



Australian
Competition &
Consumer
Commission

Issues Paper

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

21 April 2011



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1 Introduction

Under Part IIIA of the *Competition and Consumer Act 2010* (Cth) (**the CCA**)¹, the Australian Competition and Consumer Commission (**ACCC**) may accept an undertaking from a person who is, or expects to be, the provider of a service, in connection with the provision of access to that service.

Co-operative Bulk Handling Limited (**CBH**) has submitted a proposed access undertaking (**Proposed Undertaking**) to the ACCC for assessment under Part IIIA of the CCA. CBH's Proposed Undertaking relates to the provision of access to services for bulk wheat export at four grain terminals operated by CBH in Western Australia. These terminals are:

- Albany;
- Esperance;
- Kwinana; and
- Geraldton.

The Proposed Undertaking is intended to replace the existing undertaking, which was accepted by the ACCC, pursuant to Division 6 of Part IIIA of the *Trade Practices Act 1974* (now the CCA), on 29 September 2009 (**2009 Undertaking**).

CBH has submitted the Proposed Undertaking in accordance with legislative requirements under the *Wheat Export Marketing Act 2008* (Cth) (**WEM Act**).

The ACCC is conducting a public consultation as part of its assessment of the Proposed Undertaking and seeks submissions from interested parties by **20 May 2011**.

1.1 CBH's Proposed Undertaking

CBH provided the Proposed Undertaking to the ACCC on 31 March 2011. The Proposed Undertaking and associated documents, including a version with changes from the existing undertaking marked-up and a supporting submission from CBH, are available on the ACCC's website at:

<http://www.accc.gov.au/wheat>

Alternatively, go to the ACCC's homepage at www.accc.gov.au and follow the links to 'For regulated industries' and 'Wheat Export: Port Terminal Services Undertakings' and 'CBH.'

CBH, in its supporting submission, states that the Proposed Undertaking will maintain the publish-negotiate-arbitrate structure and have the following key features:

- an established framework for access negotiations;

¹ On 1 January 2011, as part of Australian Consumer Law amendments, the *Trade Practices Act 1974* (Cth) was renamed the *Competition and Consumer Act 2010* (Cth).

- publication of 'Standard Access Terms' (including reference prices);
- an obligation on CBH as port operator to negotiate in good faith;
- dispute resolution provisions;
- a robust non-discrimination provision, with clauses enabling the ACCC to require the appointment of an auditor to examine compliance with that obligation; and
- a three year term.

CBH's Proposed Undertaking retains much of the structure and content of the 2009 Undertaking, although there are some significant changes proposed, particularly in relation to capacity allocation and the variation of Port Terminal Rules. CBH submits that the changes from the 2009 Undertaking were required to:

- improve the clarity and utility of the document;
- address concerns or implement suggestions of the ACCC, the Productivity Commission (PC), and market participants;
- enable the Proposed Undertaking to replace the 2009 Undertaking without undue uncertainty or disruption to business.

The Proposed Undertaking would provide for commencement on 1 October 2011 and would expire on 30 September 2014. CBH's 2009 Undertaking will expire on 30 September 2011. CBH has included in the Proposed Undertaking transitional provisions to ensure continuous coverage of the Undertakings to access agreements.

1.2 ACCC assessment

The ACCC must apply the test set out in section 44ZZA(3) of the CCA in deciding whether to accept the access undertaking application. Essentially, the ACCC may accept the undertaking if it thinks it appropriate to do so, having regard to various matters. The full test is set out in section 3 of the Issues Paper.

Subsection 44ZZA(3) sets out the matters which the ACCC must have regard to in deciding whether to accept or reject an undertaking. Those matters include the objects of Part IIIA of the Act.² These objects include to provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.³

In its assessment of CBH's proposed undertaking, the ACCC will be required to form views regarding what constitutes an appropriate access undertaking in the bulk wheat export industry from 2011. Where appropriate, given CBH's circumstances, the ACCC will consider industry-wide issues in its assessment of this Proposed Undertaking.

The ACCC is also currently assessing access undertakings lodged by GrainCorp Operations Limited, Australian Bulk Alliance and Viterro Operations Limited.

² Section 44ZZA(3)(aa).

³ Section 44AA sets out the objects of Part IIIA.

1.3 Indicative timeline for assessment

Under section 44ZZBC(1) of the CCA, the ACCC must make a decision on the access undertaking application within 180 days, starting on the day that the application was received, in this case 31 March 2011 (referred to in the CCA as ‘the expected period’).

The CCA also provides for ‘clock-stoppers’, meaning that some days will not count towards the 180 day expected period. Specifically, the timeframe is suspended where the ACCC either publishes a notice inviting public submissions on an undertaking application, or gives a notice requesting information about an application.⁴ The consultation period on this Issues Paper will be disregarded in accordance with the ‘stopping the clock’ provisions.

