

Our reference  
MK/COOP2260-9073840

Woodside Plaza  
240 St Georges Terrace Perth WA 6000  
GPO BOX 9925 WA 6001  
Tel (08) 9460 1666  
Fax (08) 9460 1667  
[www.corrs.com.au](http://www.corrs.com.au)

**CORRS  
CHAMBERS  
WESTGARTH**  
lawyers

Sydney  
Melbourne  
Brisbane  
Perth

14 June 2011

**By email and post:** [transport@accc.gov.au](mailto:transport@accc.gov.au)  
Mr Anthony Wing  
General Manager, Transport and General  
Prices Oversight  
Australian Competition & Consumer  
Commission  
GPO Box 520  
MELBOURNE VIC 3001

**Contact**  
Matthew Knox (08) 9460 1602  
Email: [matthew.knox@corrs.com.au](mailto:matthew.knox@corrs.com.au)

Dear Mr Wing

## **CBH Access Undertaking for Port Terminal Services**

Please find **attached** a public submission from Cooperative Bulk Handling Limited on the submissions in response to the Australian Competition & Consumer Commission's Issues Paper for Cooperative Bulk Handling Limited's proposed Port Terminal Services Access Undertaking dated 21 April 2011.

If the Commission requires any further information, or has any questions in relation to the information provided in the enclosed submission, please contact me.

Yours faithfully  
**Corrs Chambers Westgarth**



**Matthew Knox**  
Partner

### **attachments**

**copy:** Mr Richard Codling, Group General Counsel, Co-operative Bulk Handling Limited, Gayfer House, 30 Delhi Street, WEST PERTH WA 6005, by email: [Richard.Codling@cbh.com.au](mailto:Richard.Codling@cbh.com.au)

14 June 2011

Australian Competition & Consumer Commission

**CBH Access Undertaking for Port Terminal Services**

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Cooperative Bulk Handling Limited

Public Submission to the Australian Competition &  
Consumer Commission

# Port Terminal Services Undertaking

Dated: 14 June 2011

## **Public Submission to the Australian Competition & Consumer Commission**

### **1 Purpose of this submission**

- 1.1 This is a submission in response to the submissions on the ACCC's issues paper dated 21 April 2011 regarding the undertaking lodged by Cooperative Bulk Handling Limited (**CBH**) with the ACCC on 31 March 2011 (**Undertaking**).
- 1.2 At the outset, CBH notes the submission from Freight and Logistics Council of Western Australia which supports the Undertaking and its recognition of the operational and economic efficiencies contained in the Undertaking.
- 1.3 The remaining submissions comment on a number of matters in the Undertaking. CBH sets out its response to each comment below.

### **2 Base Load Capacity System**

- 2.1 At the outset CBH notes that the submissions (or lack of them) indicate that the Freight and Logistics Council of WA and the majority of exporters of grain either support the base load capacity system or are not opposed. The objections contained in the submissions are from exporters who ship less than **[confidential]** of total grain through CBH's ports. This indicates that the proposed base load capacity system is consistent with the interests of the overwhelming majority of exporters (and therefore the growers who sell to those exporters). It is also consistent with CBH's legitimate business interests which is a relevant matter for the ACCC's consideration (section 44ZZA(3)(a)).
- 2.2 CBH does not raise this to discount the concerns of the smaller exporters who provided submissions (Louis Dreyfus Commodities Australia Pty Ltd (**Louis Dreyfus**), Gavilon Grain Australia Pty Ltd (**Gavilon**) and Plum Grove Pty Ltd (**Plum Grove**)). Rather, it is intended to draw the ACCC's attention to the legitimate support of the base load capacity system in furtherance of the legitimate business interests of the port terminal operator and existing users of the CBH Port Terminal. In particular, the proposed system has safeguards to ensure that small or prospective users are protected and retain an ability to export wheat through the port terminals.
- 2.3 CBH is conscious of the concerns of the smaller exporters. CBH considers that these concerns arise due to a number of misconceptions about the base load capacity system. CBH addresses these below.
- 2.4 It is not in CBH's interests to reduce port throughput. The base load capacity mechanism provides increased flexibility for CBH and will allow it to *increase* efficiencies and port throughput. This will be to the benefit of all exporters as it will allow CBH to provide more capacity at a cheaper price for all.

