

**Emerald Group Australia Pty Ltd****Submission to ACCC****CBH Limited: Proposed Port Access Undertaking****Introduction**

Emerald Group Australia Pty Ltd (“**Emerald**”) is a leading grain trader with offices across Australia. Emerald has a significant interest in Western Australian port access because of our prominent role as a grain accumulator in that state.

**CBH Proposed Undertaking**

In general, Emerald Group Australia is supportive of the changes CBH is proposing to its previous undertaking, specifically in respect to the replacement of the existing auction capacity allocation system with the two-tiered system of capacity allocation.

Given that Emerald is a high volume customer of CBH’s services, the two-tier proposal does offer our Company more certainty to access port capacity which allows us to plan well ahead with our sales and shipping programs which we have found to be restricted under the current auction system.

We provide the following specific comments in response to the issues raised in ACCC’s issues paper.

**Publish-negotiate-arbitrate model / Pricing**

Emerald believes that the publish-negotiate-arbitrate approach has not been tested to its full potential because of the relative novelty of the access regime. However, our sense is that the threat of arbitration has encouraged CBH to act in a reasonable manner in its negotiations with access seekers and to listen to their concerns.

In respect to pricing issues, our observation is that CBH has not abused its position as a monopoly provider under the 2009 undertaking regime and we note that its fees compare favourably to other exporting states’ bulk handlers.

The cost structures for bulk handlers in general have developed from historical co-operative principles and as such their pricing structures are not necessarily understandable or efficient in a market that is striving to be competitive and efficient on a world stage. All of the bulk handlers now need to properly cost their individual services to allow exporters to choose the services that they need and to be able to explore and compare alternative service offerings where available. Having said this, in certain circumstances, the reality of the market for services such as rail needs to be recognised and bundling of services can make sense in an environment of scarce resources. For example, the Grain Express service offering can add significantly to the efficiency of the export supply chain.

Emerald supports the system for the rebate of auction premiums to customers that execute against shipping slots. It is very important that genuine exporters are not penalised by the arbitrage activities of opportunistic traders and hedge fund operators.

### **Substance of Standard Access Agreement**

We believe the standard access agreement is a good starting point for negotiations. We expect that exporters in the future will test some of the more contentious provisions of the standard CBH access agreement such as limitation of liability.

Emerald believes that CBH's proposed undertaking should require that any significant variations to the standard terms be approved by ACCC. The interest of the ACCC in ensuring a fair, non-discriminatory and well-informed market is a valuable counter-point to CBH's powerful negotiating position.

### **Capacity Allocation**

- Emerald accepts that capacity is a dynamic concept and is influenced by many factors along the supply chain. CBH's approach to including factors such as up-country issues and freight capacity is reasonable, so long as CBH provides the market with regular reporting of changes to available capacity as circumstances change. As a minimum, monthly update highlighting performance and changes to assumptions to the capacity model should be provided.

### **Port Terminal Rules – the Auction system**

Our experience of the auction system has been that we have not always been able to secure shipping slots that we have needed to satisfy our customers' requirements, thus forcing us to sell accumulated grain in the track market, sometimes at a loss. Under both the first-come-first served system and the auction system, allowance needs to be made for traders who have accumulated major physical positions. For this reason, we support a modification to CBH's auction system to introduce a two-tiered capacity allocation system.

### **Port Terminal Rules – CBH's proposed two-tiered capacity allocation system**

Emerald believes that a two-tiered allocation system will encourage competition in the accumulation market by providing much needed certainty to higher volume exporters.

This certainty enables serious exporters to plan their sales program, sell forward and make long term commitments to accumulation in WA.

It could be argued that the proposed two-tiered system is discriminatory. Discrimination is often justified when it aids efficiency. We believe that the two-tiered capacity allocation proposal would aid the efficiency of the market and promote competition by

- (a) encouraging and rewarding commitment to the market by high volume traders.
- (b) sharing the risks with CBH of seasonal volatility.