The ACCC has developed the following indicative timeline for its assessment of the Proposed Undertaking:

- receipt of submissions on the ACCC Issues Paper by 20 May 2011;
- ACCC draft decision in July 2011; and
- ACCC final decision in September 2011.

However, as stated above, the indicative timeline is subject to the operation of clock-stoppers, which may extend the timeframes.

1.4 Consultation

The ACCC, pursuant to section 44ZZBD of the CCA, invites submissions on the Proposed Undertaking. You are welcome to provide submissions on any aspect of the Proposed Undertaking.

Section 2 of the Issues Paper sets out specific matters on which the ACCC is seeking views. The matters listed in section 2 do not represent a comprehensive summary of all aspects of the Proposed Undertaking, nor do you need to comment on each of those matters. Further, you are invited to comment on any aspect of the Proposed Undertaking that you consider relevant.

Background information on the legislative criteria by which the Proposed Undertaking will be assessed is set out in section 3 of the Issues Paper. Section 3 also includes an overview of recent amendments to Part IIIA of the CCA. If practicable, submissions should refer to the legislative criteria, as this will assist the ACCC in assessing the Proposed Undertaking.

Please include detailed reasons to support the views put forward in your submissions. If you consider that an aspect of the Proposed Undertaking is *not* appropriate, please suggest changes that may address your concerns, including drafted amendments where possible.

⁴ See section 3 of the Issues Paper for further information on these provisions of the CCA.

1.5 Making a submission

Submissions should be addressed to:

Mr Anthony Wing
General Manager
Transport and General Prices Oversight
ACCC
GPO Box 520
MELBOURNE VIC 3001

Email: transport@accc.gov.au

Submissions are to be sent preferably by email, in Microsoft Word or other text readable document form. Please also provide in your submission background information relevant to your organisation.

1.5.1 Due date for submissions

Submissions **must** be received on or before 20 May 2011. The ACCC may disregard any submissions made after this date, as prescribed by section 44ZZBD of the CCA. Therefore it is in your interest to make submissions within the timeframe.

1.5.2 Confidentiality of information provided to the ACCC

The ACCC strongly encourages public submissions. Unless a submission, or part of a submission, is marked confidential, it will be published on the ACCC's website and may be made available to any person or organisation upon request.

Sections of submissions that are claimed to be confidential should be clearly identified. The ACCC will consider each claim of confidentiality on a case by case basis. If the ACCC refuses a request for confidentiality, the submitting party will be given the opportunity to withdraw the submission in whole or in part. The ACCC will then assess the Undertaking in the absence of that information.

For further information about the collection, use and disclosure of information provided to the ACCC, please refer to the ACCC publication *Australian Competition and Consumer Commission / Australian Energy Regulator Information Policy—the collection, use and disclosure of information*, available on the ACCC website.

1.6 Further information

As noted in 1.1 above, the Proposed Undertaking and associated documents, including a version with changes from the 2009 Undertaking marked-up and a supporting submission from CBH, are available at the ACCC's website.

Public submissions made during the current process will also be posted at that location.

Background information on the legislative criteria, including an overview of the recent amendments to Part IIIA of the CCA, is set out in section 3.

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

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2 Matters for comment

This section outlines matters on which the ACCC is seeking comment from stakeholders, to assess whether the Proposed Undertaking is likely to be appropriate.

2.1 Publish–negotiate–arbitrate model

2.1.1 General approach

CBH's Proposed Undertaking maintains the publish-negotiate-arbitrate approach of the 2009 Undertaking. CBH submits that it seeks to maintain this approach in the Proposed Undertaking because:

- as concluded by the PC in its Inquiry Report on Wheat Export Marketing Arrangements (1 July 2010) (the **PC Report**)⁵, adopting a heavier-handed approach to regulation would result in costs to the industry that would likely outweigh any benefits that may result;
- there is no evidence of access seekers being denied access to CBH's port terminal services – with no pricing disputes and relatively few negotiations taking place. Additionally, given that large customers are generally well resourced and experienced grain marketing companies, they would be unlikely to find the costs of arbitration prohibitive;
- there is no evidence that CBH is discriminating in favour of its related marketing entity, CBH Grain; and
- CBH has neither the incentive nor opportunity to derive monopoly rents or preferentially self-deal due to the combined effect of 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 ring-fencing arrangements.

Issues for comment

- *Has the publish-negotiate-arbitrate approach in CBH's current undertaking assisted access seekers to gain access to port services on reasonable terms, including through commercial negotiation?*

2.1.2 Approach to pricing

CBH currently publishes prices for its port terminal services on a non-itemised basis. CBH submits that this is because it approaches revenue, cost and capital expenditure on a consolidated basis and pricing for particular service elements has not been directly cost-reflective.

