercial risks involved;
- (ii) the access price structure should:
 - (A) allow multi-part pricing and price discrimination when it promotes efficiency; and
 - (B) not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations (except where the cost of providing access to other operators is higher);
- (iii) the access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.

- 4.4 The Proposed Undertaking requires that access to Port Terminal Services be provided on non-discriminatory terms. It has provisions specifically prohibiting CBH from discriminating in favour of its own business. This, together with a binding dispute resolution process, ensures that CBH provides access at prices that are consistent with section 44ZZCA.

- 4.5 Under the proposed undertaking, CBH will publish a single set of reference prices each year. If CBH revises these prices then it must publish those prices within 2 business days of the revision. CBH is prohibited from discriminating between different applicants (including its own trading business) in favour of its own trading business including discrimination based on the location or identity of the storage custodian, handler or transporter of the applicants' bulk wheat. The only exception to this is where the cost of providing access to an applicant is higher than the cost of providing access to other applicants.

- 4.6 A party which is not satisfied with the price may negotiate with CBH and then submit to a binding dispute resolution process if it is unsatisfied with the negotiated outcome. The ACCC also have the right to audit CBH's compliance with its non discriminatory obligations.
- 4.7 This regime provides for pricing certainty. CBH submits that it is unnecessary to import the pricing principles into the Port Terminal Rules, as there is no evidentiary basis to believe that lack of pricing certainty is an issue in relation to CBH providing users with access to its port terminal services. There have not been any submissions from interested parties that lack of pricing certainty is an issue, nor have there been any complaints from users about CBH's port terminal services pricing under the Undertaking.
- 4.8 Further, it is clear from the Productivity Commission report² at page 203 that the Productivity Commission was not attracted to heavy handed regulation for port terminals, particularly because of the potentially large costs involved.
- 4.9 CBH agrees with this view and estimates that the costs of port terminal access regulation over the last eighteen months has exceeded \$1.5 million. CBH was already providing access to all wheat exporters prior to the access undertaking. Prior to the passage of the WEMA, there was no evidence that CBH had refused access or engaged in any market leverage strategy for the purpose of lessening competition.
- 4.10 For this reason it is appropriate to maintain a "lighter" approach to price setting at port terminal facilities. This does not mean that the ACCC and Customers do not have an ability to contest fees and charges. As stated above, the access undertaking provides a negotiate / arbitrate regime that allows dissatisfied Customers recourse to arbitration if they consider appropriate without imposing prescriptive pricing mechanisms that may raise costs.
- 4.11 There has been limited interest in negotiating alternative fees and charges by Customers and no recourse to arbitration.
- 4.12 CBH recently analysed its supply chain pricing compared to alternative bulk handling companies and notes that the cost of exporting grain from Western Australia is still the lowest in Australia.³ To a large degree this is a result of the significant capital investment that CBH has made in its port terminal facilities to keep them productive and efficient prior to the introduction of the access undertaking.

Itemised pricing

- 4.13 CBH publishes a non-itemised price for the Port Terminal services. CBH pricing has not been strictly and directly cost-reflective on an item by item basis, primarily because, as a cooperative, CBH has not needed to derive commercial rates of return on particular functions but has instead approached revenue, cost and capital expenditure on a consolidated basis.

² PC Report.

³ CBH provided this information to the ACCC in its confidential letter to Ms Gina D'Ettorre dated 8 October 2010.

- 4.14 If CBH were to provide itemised components of Port Terminal Services it would require detailed cost analysis which would impose substantial costs and, given the time constraints to approve the Undertaking, may not be feasible. Requiring CBH to perform such an analysis in the absence of any dispute over access prices would impose substantial costs without sufficient basis. CBH would also seek to pass these costs through to Users which would raise access prices for little, if any, benefit.
- 4.15 Given that CBH has not based its pricing on an item by item basis (preferring, for the reasons stated above, for the entire access charge to be cost reflective) then were CBH required to provide itemised components, the itemisation would be somewhat arbitrary. As a result, any process in the Undertaking which would require CBH to negotiate or arbitrate a particular itemised price would require the *entire* price structure to be negotiated or arbitrated, which is the model in the current Undertaking and the proposed Undertaking.
- 4.16 There are a number of charges that CBH does itemise including:
- (i) Lost Capacity Fee
 - (ii) Capacity Transfer Fee
 - (iii) Capacity Re-position Fee
 - (iv) Additional Port Storage Charge
 - (v) Outloading Fee for residual or contaminated grain
 - (vi) Wharfage Fee
 - (vii) Failed Survey Fee
 - (viii) Shipping Agency Fee
 - (ix) Fumigation Charges
 - (x) Fumigation Statements
 - (xi) Ship Sample Charge
 - (xii) Cargo Sample Charge
 - (xiii) Sample Re-Assessment Charge