***The base load capacity system disadvantages smaller traders***

- 2.5 Wheat Exports Australia (**WEA**) submits that the base load capacity system is to the detriment of smaller traders. Gavilon, QR National Freight (**QRNF**) and Louis Dreyfus make similar submissions. However, as set out in CBH's response to the ACCC's request for information dated 18 May 2011 CBH has designed the base load capacity system to ensure that smaller access seekers are not disadvantaged. See in particular the answer to questions 6 and 7 in CBH's submission. The base load capacity system provides for significant efficiencies which enable CBH to keep its port prices low and capacity maximised for the benefit of all users.
- 2.6 The submissions appear to form this view on the basis that the auction allocated capacity is an inferior product. For example, QRNF appears to consider that base load capacity allocates "*premium shipping slots*". WEA makes a similar assumption. This is false. There are no "premium" slots. Rather base load capacity enables larger users to plan shipping all year around.
- 2.7 Auction allocated capacity is simply a different product that is more suitable for smaller exporters. Even though the base load capacity is allocated first, it is capped at 60% of annual capacity, 20% for an individual customer, and 10% of a customer's entitlement in a single month. Further, since capacity is less constrained then this will not "lock out" smaller exporters. Auction capacity is also allocated later when harvest tonnages are better known and therefore more certain. There is less seasonal risk with acquiring auction capacity than with base load capacity.
- 2.8 There are also some aspects of base load capacity which are less favourable than auction capacity. For example, the auction lost capacity allocation charge (\$7 per tonne) is less than the base load lost capacity allocation charge (\$10 per tonne). There are also restrictions on shipment size (to name just two differences). It reflects that base load capacity is a different product.

***Leveraging base load capacity to affect auction capacity***

- 2.9 The Australian Grain Exporters Association's (**AGEA**) submission sets out a scenario where larger exporters purchase the 60% base load capacity so that there is no capacity nominally allocated to base load capacity that is rolled into the auction process. The large exporters then bid up the 40% auction capacity "*knowing that they can spread the auction premium over the total of their tonnes*". Louis Dreyfus postulates a similar scenario. This scenario relies on two false assumptions.
- 2.10 First, the port will be capacity constrained which has not occurred under the existing undertaking (and is unlikely to occur unless there is an external event such as the revocation of the Grain Express notification which will almost certainly shrink port capacity in the short term). Second, it assumes that the larger exporters will purchase significant amounts of base load take or pay capacity (with a higher lost capacity fee) that they do not intend to use, together with auction capacity at a premium that they do not intend to trade or will only trade at a

premium. The costs of this type of behaviour would far outweigh any alleged benefits to the exporter.

- 2.11 Louis Dreyfus also state that:

*“there is no provision for restrictions for Base Load Capacity on a per Port basis, or on a per Month basis. The proposed Base Load Capacity service offering would allow eligible parties to completely book out the capacity at specific Port zones, in turn leaving no available capacity available for participants in the Auction process”.*

- 2.12 Base load capacity is restricted on a month basis (see clause 4.4(e) of the Port Terminal Rules). The base load capacity system is designed to smooth out capacity so that there is a more even spread year round rather than having all bulk wheat exported in a small window. This should free up capacity during peak times which, in turn, will lower auction prices. In any event, the restrictions on base load capacity ensure that there is appropriate capacity remaining for auction participants.

***Cost of not using capacity***

- 2.13 Plum Grove submits that the base load lost capacity fees should be rebated to the auction system. However, if this was allowed, it would assist base load capacity acquirers to hoard capacity by, in effect, reducing the lost capacity fee (as the “hoarded” base load capacity could be replaced by auction capacity subsidised by the lost capacity fee).
- 2.14 Louis Dreyfus and AGEA submit that any lost capacity fee payable by CBH Grain should be rebated to port users and not CBH. This is a very onerous disincentive against providing capacity to CBH Grain. It would force CBH Grain to subsidise its competitors every time it did not use capacity. This incentivises CBH Grain to be more conservative when acquiring capacity than it should be which, in turn decreases competition and penalises growers.
- 2.15 CBH Grain must pay CBH for lost capacity (which in turn reduces the capital that CBH Grain has available to use to purchase grain). If CBH were to merely inject that money back into CBH Grain then the Australian Tax Office may judge the lost capacity fee to not be a true cost and disallow any tax deduction that CBH Grain may claim (as CBH is not taxable). This would have the effect of increasing CBH Grain’s tax payable by 30% of the lost capacity fee.
- 2.16 The proposal also penalises CBH for being vertically integrated by depriving it of income, requiring its subsidiary to subsidise its subsidiary’s competitors and reducing the revenue of CBH’s subsidiary.