CBH submits that providing itemised pricing for its port terminal services would require a detailed cost analysis which would impose substantial costs. Requiring CBH

⁵ Productivity Commission, *Wheat Export Marketing Arrangements – Inquiry Report No.51*, 1 July 2010, pp.187-188,

to perform such an analysis in the absence of any dispute over access prices would impose these substantial costs (which would be passed on to customers) for little, if any, benefit. CBH further submits that any process in the Proposed Undertaking which would require CBH to negotiate or arbitrate a particular itemised price would require the entire price structure to be negotiated or arbitrated.

Issues for Comment

- *How has the approach to pricing in the 2009 Undertaking (i.e. publish, negotiate, arbitrate approach) worked in practice?*
- *Is there a sufficient level of transparency in relation to the charges payable to export bulk wheat from a Western Australian grain port terminal?*
- *Are the arrangements for the rebate of auction premiums to customers who execute shipping slots appropriate?*

2.1.3 Substance of the Standard Access Agreement

CBH is proposing to continue with the approach in the 2009 Undertaking, under which a Standard Access Agreement is available for access to its port terminal services. However, CBH is also proposing to include a new provision (under clause 6.1(c)), which would enable it to vary its Standard Terms for the provision of port terminal services without ACCC approval.

Issues for Comment

- *How has the approach to the provision of standard terms in the form of the Standard Access Agreement worked in practice?*
- *Were access seekers able to negotiate and reach agreement on access agreements with CBH to their satisfaction?*
- *Does the Standard Access Agreement in the Proposed Undertaking appropriately balance the interests of CBH and access seekers as a starting point to commence commercial negotiations?*
- *Is it appropriate that the Proposed Undertaking provides CBH with an ability to unilaterally vary its published Standard Terms for the provision of port terminal services without ACCC approval?[clause 6.1(c)]*

2.2 Capacity allocation

2.2.1 Definition of available capacity

CBH defines “Annual Capacity” as:

the tonnage of grain capable of being exported through the Port Operator’s grain terminals during a year from November to October, as determined by the Port

Operator, taking into account the efficient deployment of resources (including fixed assets and labour) over the year⁶

and “Capacity” as:

the tonnage capacity of the Port Operator’s Port Terminal Facilities to put grain on board a vessel during a defined period⁷.

Under proposed clause 4 of the Port Terminal Rules, CBH may allocate a proportion of Annual Capacity to eligible customers as “Base Load Capacity” (this process is discussed below at 2.2.3). Under clause 4.1(b):

The Port Operator may determine the amount of Base Load Capacity it will offer based on its assessment of the Western Australian harvest size and in accordance with rules 3.2 and 4.2.

Rule 3.2 sets out the criteria and process for estimating available Capacity. This rule requires that CBH review the past performance of the Port Terminal Facilities in loading vessels in high demand periods and the efficient deployment of labour and other resources in Port Terminal Facilities over the year (1 November to 31 October). It also stipulates that CBH must factor into its calculation of available capacity a number of factors that appear to be unrelated to port operations such as:

- the estimated size and characteristics of the upcoming harvest;
- the likely distribution of the transport task between road and rail in each port zone; and
- the risk of unforeseen events up-country that may reduce the speed with which grain is delivered to port such as transport shortages, breakdowns or accidents.

Under CBH’s Proposed Undertaking “Surge Capacity” may also be made available, taking into account whether supply chains deliver grain at a more accelerated pace than would be expected under normal operating conditions (rule 3.2(b)).

The PC in its report⁸ discussed the issue of the definition of available capacity. The PC pointed out that to the extent that capacity constraints are based on limitations of the up-country supply chain rather than at the ports themselves, what is effectively being made available through the auction process is up-country supply chain capacity. The PC considered that the capacity made available [through auction] should only relate to actual port capacity, unbundled from the up-country supply chain.

⁶ CBH *Port Terminal Rules*, 31 March 2011, clause 1.1 Definitions.

⁷ CBH *Port Terminal Rules*, 31 March 2011, clause 1.1 Definitions.

⁸ Productivity Commission, *Wheat Export Marketing Arrangements – Inquiry Report No.51*, 1 July 2010, pp.187-188

Issues for comment

- *Is the method by which CBH defines available “Capacity” for port terminal services under the Proposed Undertaking appropriate?*
- *Is there any aspect of this method that has or could have the effect of deterring third party access to CBH port terminal facilities? If so, how?*

2.2.2 Port Terminal Rules – the auction system

The Port Terminal Rules provide information in relation to the pathway for the export of grain commodities out of CBH’s port terminals and set out the processes and procedures which CBH applies to order and manage vessels for loading.

Under the Port Terminal Rules, CBH operates an auction system for the allocation of port-terminal capacity, under which capacity is allocated to the highest bidder (during specified periods of the shipping year) for a given shipping window at port. Under the auction system, port terminal capacity is allocated separately for the ‘harvest period’ between 1 November and 15 January, and the ‘annual shipping period’ between 16 January and 31 October.

Following an auction, should there be spare capacity for a relevant shipping window, CBH publishes this on its website and allocates the spare capacity to customers on a first-come first-served basis.