5 Capacity Allocation

Improvements recommended by the Productivity Commission

- 5.1 The Productivity Commission Report suggests three main improvements to the CBH Capacity Allocation system:
- (i) breaking of the link between the port capacity auction system and the Grain Express supply chain such that auction arrangements would not preclude or discourage exporters taking grain to port via means other than Grain Express;
 - (ii) the removal of the requirement to nominate so far ahead whether Grain Express or other arrangements are to be used to bring grain to port; and
 - (iii) tonnage based transfer fees in the secondary market replaced with a flat fee per transaction.
- 5.2 CBH's Capacity Allocation system now includes the two of these three features. Specifically, in September 2010, CBH amended the Port Terminal Rules to provide that capacity is to be nominated to a supply chain no later than 30 days prior to the first day of a Shipping Window. This enables users to book capacity first, and make a choice on its up-country storage and transport options later. The Productivity Commission's Final report noted that this change (proposed at the time of drafting) would "go a long way to alleviating this problem and the Commission therefore endorses it."⁴
- 5.3 CBH amended its Standard Access Terms in September 2010 to simple flat fees for capacity transfers, rather than tonnage based fees. This facilitates an efficient secondary market. To date no, secondary market transfers have taken place in 2010/11 although 63 took place in 2009/10. CBH elected to replace tonnage based transfer fees of its own accord prior to the release of the Productivity Commission's final report. CBH notes that other terminal operators do not permit the transfer of capacity bookings, instead requiring the forfeiting of the booking and re-booking. Even with tonnage based transfer fees the cost of transferring capacity was still lower in the CBH system.
- 5.4 In relation to the last suggestion, CBH does not accept the premise that there is a link between Grain Express and the port capacity auction system that precludes or discourages exporters that do not wish to use Grain Express.
- 5.5 The PC report suggests that capacity should be determined without reference to the capacity of the existing land-based supply chain. Such an approach would inevitably lead to users paying for capacity that the existing land-based supply chain may be incapable of delivering. This would be unrealistic and inefficient. In the current allocation process, CBH already makes more capacity available than could possibly be used because the tonnage of capacity available has exceeded both estimated and actual harvest tonnages. However, CBH recognises that capacity allocation should not offer port capacity to Grain Express customers that

⁴ PC Report, page 214.

is not equally available to others notwithstanding that this reduces the incentive in port terminal infrastructure.

CBH 2009/10 Shipping Compared to historical shipping						
Period	Capacity Offered	Capacity Acquired	2009/10 Shipped	2008/09 Shipped	2007/08 Shipped	2003/04 Shipped ⁵
Nov – Jan	3,520,000	2,817,227	2,624,267	2,511,481	1,216,736	3,037,668
Feb – Apr	4,130,000	3,286,500	2,882,643	3,647,806	2,052,579	3,513,161
May - July	3,545,000	2,710,775	2,039,669	2,721,466	1,795,237	3,085,775
Aug – Oct	2,870,000	1,776,550	0 ⁶	1,543,606	1,492,865	3,021,030
Totals	14,065,000	10,591,052	7,546,579	10,424,359	6,557,417	12,657,634

CBH 2010/11 Shipping Capacity		
Period	Capacity Offered	Capacity Acquired
Nov – FH Jan	2,220,000	826,205
LH Jan - Oct	6,650,000	1,083,000
Acquired Auction 2	0	354,300
Acquired Spare	0	2,947,881
Surge Capacity	318,159	318,159
Totals	9,188,159	5,529,545

- 5.6 CBH's Capacity Allocation system applies equally regardless of the supply chain used to get grain to port and all capacity is available to users, regardless of the choice of up-country supply chain. In the past, it has been suggested that the availability of Surge Capacity discriminates in favour of Grain Express. This suggestion is incorrect. Bidders not intending to use Grain Express may still acquire Surge Capacity and they will not be charged Surge Fees if they do not use CBH storage and transport services. This was explained in CBH's submission to

⁵ 2003/04 was CBH's biggest shipping year on the back of a 14.7 million tonne harvest.

⁶ Note that 2009/10 season figures are year to date figures.

the ACCC on 30 August 2009 at paragraph 5.9. In addition the contractual nexus to charge surge capacity would not be present if the CBH supply chain was not being used.