In respect to the 60%/40% allocation, it is significant that large volume users are required to enter into take or pay arrangements and we would expect that this rule would encourage conservatism on the part of the large volume users bidding for capacity. Accordingly, we would expect that more than 40% of capacity would be available to small volume exporters.

We support the take or pay requirement as it allows CBH the certainty to invest in efficient supply chain infrastructure by alleviating the seasonal risk and sharing that risk with exporters.

We believe that the eligibility requirements for base load capacity access seekers are appropriate in the context of the WA market.

Emerald does not believe that it is unreasonable that eligible customers are required to enter into a supply chain agreement which is not regulated. We accept that the port access regime does not extend to freight and up country storage and we also recognise that a requirement to use CBH supply chain aids CBH's ability to offer base load capacity.

We believe that eligible base load capacity customers should be able to transfer a percentage of their allocation given the commitment to the take or pay arrangements is financially onerous. We understand that in the absence of some sensible business rules around this requirement there could be the potential for aggressive traders to block out capacity for opportunistic gain. A suitable balance is required.

### **Direct Port access**

Emerald strongly supports the ability for exporters to have direct-to-port access. Given the financial obligations involved in committing take or pay arrangements, we believe that CBH needs to provide more detail in respect to direct port access for eligible customers taking up base load capacity and articulate the rules for cross-over.

### **Secondary Market for Port Terminal capacity**

Emerald has used the secondary market for trading of port capacity and has had no problems with its application to date.

We believe that the secondary market will continue to be effective notwithstanding the proposed two-tiered capacity allocation model. We expect that eligible customer will not take up their full theoretical allocations and will participate in the auction system and potentially the secondary market. However as noted above, Emerald believes that eligible customers should be able to transfer some proportion of their allocation if not required.

### **Port Terminal Rules variation process**

Emerald is comfortable that, provided there is industry consultation and the views of access seekers are properly taken into account, CBH should be allowed the flexibility to change the port loading protocols without the approval of ACCC. We have observed that the changes made by CBH to the port loading protocols in the past have generally been directed to improving the efficiency or fairness of the system and CBH's level of consultation has been reasonable.

### **Ring-fencing arrangements**

Emerald's view on ring-fencing is that structural ring-fencing arrangement have the potential to add significant costs to the supply chain without necessarily exhibiting any demonstrable benefits. We do however believe that there are appropriate behavioural ring-fencing initiatives that CBH should be required to comply with in order to assure a level playing field for bulk wheat exporters. For example, any notifications to CBH Grain regarding spare capacity should only occur as part of an "all customer" email. ACCC should have the ability to audit the information flow between the storage and trading companies.

We do note that the auction system takes away a lot of the tension around the provision of inside information which is more likely to occur under a first-come- first- served system.

### **Dispute resolution**

Emerald has some issues with the exceptions proposed by CBH to the ability of access seekers to dispute terms of access::

*(a) Disputes in relation to an executed access agreement.*

CBH holds considerable power in the process of the negotiation of an access agreement and many exporters will feel compelled to execute an agreement in order to operate in WA. The executed access agreements should be capable of being disputed. It is noted that until the matter comes to arbitration, CBH will have the protection of being able to provide services under the terms of the agreement under dispute.

*(b) A decision by the port operator to vary the prices at which port terminal services are provided to reflect changes to CPI.*

All prices should be subject to dispute. It would be incongruous if certain prices were protected from dispute simply by CBH applying a CPI increase.

**Term of proposed undertaking**

We are comfortable with the three year term of the Undertaking and the transition process. However it is not clear what happens at the end of the three years.

Emerald strongly believes that an access regime should continue after 2014, notwithstanding the recommendations of the Productivity Commission.

- **Publication of key port information and performance indicators.**

As previously mentioned, CBH should be obliged to provide a monthly update highlighting performance and changes to assumptions to the port capacity allocation model.

Yours faithfully

**ASHLEY ROFF**

**LEGAL COUNSEL & COMPANY SECRETARY**

**25 MAY 2011**