Issues for comment

- *Have access seekers found that the auction system under CBH’s Port Terminal Rules has worked well and has efficiently allocated port loading capacity?*
- *Is the existing auction system appropriate for the allocation of capacity in a high-yield year where demand exceeds supply?*
- *Have access seekers found the process of seeking spare capacity via the spare capacity allocation system under the Port Terminal Rules an efficient approach to allocating port loading capacity?*

2.2.3 Port Terminal Rules – CBH’s proposed two-tiered capacity allocation system

CBH proposes to replace the existing auction capacity allocation system (contained in the Port Terminal Rules) with a two-tiered system of capacity allocation under which:

- CBH will offer up to 60 per cent of its available port terminal capacity (to be referred to as ‘base load capacity’) to access seekers that are ‘high volume customers’ on a take-or-pay basis. The eligible applicant/access seekers will be restricted from using more than 10 per cent of their base load capacity in any single month, which CBH claims will prevent customers from ‘blocking out’ particular periods on the shipping stem during the season; and

- CBH will offer the remaining 40 per cent of its available port terminal capacity (or more depending on what is taken up by eligible applicants) for auction to any and all access seekers throughout the year in accordance with the Auction Timetable published by CBH under the Proposed Undertaking for each season.

In providing its reasons for the proposal to move to the two-tiered capacity allocation model, CBH submits that auctions are not an ideal allocation method for high volume customers which plan to export using multiple shipments through the season. CBH notes that such customers are unable to acquire certainty of capacity until auctions are actually held – which inhibits longer term planning for both marketers and CBH. CBH submits that the offer of longer term capacity on a take-or-pay basis is therefore aimed at providing a higher level of certainty in relation to available port capacity to eligible large volume customers and to therefore enable longer term planning by both customers and CBH.

CBH submits that the auction system has resulted in maximum accumulation periods that are shorter than would be possible with a more flexible system, and that reliance on the auction system has reduced flexibility in port capacity management due to the confinement of users to ‘hard’ shipping windows.

As detailed in the Undertaking at clause 4.2 *Eligibility to acquire Base Load Capacity*, 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 PTSA⁹ 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 in accordance with rule 4.3 below; and
- (iv) have reasonable grounds to represent to the Port Operator that it has the intention and ability to use Base Load Capacity.

While CBH notes at paragraph 5.34 of its submission on the Proposed Undertaking that:

Port Terminal Services (including Base Load Capacity) would not be supplied on condition that users also acquire other services from CBH.¹⁰

at paragraph 5.14 of CBH’s submission under the heading *Base Load Capacity – Eligibility*, one of the criteria a customer must fulfil is to:

have stated in writing to the Port Operator that it is willing to enter into a Supply Chain Agreement with the Port Operator.¹¹

⁹ ‘PTSA’ is not a defined term under the Proposed Undertaking or Port Terminal Rules. CBH’s submission to the ACCC dated 1 April 2011 refers to a ‘Supply Chain Agreement’ rather than a PTSA: Co-operative Bulk Handling Ltd (2011), *Submission to ACCC on Proposed Undertaking*, para 5/14, p. 14.

¹⁰ Co-operative Bulk Handling Ltd (2011), *Submission to ACCC on Proposed Undertaking*, para 5.34, pp.18-19.

However, as set out above, clause 4.2 of the Proposed Undertaking refers to a PTSA rather than a supply chain agreement. The term PTSA does not appear to be a defined term in either the Port Terminal Rules or the Proposed Undertaking.

The Port Terminal Rules at clause 4.4 *Base Load Capacity Allocation process* outline a requirement that the Port Operator and each eligible customer must negotiate a Supply Chain Agreement (detailed further at 4.4 (b)). The Port Terminal Rules define *Supply Chain Agreement* to mean:

an agreement between the Port Operator and an eligible Customer for the allocation of Base Load Capacity and the supply of services to the Customer.¹²

Issues for comment

- *Do access seekers have concerns with the current capacity allocation model (comprising of the auction system, spare capacity allocation and a secondary market) to efficiently allocate capacity? If so what improvements or alternatives could be made to current arrangements to address any concerns?*
- *Do access seekers consider the CBH two-tiered capacity allocation to be appropriate to allocate port loading capacity for bulk wheat in Western Australia?*
- *Will the allocation of 'base load capacity' to customers that meet CBH's 'eligibility requirements' unreasonably discriminate in favour of customers that typically have large volumes of bulk wheat for export, to the detriment of bulk wheat exporters with relatively smaller bulk wheat volumes?*
- *Is the offer of 40 per cent of available port terminal capacity for auction sufficient to meet the port terminal loading capacity requirements of all access seekers that do not wish to obtain 'base load capacity' on a take-or-pay basis under CBH's proposed two-tiered capacity allocation system?*
- *What are the expected consequences of introducing the allocation of 'base load capacity' (up to 60 per cent of total available capacity) on the operation of the auction system and residual capacity (a minimum of 40 per cent of available capacity)?*
- *Are the eligibility requirements for 'base load capacity' access seekers appropriate?*
- *Is the requirement to negotiate a Supply Chain Agreement appropriate? Is there sufficient clarity about the requirement to enter into a Supply Chain Agreement and what that involves?*

¹¹ Co-operative Bulk Handling Ltd (2011), *Submission to ACCC on Proposed Undertaking*, para 5.14, p. 14.