Base Load Capacity Allocation – introduction and summary

- 5.7 CBH currently uses an auction system to allocate capacity according to demand in a non-discriminatory manner. The ACCC and PC have each expressed support for the use of auctions to allocate capacity. However, there are some difficulties associated with the use of an auction system to allocate all capacity, because:
- (i) auctions incur substantial costs;
 - (ii) demand can fluctuate markedly from year to year as a result of crop size and global market conditions;
 - (iii) in low-demand years, auctions are regarded by participants as unnecessary;
 - (iv) participants are unable to acquire certainty of capacity until the auctions are held, which inhibits longer term planning for both marketers and CBH;
 - (v) the auction system has resulted in maximum accumulation periods that are shorter than would be possible with a more flexible system; and
 - (vi) reliance on the auction system has reduced flexibility in port capacity management, because users have been confined to “hard” shipping windows, with limited ability to manage risk.
- 5.8 In Western Australia, a high proportion of capacity has been used by a relatively small number of exporters, each of which use capacity year-round and have the ability to generate substantial efficiencies from longer-term cargo accumulation and shipping planning. A system that enabled this to occur, yet still preserved sufficient capacity in an auction system to ensure that smaller users could secure capacity on non-discriminatory terms would represent an appropriate balance between the interests of larger and smaller users. It would also be a fairer and more transparent system than the “first come, first served” approach that is used in other Australian Ports.
- 5.9 The shortcomings of first-come, first-served are particularly apparent in high-demand conditions, as is becoming evident in this year’s harvest in NSW, Victoria and South Australia.
- 5.10 The PC concluded:
- “... auctions should be the preferred method for allocating port terminal slots in situations where there is likely to be shifting peak load issues (that is, periods of excess demand given capacity constraints).”⁷*
- 5.11 CBH agrees, and has preserved the auction method for this reason. However, it also agrees that larger users can generate efficiencies from being able to negotiate for capacity much earlier than the standard auction system allows.

⁷ PC Report, page 220.

- 5.12 CBH is concerned that difficulties associated with a pure auction system may be causing marketers to prefer to do business in other States over Western Australia.
- 5.13 To address these issues, CBH proposes to allocate a proportion of its annual capacity well in advance of the harvest. This new process will be called Base Load Capacity Allocation. Auctions will still be held to allocate remaining capacity but fewer auctions will be required.

Base Load Capacity– Eligibility

- 5.14 Base Load Capacity allocation is only available to Eligible Customers. The Eligibility criteria are set by Clause 4.2(b) of the Port Terminal Rules, which provide that to be eligible to acquire Base Load Capacity a Customer must:
- (i) have stated in writing to the Port Operator that it is willing to enter into a Supply Chain Agreement with the Port Operator;
 - (ii) have a forecast shipment schedule in excess of eight hundred thousand (800,000) metric tonnes in the next Year;
 - (iii) have provided the Port Operator with a forecast; and
 - (iv) have reasonable grounds to represent to the Port Operator that it has the intention and ability to use Base Load Capacity.
- 5.15 The main point of these criteria is to ensure that Base Load Capacity is only available to users capable of using that capacity reliably and efficiently. That is, large volume users that are able to plan vessel arrivals over the full year and have a high degree of assurance of using a substantial amount of capacity. Unlike smaller customers, large volume customers can flexibly deploy large grain stocks between cargoes, and flexibly deploy vessels to use capacity. For smaller users, annual planning is simply unnecessary and auction-based capacity allocation is appropriate, provided that:
- (i) eligibility criteria are based on objective criteria that enable smaller customers to acquire the capability to grow and attain eligibility if they wish to do so;
 - (ii) large users are prevented from booking out all capacity prior to auctions; and
 - (iii) the terms on which Auction Capacity is acquired are not inferior to the terms on which Base Load Capacity is acquired.
- 5.16 For these customers, auctions represent a late, uncertain process for planning annual shipping.
- 5.17 ***[Confidential]***

[Confidential]

- 5.18 Eligibility criteria are necessary to ensure that acquirers of Base Load Capacity have the capability to effectively use the capacity they acquire. This is an important issue for port terminal operators. Under its port protocols, Viterra retains the ability to deny bookings if someone is booking more capacity than they have used in the last 3 years.⁸

Base Load Capacity– pricing

- 5.19 Base Load capacity prices will be set at the same price as the starting price of Auction Capacity.
- 5.20 The pricing of Base Load Capacity raises an issue whether Base Load Capacity is available on terms that discriminate against, or in favour of, Eligible Customers. There are several reasons why this is not the case.
- 5.21 Firstly, Base Load Capacity is supplied on take-or-pay terms. This introduces a risk that acquirers of Auction Capacity do not assume because they are able to trade Auction Capacity with others in the secondary market. Acquirers of Base Load Capacity will not be able to trade Base Load Capacity.
- 5.22 Secondly, Base Load Capacity must be used relatively uniformly across a Year (Port Terminal Rule 4.4(e)). As the ACCC is aware, CBH uses a rebate system used to proportionally return Auction Premiums to users. This ensures that CBH derives no rents from Auction Premiums and the auction is purely a mechanism for aligning supply and demand. Because of this system, users that acquire Auction Capacity evenly through the year are rebated a sum that, on average, will result in their paying little or no net premium. This approximates the outcome for the use of Base Load Capacity.
- 5.23 All Base Load Capacity will be supplied at the same price for all users under Clause 4.4(d). The Lost Capacity Fee for Base Load Customers is higher than the Lost Capacity Fee for acquirers of Auction Capacity (it is proposed to be \$10 p/t against \$7 p/t). The reason for this difference is that the cost to the Port Operator is greater where a Base Load Customer does not use the Capacity as the efficiency benefits of the Base Load Capacity process are not realised. In addition, CBH does not have the opportunity to re-sell the Capacity.

Base Load Capacity – allocation process

- 5.24 The process for allocation of Base Load Capacity is set out in Rule 4 of the Port Terminal Rules. The process begins with the forecasting process outlined in Rule 4.3. Under that process, any Customer intending to acquire Base Load Capacity must submit to the Port Operator a forecast of the Customer's exporting requirements for the coming Year. This information is the foundation of the efficiency objective of the Base Load Capacity allocation process. CBH considers that its infrastructure is most efficiently used when Port Terminal Facilities are used throughout the year. For example, operating a port terminal for 2 months to export 10mmt will cost more per tonne than 10mmt over 12 months because of the

⁸ Viterra Port Protocol 12.2.

pressure on the staff, equipment and extra storage and transport that cannot then be used for the other 10 months.

- 5.25 When users provide progressively updated annual shipping plans, CBH is able to more accurately forecast demand and allocate its resources accordingly. The previous version of Port Terminal Rules required all users to provide annual shipping plans. On review of this requirement, CBH identified that few, if any, users were complying with the obligation to provide annual plans. For many smaller exporters, the process and associated cost of preparing and submitting annual plans appears not to be justified because few vessels will be arranged by the exporter in a year.
- 5.26 In the absence of an annual shipping schedule, smaller users are unable to use capacity flexibly (for example, by opting to nominate and load an alternative vessel in a shipping window in order to use capacity that might go unused if the vessel originally planned is late).
- 5.27 The likely small number of eligible Customers, and the substantial size and resources of those entities supports a process for allocation that is relatively flexible and non-prescriptive. In essence, CBH proposes a simple negotiation process, backed by the discipline of:
- (i) the non-discrimination and negotiation in good faith requirements in the Undertaking; and
 - (ii) the availability of Auction Capacity if negotiations do not conclude by the specified date.
- 5.28 Blocks of capacity will be available for advance purchase by users, with capacity allocated out to ensure that efficiencies can be maintained by the allocation of Base Load Capacity. Certainty of Base Load Capacity will allow CBH to ensure that costs and shipping are spread out over the year to retain the lowest cost supply chain for participants in the Western Australian Grain Supply Chain.
- 5.29 Importantly, CBH proposes to incorporate safeguards into the new system, to prevent Base Load Capacity users from 'blocking-out' all available capacity in any given month and ensure that capacity is always available on a non-discriminatory basis. This will ensure the new capacity allocation system will not raise barriers to entry or expansion or artificially place impediments on larger more frequent shippers.
- 5.30 Base Load Capacity is only available on a "take-or-pay" basis, which will also create a disincentive for strategic overbooking of capacity.
- 5.31 CBH considers that there is a strong case for a more flexible capacity allocation system that enables better forward planning from early allocation, whilst at the same time ensuring that new entrants have access to export capacity through the auction system.
- 5.32 CBH does not consider that capacity at port can be totally unbundled from the supply chain as the ultimate ability of a port to put grain onto vessels is intrinsically linked to the capacity of the supply chain to deliver the right grain at the right time.

- 5.33 The revised capacity allocation system supports both the existing users of the system and the potential new entrants who may wish to gain access to the system. It therefore meets the objectives set out in sections 44ZZA(3)(a) and (c) of the CCA.
- 5.34 The ACCC raised an initial concern that, under the previous draft PTRs, users were required to be willing to enter into a Supply Chain Agreement in order to acquire Base Load Capacity. We assume that this concern arises from an assumption that a Supply Chain Agreement would oblige users to acquire services other than Port Terminal Services from CBH. CBH did not intend that this would be the case. Rather, CBH intended that large customers have the certainty of a single agreement covering all of the services they acquire from CBH. That agreement would not include any obligation to use all of the services provided for. It would provide the terms on which services would be supplied to the extent that they were required by customers. In other words, Port Terminal Services (including Base Load Capacity) would not be supplied on condition that users also acquire other services from CBH. To ensure this is clear, CBH has decided not to implement a new single Agreement for large customers. Instead, the acquisition of both Auction Capacity and Base Load Capacity will be governed under the PTRs and the Standard Access Terms.