¹² Under clause 1.1 – Definitions of the Proposed Undertaking.

- *Is it appropriate that eligible customers for 'base load capacity' under CBH's proposed two-tiered capacity allocation system are not permitted to transfer port terminal capacity?*

2.2.4 Direct Port Access

Currently access seekers may access CBH's port terminals via the CBH supply chain (i.e. utilising CBH's storage, handling and transport services) or by utilising an alternative storage and transport provider to move bulk wheat to port (i.e. bypass of CBH via a Direct Port Access option). To date the ACCC is not aware of any access seeker utilising the Direct Port Access option for bulk wheat. The ACCC is also not aware of any access seeker utilising CBH storage but then arranging non-CBH transportation services to deliver bulk wheat to port.

The ACCC is currently considering CBH's Grain Express Exclusive Dealing Notification. In December 2010 the ACCC issued a Draft Decision to revoke the notification. A final decision is yet to be made. In the Draft Decision the ACCC noted that should the decision be made to revoke the notification:

growers who store their grain with CBH will be free to choose whether to use CBH's transport services or organise their own transport outside the CBH system.¹³

The PC Report recognised that the key to making bypass of CBH's storage and transport services contestable was access to its port terminals by road and rail other than that provided via CBH (e.g. through Grain Express).¹⁴

Issues for comment

- *Are the Direct Port Access arrangements in the Proposed Undertaking adequate and is there sufficient transparency of services, fees, charges, accumulation and storage provisions?*
 - *Does the CBH proposed two tiered port capacity allocation model provide sufficient detail about Direct Port Access for eligible customers taking up base load capacity?*

2.2.5 Secondary market for port terminal capacity

In Western Australia, wheat port-terminal capacity currently can be accessed via the existing CBH auction system, spare capacity provisions or via a secondary market, which involves the trading of port terminal capacity between customers. The ability for customers to transfer booked port terminal capacity (and to therefore participate in the secondary market) is provided for under CBH's 2009 Undertaking and 2009 Port Terminal Rules. The transfer of port terminal capacity is subject to the discretion of CBH to approve or reject any such transfers between customers. CBH notes that 63

¹³ ACCC, *Draft Notice in respect of a notification lodged by Cooperative Bulk Handling*, 6 December 2010, p. i

¹⁴ Productivity Commission Inquiry Report, *Wheat Export Marketing Arrangements*, No. 51 (1 July 2010), p. 21.

secondary market transfers took place in 2009/10 and no transfers have taken place in 2010/11.¹⁵

The ACCC notes the linking of port capacity with the Grain Express supply chain was considered in detail in the PC Report. The PC Report noted that this link may have hindered the development of the secondary market in Western Australia.¹⁶ The ACCC notes that CBH removed this requirement and now only requires that capacity is to be nominated to a supply chain no later than 30 days prior to the first day of a Shipping Window.

Issues for comment

- *Have access seekers found that there is an effective secondary market for the trading of port terminal capacity in Western Australia?*
- *How important is the effective operation of a secondary market for the allocation of port terminal capacity to the efficient operation of the bulk wheat export industry in Western Australia?*
- *Are there any impediments in the Proposed Undertaking (for example particular rules in the Port Terminal Rules and/or the Auction Rules), which would inhibit the development of an effective secondary market?*
- *What effect would CBH's proposed two-tiered capacity allocation model, in which customers who acquire base load capacity will not be permitted to transfer such capacity on the secondary market, have on the development of a secondary market?*
- *Are there any impediments in the Proposed Undertaking (for example particular rules in the Port Terminal Rules or processes in the Auction Rules), which prevent access seekers who opt for direct port access (e.g. not utilising CBH's up-country storage and/or transport services) from transferring port capacity on the secondary market?*

2.3 Port Terminal Rules

2.3.1 Port Terminal Rules variation process

The ACCC notes that since the commencement of the 2009 Undertaking, CBH has twice varied the Port Terminal Rules.

CBH has proposed changes to the Port Terminal Rules variation process in the Proposed Undertaking from that in the 2009 Undertaking. The changes are largely consistent with those adopted by GrainCorp following consideration of the matter by

¹⁵ Co-operative Bulk Handling Ltd (2011), *Submission to ACCC on Proposed Undertaking*, para 5.3, p.11.

¹⁶ Productivity Commission Inquiry Report, *Wheat Export Marketing Arrangements*, No. 51 (1 July 2010), p. 17

the ACCC in its Draft Decision on that undertaking.¹⁷ However, CBH has included an arbitration option should it dispute an objection notice issued by the ACCC in relation to a proposed variation to the Port Terminal Rules.

Issues for Comment

- *Are access seekers satisfied with the proposed consultation process CBH will conduct prior to varying its Port Terminal Rules?*
- *What has been the experience of access seekers in variation consultations under CBH's 2009 Undertaking?*
- *Is it appropriate that CBH be provided with the flexibility to vary the Port Terminal Rules under 'exceptional circumstances' (as defined under the Proposed Undertaking) without prior consultation with interested parties?*
- *In the event that CBH disputes an 'objection notice' issued by the ACCC under clause 10.6 of the Proposed Undertaking in relation to a proposed variation to the Port Terminal Rules, is it appropriate that the matter be referred to arbitration for determination? [clause 10.6(f)(iii)]*

2.4 Ring-fencing arrangements

CBH is 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.

The matter of ring-fencing was also examined with respect to CBH in the ACCC's Final Decision on the 2009 Undertaking. In its decision the ACCC noted that it was:

cognisant of calls by a number of interested parties for robust ring-fencing measures to be included in the September Undertaking and notes that, once the regulatory framework to which CBH is subject is more certain, any future undertaking submitted by CBH may need to include robust ring-fencing rules which cover CBH's port operations.¹⁸

As noted above at 2.2.3 *Direct Port Access* the ACCC is currently considering the Grain Express Exclusive Dealing Notification. Should the decision be made to revoke the notification CBH would no longer be obliged to maintain ring-fencing arrangements between its trading and operations arms.

CBH submits that there is no evidence that it has discriminated in favour of its related marketing arm, CBH Grain, and that it is prevented from such preferential self-dealing by the ring-fencing arrangements it has in place pursuant to the Grain Express notification. Further, CBH submits that additional ring-fencing is not required due to the efficient operation of the publish-negotiate-arbitrate structure (and non-discrimination provisions) in place and that requiring any such additional ring-fencing would result in significantly higher regulatory and compliance costs for no benefit.

¹⁷ ACCC, *GrainCorp Operations Limited – Port Terminal Services Access Undertaking – Draft Decision*, 24 March 2011.

¹⁸ ACCC, *Co-operative Bulk Handling Limited – Decision to Accept*, 29 September 2009, p.212

CBH therefore submits that additional ring-fencing obligations would result in detriment to CBH's business, growers and traders due to the significantly less efficient grain supply chain that it claims would result.

For the reasons above, CBH submits that no additional ring-fencing between its bulk handling and marketing divisions should be required under the Proposed Undertaking, even should the Grain Express notification be revoked (i.e. the existing ring-fencing arrangements maintained by CBH are removed).

Issue for Comment

- *Should the current ring-fencing arrangements maintained by CBH for the purpose of the Grain Express Exclusive Dealing Notification be included in the Proposed Undertaking? If not, describe what, if any, ring-fencing arrangements should be included.*

2.5 Dispute resolution

The dispute resolution provisions of CBH's Proposed Undertaking are contained at clause 8 and are largely unchanged from the 2009 Undertaking. The main changes that have been proposed by CBH in the Proposed Undertaking relate to:

- provisions that specify that the ACCC and/or arbitrator are not permitted to make determinations which have the effect of setting the terms and conditions of access to a port terminal in respect of any period after the expiry of the Proposed Undertaking;
- provisions that specify that any disputes, mediations or arbitrations must be concluded and, if applicable, a determination handed down by 15 September; and
- minor amendments to provide an enhanced level of clarity on the process for dispute resolution and to reflect legislative changes.

Issues for Comment

- *How have the dispute resolution provisions in the 2009 Undertaking worked in practice?*
- *Are the listed exclusions to the definition of 'dispute' under the Proposed Undertaking appropriate?[Clause 1.1 Definitions]*

2.6 Term of the Proposed Undertaking and transition arrangements

CBH has proposed a three year term for the Proposed Undertaking. CBH also provides transitional arrangements at clause 7.8 of the Proposed Undertaking. Under these transitional arrangements, customers may enter into a 'Transition Agreement' covering the port terminal services acquired by them during any transitional period

between the expiry of the 2009 Undertaking and commencement of the Proposed Undertaking.

Issues for Comment

- *Is the three year term of the Proposed Undertaking appropriate?*
- *Is the Proposed Undertaking drafted in a way to ensure a smooth transition from the 2009 Undertaking to the Proposed Undertaking?*
- *Does the Proposed Undertaking adequately plan, and allow sufficient time, for the introduction of the two-tiered capacity allocation model for the 2011/2012 shipping calendar; including appropriate lead in times to allocate base load capacity, negotiate access agreements and commence the auction timetable?*

2.7 Publication of key port information and performance indicators

CBH's obligation to publish key information and key performance indicators is provided for at clause 12 of the Proposed Undertaking, which is largely unchanged from the 2009 Undertaking. Under the Proposed Undertaking, CBH will continue to have an obligation to publish: the total amount of bulk wheat and the total amount of grain other than bulk wheat situated at each of its port terminals; the details of all vessel nominations accepted on the shipping stem; and a range of key performance indicators.