6 Port Terminal Rules amendment process

6.1 CBH proposes a new, simpler and clearer process for amending the PTRs. The amendments to Clause 10 of the Undertaking implement the ACCC's suggestion in recent consultation that a simpler process be employed, similar to the ACCC's draft notice/final notice process in adjudicative matters.

6.2 Under the new Clause 10, The Port Terminal Rules may be varied using one of three processes:

- (i) the process in Clause 10.3 for typographical, formatting or grammatical errors;
- (ii) the process in Clause 10.4 for standard amendments; or
- (iii) the process in Clause 10.5 for exceptional circumstances.

Standard amendments

6.3 Under the standard amendment process, CBH must:

- (i) publishing a Draft PTR Variation Notice and certain specific information concerning the amendments proposed on its website;
- (ii) send the Draft Notice to Users and the ACCC;
- (iii) publish copies of any responses;
- (iv) if requested to do so, conduct a meeting to discuss the proposed variation with interested parties no later than 10 business days after publication of the Draft PTR Variation Notice;
- (v) review and consider in good faith any written responses and discussions with Users and the ACCC in relation to the proposed changes; and
- (vi) publish, on its website a Final PTR Variation Notice.

6.4 The PTR amendments in the Final PTR Variation Notice will then come into effect on a date to be specified in the Final PTR Variation Notice, which must not be any earlier than 20 business days after publishing the Final PTR Variation Notice.

6.5 This process is simpler and clearer than the existing process and provides ample opportunity for consultation. CBH observes that in 2010, it made several amendments to the PTRs, all of which were requested by access seekers. Further changes to the amendments originally proposed were the direct result of CBH paying due attention to the concerns of users. There were, however, some process issues raised by the ACCC. It is not necessary to examine each of these in this submission because the relevant amendments and the amendment process have already been the subject of substantial correspondence with the ACCC. CBH is confident that the Proposed Undertaking now includes amendment processes that represent an appropriate balance between certainty and flexibility.

Exceptional circumstances

6.6 If CBH needs to amend the PTR in exceptional circumstances, it may do so on giving 2 business days' notice, provided that it publishes a notice on its website

explaining the amendments, and the facts and matters that give rise to 'exceptional circumstances'. Once CBH has made an exceptional circumstances amendment, it must then commence the standard procedure in Clause 10.4, to allow interested parties an opportunity to make submissions on the exception circumstances amendment.

Typographical, grammatical or formatting amendments:

- 6.7** If CBH needs to make typographical, grammatical or formatting amendments to the PTR, it can do so when necessary, without having to use the consultation amendment procedure. If CBH does make an inconsequential amendment to the PTR, it must publish a notice listing the paragraphs which were amended, and a marked up copy of the PTR showing the amendments.

Conclusion

- 6.8** CBH has reviewed the ACCC's draft decision on GrainCorp Operations Limited's Port Terminal Services Access Undertaking and notes the ACCC's concerns regarding the PTR amendment process. CBH has incorporated amendments into the Proposed Undertaking to address the ACCC's concerns, including an "objection notice" mechanism.
- 6.9** CBH considers that these proposed changes to the PTR amendment procedure will alleviate the difficulties CBH experienced in amending the PTR in 2010. The proposed changes preserve interested parties' rights to consult with CBH and provide submissions on proposed changes, while allowing CBH the flexibility to address interested parties' concerns and incorporate suggestions without the delays caused by re-commencing the amendment procedure.
- 6.10** The changes will assist CBH to efficiently and effectively discuss proposed PTR amendments with interested parties, and will provide greater certainty and transparency to both CBH and interested parties in relation to the amendment procedure.

7 Ring-fencing

- 7.1 CBH notes the comment by the National Competition Council (**NCC**) in its submission to the PC Report that in the NCC's view:

*to date little if any evidence has been provided to establish that it is necessary to regulate port terminal services for bulk wheat export ... In such circumstances, the Council considers it is undesirable and risky to continue imposing access regulation to port terminal services ... In the absence of clear evidence of a need for regulated access, unnecessary costs and regulatory burdens are likely to be imposed on wheat export marketers and other participants in wheat markets.*⁹

- 7.2 CBH agrees with the following statement in the PC Report:

*"Although the Commission sees merit in ring fencing in certain circumstances, it does not see convincing arguments to enforce ring fencing provisions in what is very much a market in transition. In seeking to achieve competitive outcomes, ring fencing measures should be considered as more of a 'last resort' than a first option for a developing market. Further, the Commission considers that there are benefits to be gained from vertical integration in the export of bulk wheat — indeed, the fact that all of the major handlers have acquired a trading arm would attest to this fact. Most of Australia's overseas competitors are also vertically integrated and to deny such benefits in the Australian context could place domestic traders at a disadvantage relative to other global players."*¹⁰