Issues for Comment

- *Have access seekers found that CBH's publication of key port information met their information needs, particularly in relation to available capacity at CBH's port terminals?*
- *Does the publication of 'estimated annual capacity' by CBH provide a sufficient level of information to access seekers, or should CBH be required to also publish detail on the 'available capacity' at its port terminals?*
- *Have access seekers found CBH's publication of key port performance indicators met their information needs?*

Apart from the specific questions posed in this Issues Paper, the ACCC welcomes any other comments you wish to make relevant to the assessment of the Proposed Undertaking.

3 Appendix: Background information

3.1 Current legislative arrangements

The *Wheat Export Marketing Act 2008* (Cth) (**the WEM Act**) came into effect on 1 July 2008. The WEM Act and associated transitional legislation replaced the Export Wheat Commission with a new statutory body, Wheat Exports Australia (**WEA**). WEA has the power to develop, administer and enforce an accreditation scheme for bulk wheat exports, including the power to grant, vary, suspend or cancel an accreditation.¹⁹

Under the WEM Act, parties without WEA accreditation are prohibited from exporting bulk wheat from Australia. Parties seeking accreditation as bulk wheat exporters must be deemed by WEA to be ‘fit and proper’ having regard to certain criteria. The WEM Act further provides that parties seeking bulk wheat export accreditation, which also provide ‘port terminal services’, must satisfy an additional ‘access test.’

Part of the ‘access test’ is linked to Part IIIA of the *Competition and Consumer Act 2010* (**CCA**) (previously the *Trade Practices Act 1974*). The relevant part of the access test will be satisfied if either:

- the ACCC has accepted from a person, who owns or operates a port terminal facility used to provide a port terminal service, an access undertaking under Division 6 of Part IIIA of the CCA. The undertaking must relate to providing access to the port terminal service, for purposes relating to wheat export, to accredited wheat exporters; or
- a decision is in force under Part IIIA of the CCA that a State or Territory regime is an ‘effective access regime’ and that regime provides for access to the port terminal service for purposes relating to wheat export.

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

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

Under Division 6 of Part IIIA of the *Trade Practices Act 1974* (**TPA**) (now CCA), the ACCC accepted CBH’s 2009 Undertaking on 29 September 2009. The 2009 Undertaking was submitted to the ACCC on 24 September 2009. The 2009 Undertaking related to the provision of access to port terminal services, for the

¹⁹ The relevant transitional legislation is the *Wheat Export Marketing (Repeal and Consequential Amendments) Act 2008* (Cth).

purposes relating to bulk wheat export, to accredited wheat exporters. The ACCC's acceptance of the 2009 Undertaking followed a lengthy process of consultation on an earlier version of CBH's 2009 Undertaking.

CBH's 2009 Undertaking expires on 30 September 2011.

3.2 Productivity Commission inquiry

The Productivity Commission completed an inquiry into the wheat export marketing arrangements following the deregulation of the industry. The Productivity Commission has provided a final report to the government which was released on 1 July 2010. The report made several findings and recommendations, including:

- The accreditation scheme has facilitated a smooth transition but the benefits will rapidly diminish in the post-transitional phase. Accreditation and Wheat Exports Australia should be abolished on 30 September 2011.
- The access test has provided greater certainty for traders and made access easier, more timely, and less costly compared to reliance on Part IIIA of the Act. The access test should remain in place for a further three years until 30 September 2014.
- The benefits of the access test will diminish and could become costly in the long term. Therefore, from 1 October 2014 regulated access should rely on Part IIIA of the Act supported by mandatory disclosure and a voluntary code of conduct.

The full report is available on the Productivity Commission website at

<http://www.pc.gov.au/projects/inquiry/wheatexport/report>.

As at the date of release of this issues paper, the government has not yet responded to the Productivity Commission's report.

3.3 Legal test for accepting an access undertaking

Part IIIA of the CCA establishes a regime to assist third parties to obtain access to services provided through facilities with natural monopoly characteristics to promote competition in upstream or downstream markets.

Part IIIA provides three main mechanisms by which access can be obtained to infrastructure:

- declaration of a service (under section 44H) and arbitration (under section 44V);
- access undertakings and access codes (under sections 44ZZA and 44ZZAA respectively); and
- decision that a State or Territory access regime is effective (under section 44N).

In relation to access undertakings, a provider of a service (or a person who expects to be the provider of a service) may give an undertaking to the ACCC in connection with the provision of access to the service. An undertaking may specify the terms and conditions on which access will be made available to third parties. The ACCC may accept the undertaking if it thinks appropriate to do so after considering the matters set out in subsection 44ZZA(3).

If the ACCC accepts the undertaking, the provider is required to offer a third party access in accordance with the undertaking. An access undertaking is binding on the access provider and is able to be enforced in the Federal Court upon application by the ACCC.