- 7.3 CBH notes the ACCC's draft decision on GrainCorp Operations Limited's Port Terminal Services Access Undertaking does not require ring fencing of GrainCorp's Port Terminal operations from its other business activities. CBH considers that the ACCC should maintain this approach with the Proposed Undertaking.
- 7.4 CBH notes that users were able to obtain access to CBH's Port Terminal Services on acceptable terms for the 2009/2010 and 2010/2011 seasons without formal disputes or substantial complaints of breaches of the Undertaking or the Port Terminal Rules. This demonstrates the success of the current regulatory arrangements. In these circumstances, CBH considers that there is no justification for further ring fencing measures.
- 7.5 It is also important to note that the trigger for the "access test" in the WEMA is not the mere ownership of Port Terminal Facilities. Rather, it is the combination of ownership of Port Terminal Facilities and an intention to obtain wheat export accreditation that leads to the "access test" requirement. It is clear from this that the purpose of this aspect of the statutory scheme was not to prevent bare gouging

⁹ PC Report at 181.

¹⁰ PC Report at 248.

but rather, to prevent preferential self-dealing. Accordingly, the focus of consideration of CBH's Proposed Undertaking should be non-discrimination.

- 7.6 The existing undertaking (and the Proposed Undertaking) ensure that CBH cannot preferentially self deal. The ring fencing arrangements in place as part of CBH's Grain Express notification prevent this. Further, under the existing undertaking and the proposed undertaking, CBH has maintained the robust non-discrimination provision in Clause 6.2. Clause 6.3 continues to empower the ACCC to require the appointment of an auditor to examine compliance with that obligation. Finally, there is no evidence that CBH is discriminating in favour of its related marketing entity, CBH Grain.
- 7.7 In a market structure in which users of Port Terminal Services are overwhelmingly large, well resourced global companies, a publish-negotiate-arbitrate structure with robust non-discrimination requirements sufficiently addresses the purpose behind the access test.
- 7.8 Accordingly, for these reasons CBH considers that there is no justification for additional ring fencing obligations to be required and the mandating of any such obligations will result in significantly higher regulatory and compliance costs for no benefit. In fact, as a result of CBH's existing ring fencing arrangements, any additional ring fencing obligations will actually be detrimental to CBH's business interests and result in a significantly less efficient grain supply chain, to the detriment of growers and traders.
- 7.9 Unlike its Eastern States counterparts, CBH has an existing robust ring-fencing arrangement in place as a result of its Grain Express project. If CBH's Grain Express notification is not revoked, that arrangement will remain in place. Those arrangements do not separate up-country storage & handling from Port Terminal Services. Rather, they separate CBH's marketing subsidiary, CBH Grain from CBH's other businesses.
- 7.10 If CBH were required to ring-fence its Port Terminal Service operations from its up-country storage & handling, this would require a second level of arrangements and incur substantial costs. Even if the Grain Express Notification is revoked, the imposition of a new ring-fencing obligation would mean that CBH had been required by the ACCC to incur the expense and difficulty of undertaking two distinct ring-fencing arrangements within 5 years.
- 7.11 It would also threaten the efficiencies generated by Grain Express, which is predicated on the efficient integration of Port and up-country functions.
- 7.12 The ACCC has recognised the efficiency benefits of the Grain Express bundle, even as it expressed concerns about what it regards as tying conduct. As the ACCC has acknowledged, a revocation of the Grain Express Notification would not stop CBH from offering Grain Express as a bundled service. However, ring-fencing up-country storage & handling from Port Terminal Services would quite likely threaten Grain Express because it could prevent the flow of information that is essential to the efficient integration of these functions.
- 7.13 Finally, as noted above, the ACCC's draft decision on GrainCorp Operations Limited's Port Terminal Services Access Undertaking does not require ring fencing

of GrainCorp's Port Terminal operations from its other business activities. The ACCC noted that:

*"based on the practical experience under GrainCorp's 2009 Undertaking, that the non-discrimination, no hindering access and dispute resolution provisions of the Proposed 2011 Undertaking are sufficiently robust to ensure fair access for access seekers... formal ring-fencing rules to support these arrangements are not appropriate at this time..."*¹¹

7.14 As stated above, in relation to the current undertaking:

- (i) there is no evidence of access seekers being denied access to services provided by the use of CBH's Port Terminal Facilities;
- (ii) there were no formal disputes or substantial complaints of breaches of the Undertaking. Rather, access seekers have expressed some minor complaints in relation to operational performance but there have been no pricing disputes and relatively few negotiations;
- (iii) there is no evidence that CBH is discriminating in favour of its related marketing entity, CBH Grain; and
- (iv) the combined effect of factors including published reference prices for all Port Terminal Operators, the requirement to publish the shipping stem, and CBH's non-profit cooperative structure,

ensures that CBH has neither the incentive nor the opportunity to derive monopoly rents or to preferentially self-deal.

7.15 This demonstrates that the existing framework is working and is appropriate. Further, the Proposed Undertaking maintains the robust non-discrimination, no hindering access and dispute resolution provisions and, notwithstanding CBH's existing ring fencing provisions as part of the Grain Express notification, CBH has included a provision in the Proposed Undertaking similar to that required of GrainCorp, that it provide the ACCC with a copy of any Access Agreement with its own Trading Business.

7.16 Therefore, consistent with the ACCC's findings with respect to GrainCorp, CBH submits that formal ring-fencing rules are not appropriate at this time.

¹¹ ACCC, Draft Decision –GrainCorp Operations Limited's Port Terminal Services Access Undertaking, 24 March 2010, page 22.

Schedule 1

This Schedule sets out an explanation of the main changes to the terms of the proposed Undertaking compared to the existing Undertaking.

It does not explain every minor change. For example, where the change is to express the clause in a clearer manner or where, from the context, the reason is apparent.

If the ACCC requires a further explanation of any change, we would be pleased to provide that information.

Changes to the Access Undertaking

No.	Clause	Explanation of change
1	Background (paragraph E)	This paragraph uses the defined term “Accredited Wheat Exporter” rather than restating the meaning of that term. This change has been made to simplify the Background.
2	Background (paragraph F)	This paragraph refers to the CCA rather than the <i>Trade Practices Act 1974</i> . The CCA is defined as the <i>Competition and Consumer Act 2010 (Cth)</i> . This change occurs throughout the document.
3	Background (paragraph G)	This paragraph has been inserted to include details of the current undertaking given by the Port Operator which expires on 30 September 2011 (defined as the Original Undertaking).
4	Background (paragraph H)	The insertion into this paragraph has been included to explain that the new access undertaking (defined as the Undertaking) will replace the Original Undertaking.
5	Definitions	<p>The amendments to the definitions are generally consequential as a result of the amendments below.</p> <p>The definition of “dispute” has been amended to remove disputes over the standard terms or CPI price rises.</p> <p>The definition of “material default” has been amended to cover agreements entered into with related bodies corporate of the Port Operator.</p>
6	Clause 1.3	The amendment is proposed in response to the ACCC’s concerns as set out in its draft decision on GrainCorp’s Port Terminal Services Access Undertaking.

No.	Clause	Explanation of change
7	Clause 3.3	This clause clarifies the priority of the documents if there is a conflict between the terms of the Undertaking and the Standard Port Terminal Terms.
8	Clause 4.1	The amendment to the Commencement Date has been made to reflect the commencement date for the new Undertaking.
9	Clause 5.3(a)	The subclause clarifies the duration of services negotiated under the Undertaking.
10	Clause 5.3(b) and (c)	The existing Undertaking does not cover services which are not Port Terminal Services. The amendments maintain this position but clarify that related bodies corporate who provide such services are not covered by the Undertaking.
11	Clause 5.4(b) (i) and (ii)	Amendments reflect the change in the defined term 'Price and Non-Price Terms Documents' to 'Standard Access Terms' for clarity. This change has been made throughout the Undertaking.
12	Clause 6.1(c) and (d)	Subclause (c) provides a framework for the Port Operator to amend the Standard Access Terms outside of the process set out in clause 6.1(a). Changes to subclause (d) are consequential to the amendments to subclause (c).
13	Clause 6.2(c)	The amendment is proposed in response to the ACCC's concerns as set out in its draft decision on GrainCorp's Port Terminal Services Access Undertaking.
14	Clause 6.3	The new subclause (a) reflects the existing position in Schedule 8. The remaining changes are consequential.
15	Clause 6.4	The amendment is proposed in response to the ACCC's concerns as set out in its draft decision on GrainCorp's Port Terminal Services Access Undertaking.
16	Clause 7.1(c)	Subclause 7.1(c) puts a time restriction for negotiations for Port Terminal Services to be completed in order for the Port Operator to conduct the auctions specified under the Port Terminal Rules. These amendments are required to maintain the integrity of the auction process by ensuring that the Port Operator is certain of the