An undertaking may be withdrawn or varied at any time, but only with the ACCC's consent.

In assessing a proposed access undertaking under Part IIIA of the CCA, the ACCC must apply the test set out in subsection 44ZZA(3), which provides that the ACCC may accept the undertaking if it thinks it appropriate to do so, having regard to the following matters:

- the objects of Part IIIA of the CCA, which are to:
 - promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and
 - provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry;
- the 'pricing principles' specified in section 44ZZCA of the CCA (see further below);
- the legitimate business interests of the provider of the service;
- the public interest, including the public interest in having competition in markets (whether or not in Australia);
- the interests of persons who might want access to the service;
- whether the undertaking is in accordance with an access code that applies to the service; and
- any other matters that the ACCC thinks are relevant.
- In relation to the pricing principles, section 44ZZCA of the CCA provides that regulated access prices should:
 - be set so as to generate expected revenue for a regulated service that is at least sufficient to meet the efficient costs of providing access to the regulated service or services; and

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

3.4 Recent changes to Part IIIA

The *Trade Practices Amendment (Infrastructure Access) Act 2010* (Cth) took effect on 14 July 2010 and introduced changes to Part IIIA of the TPA (now the CCA), including to the procedures set out in Part IIIA for the assessment of access undertakings.

3.4.1 Timeframes for ACCC decisions and clock-stoppers

Section 44ZZBC(1) of the CCA now provides that the ACCC must make a decision on an access undertaking application within 180 days starting on the day the application is received (referred to as ‘the expected period’).

If the ACCC does not publish a decision on an access undertaking under section 44ZZBE of the CCA within the expected period, it is taken, immediately after the end of the expected period, to have:

- made a decision to not accept the application; and
- published its decision under section 44ZZBE and its reasons for that decision: see section 44ZZBC(6).

The changes to the TPA (now CCA) also introduce ‘clock-stoppers’ which mean that certain time periods are not taken into account when determining the expected period (see section 44ZZBC(2)). In particular, the clock may be stopped:

- by written agreement between the ACCC and the access provider (in this case, CBH), and such agreement must be published: section 44ZZBC(4) & (5);
- if the ACCC gives a notice under subsection 44ZZBCA(1) requesting information in relation to the application;
- if a notice is published under subsection 44ZZBD(1) inviting public submissions in relation to the application;

- a decision is published under subsection 44ZZCB(4) deferring consideration of whether to accept the access undertaking, in whole or in part, while the ACCC arbitrates an access dispute.

3.4.2 Amendment notices

3.4.2.1 Changes to the TPA (now CCA)

Section 44ZZAAA(1) provides that the ACCC may give an ‘amendment notice’ in relation to an undertaking before deciding whether to accept the undertaking.

An ‘amendment notice’ is a notice in writing to the access provider that specifies:

- the nature of the amendment or amendments (the ‘proposed amendment or amendments’) that the ACCC proposes be made to the undertaking; and
- the ACCC’s reasons for the proposed amendment or amendments; and
- the period (the ‘response period’) within which the person may respond to the notice, which must be at least 14 days after the day the notice was given to the person: see section 44ZZAAA(2).

An access provider may give a revised undertaking in response to the notice (within the response period), incorporating amendments suggested in the notice, and provided that undertaking is not returned to the provider by the ACCC, that revised undertaking is taken to be the undertaking the ACCC is assessing under Part IIIA: see sections 44ZZAAA(5) & (7). In other words, the access provider may ‘swap over’ the revised undertaking for the original undertaking if it agrees to the amendments suggested by the ACCC in the notice.

If the access provider does not respond to the notice within the response period, it is taken to have not agreed to the proposed amendment: section 44ZZAAA(8). If the access provider provides a revised undertaking that incorporates one or more amendments that the ACCC considers are not of the nature proposed in the amendment notice, and which do not address the reasons for the proposed amendments given in the amendment notice, the ACCC must not accept the revised undertaking and must return it to the provider within 21 days of receiving it: section 44ZZAAA(6).

The Commission is not required to accept the revised undertaking under section 44ZZA even when it incorporates amendments (see section 44ZZAAA(9)) and does not have a duty to propose amendments when considering whether to accept the undertaking (see section 44ZZAAA(10)).

3.4.3 Other changes

3.4.3.1 Information requests

Section 44ZZBCA(1) provides that the ACCC may give a person a written notice requesting the person give to the ACCC, within a specified period, information of a kind specified in the notice that the ACCC considers may be relevant to making a decision on an access undertaking application.

As noted above, the period within which the ACCC requests information constitutes a clock-stopper.

3.4.3.2 Fixed principles

Section 44ZZAAB of the CCA now provides that an access undertaking given to the ACCC under subsection 44ZZA(1) may include one or more terms that, under the undertaking, are fixed for a specified period (known as ‘fixed principles’). Such principles must extend beyond the term of the undertaking: section 44ZZAAB(3).