No.	Clause	Explanation of change
		exact amount of capacity available for auction.
17	Clause 7.2 (c)	The insertion of further information into subclause 7.2(c) clarifies which information the Port Operator is not required disclose to the Applicant. The amendments are consistent with the requirement in subclause (a) that the information must be reasonably required by the Applicant.
18	Clause 7.4 (b), (c) and (f)	New subclauses (b), (c) and (f) are essentially restatements of the clauses which have been deleted.
19	Clause 7.4(d)	The insertion of the words “in the Port Operator’s opinion” in subclause (d) clarify the test to be applied by the Port Operator. If a party is unhappy with the Port Operator’s decision the option remains for the party to dispute the opinion.
20	Clause 7.4(e)	This subclause clarifies the process where an Applicant has not provided information or sufficient information within the 7 business day period. The subclause reflects the position under the existing Undertaking but is documented to avoid any disputes.
21	Clause 7.5(b)(i)	This subclause clarifies that the time limit in subclause (a) for the Applicant and the Port Operator to execute an Access Agreement is subject to the Applicant demonstrating the Eligibility Requirements or the resolution of a Dispute.
22	Clause 7.5(b)(ii)	The clause provides that the time period in subclause 7.5(a)(ii) will cease on 15 September each year. See the explanation under clause 7.1(c) above.
23	Clause 7.6(c)	The period for which the Port Operator and the eligible Applicant must negotiate under clause 7.6 ceases on the earlier of a list of 5 events. The clause has been amended to include the deadline for auctions being 15 September each year. See the explanation under clause 7.1(c) above.
24	Clause 7.6(e)	As there is an absolute deadline of 15 September for the parties to conclude negotiations, the inclusion of subclause 7.6(e)(ii) provides an additional right for the Applicant to trigger the dispute resolution process. The amendment gives

No.	Clause	Explanation of change
		the Applicant the right to seek dispute resolution where the Applicant considers that the Port Operator is dragging its feet and, as a result, the 15 September deadline will occur before the parties can execute an Access Agreement.
25	Clause 7.7	This clause clarifies the position where the deadline of 15 September has been reached and the parties did not conclude an Access Agreement.
26	Clause 7.8	This clause has been inserted to provide transitional arrangements where an Applicant has lodged an Access Application under the Original Undertaking but has not executed an Access Agreement prior to 1 October 2011.
27	Clause 8.4(e)	Subclause (e) has been amended to restrict the ACCC from making determinations for any period following the expiry of the Undertaking. This is consistent with subclause 5.3(a). Any Access Agreement for services after the expiry of the Undertaking should be consistent with any replacement Undertaking or as otherwise negotiated between the parties if no Undertaking is in place.
28	Clause 8.5(g)	This clause provides that the <i>Commercial Arbitration Act 1985 (WA)</i> will apply to any arbitration. This will result in more certainty as to the arbitration process for all interested parties.
29	Clause 8.6	Consistent with subclause 8.4(e), and subclause 5.3(a), subclause 8.6(c) restricts the arbitrator from making determinations for any period following the expiry of the Undertaking.
30	Clause 8.11	This clause has been inserted into the Undertaking to require that Disputes are resolved by way of mediation or arbitration before 15 September each year. This provision makes the dispute resolution provisions consistent with the provisions of the Undertaking dealing with the auction process. See the explanation under clause 7.1(c) above.
31	Clause 10.2	This clause has been modified to accommodate the insertion of the new clause 10.3 on typographical errors (see information on clause 10.3 below).
32	Clause 10.3	This clause has been inserted to allow the Port

No.	Clause	Explanation of change
		Operator to make amendments to the Port Terminal Rules and the Auction Rules where there is a typographical, formatting or grammatical error in those rules.
33	Clause 10.4(a)	This clause has been modified to accommodate the insertion of the new clause 10.3 on typographical errors (see information on clause 10.3 above).
34	Clause 10.4(d)	<p>This clause introduces a time within which any meeting requested by the ACCC or any User must be held. The time frame for the meeting is aimed at providing a more efficient process for PTR Variation Notices.</p> <p>The clause also allows the Port Operator to hold separate meetings with parties with confidential interests. This is consistent with the protection of confidential information in the Undertaking.</p>
35	Clause 10.4(f)	The amendment to this clause is a change from the position in the Original Undertaking in that it allows the Port Operator to modify the Draft PTR Variation Notice when publishing the Final PTR Notice without recommencing the variation process. This process is simpler and clearer than the existing process and provides certainty for all parties.
36	Clause 10.5(a)	This clause has been modified to accommodate the inclusion of clause 10.5(b).
37	Clause 10.5(b)	The “exceptional circumstances” variation process has been amended to be simpler and clearer than the existing process.
38	Clause 10.6	The amendment is proposed in response to the ACCC’s concerns as set out in its draft decision on GrainCorp’s Port Terminal Services Access Undertaking.
39	Clause 12(d)	The amendment is proposed in response to the ACCC’s concerns as set out in its draft decision on GrainCorp’s Port Terminal Services Access Undertaking.
40	Schedule 8 item 3	This item has been moved to clause 6.3.