***Transfer of base load capacity***

- 2.17 Gavilon and QRNF submit that customers should be able to transfer base load capacity. This view is not universal. Emerald Group Australia Pty Ltd (**Emerald**) recognise that the trading of base load capacity could lead to abuses of the system. Similarly, AGEA supports the restriction on trading base load capacity (noting that AGEA does not support the two tiered capacity allocation model).

- 2.18 CBH has set out detailed reasons why base load capacity is not transferrable in CBH's response to the ACCC's request for information dated 18 May 2011 (question 6).
- 2.19 Emerald submit that a percentage should be able to be transferred. AGEA makes a similar submission that lost capacity should be put on the STEM. As set out in question 6 of CBH's response to the ACCC's request for further information dated 18 May 2011, CBH would be agreeable to a limited process to allow base load capacity to be reallocated if enough notice is given.

***Efficiency***

- 2.20 Gavilon submits the base load capacity system may result in less efficient customers being allocated capacity. Gavilon provides no evidence for its statement that large customers may not be as efficient as smaller customers and therefore the allocation of base load capacity will be to less efficient customers. Further, this misses the point. The base load capacity system introduces efficiencies to the *port* (for the benefit of all users).
- 2.21 In this regard, Gavilon's comment that the base load capacity may reduce overall throughput and reduce CBH's incentives to improve port throughput is not correct or supported. The base load capacity system allows CBH to better plan the port, smooth delivery schedules and therefore *increase* port efficiency. This is recognised by some exporters. For example, Plum Grove state that it:

*"agree[s] with the argument from CBH that with an upfront vessel plan that is evenly spread over a 10 to 12 month period will provide them with logistical efficiencies".*

***Eligibility for base load capacity***

- 2.22 Emerald supports the two tiered capacity allocation system and believes the eligibility requirements are appropriate.
- 2.23 Plum Grove submits that the 800,000 tonne eligibility criteria should be reduced to 240,000 tonnes. Based on the average ship size this would represent less than 9 vessels a year in contrast to at least 30 vessels a year under CBH's proposal. Plum Grove suggest that the 800,000 tonne criteria is an attempt to advantage CBH Grain. This is not correct and there is no evidence provided that this is the case. CBH had to set a limit for eligibility and determined 800,000 tonnes based on shipping activity and ability to move vessels between port zones and timing. In CBH's view only parties with substantial capacity will be able to properly vary plans and assist CBH in flexibly maximising port terminal throughput. Plum Grove appears not to support the base load capacity system on the basis of eligibility only and, if the eligibility criteria were reduced, then would support it.
- 2.24 AGEA states that the eligibility criteria for base load capacity is "subjective". CBH does not agree. The criteria is clear and objective. Namely, the exporter must have a forecast shipment of 800,000 tonnes. The base load capacity system is not about locking up capacity or excluding exporters. It is about efficiencies for the port. CBH has also provided information about the criteria in CBH's response to the ACCC's request for information dated 18 May 2011 (question 5).

- 2.25 AGEA's submission states that CBH has "sole discretion" over who is eligible. Louis Dreyfus's submission makes a similar point. This is misleading. CBH determine eligibility for base load capacity in accordance with the criteria in the Port Terminal Rules. Any disputes as to the application of the criteria may be disputed under the Port Terminal Rules.
- 2.26 AGEA's submission asks the question that "*how does a new or emerging exporter get access...*?" The answer is that they have a credible forecast shipment schedule of 800,000 tonnes.
- 2.27 Regarding WEA's submission of the number of users who would have been eligible for base load capacity CBH does not consider that the information provided by WEA is accurate. CBH has provided this information in questions 9 and 10 of CBH's response to the ACCC's request for information dated 18 May 2011.
- 2.28 Louis Dreyfus state:
- "It is unclear what criteria CBH would use to discriminate between a customer who has previously been and remains eligible, and a customer who is equally eligible but has not previously acquired, or been able to acquire Base Load Capacity".*
- 2.29 CBH would not discriminate. Both customers would be eligible for base load capacity. Louis Dreyfus also state that the base load capacity is "discriminatory" contrary to the objectives of the Undertaking. Base load capacity is *not* discriminatory. The same terms are offered to all base load customers (in the same way that the same terms are offered to all auction customers). The objective in the Undertaking is non-discrimination as between *customers* not as between *services*.
- CBH's legitimate interests***
- 2.30 Gavilon state that the base load capacity system is not in the legitimate interests of CBH. With respect, CBH is in the best position to determine its own legitimate interests. Further, Gavilon ground this concern on the basis that the base load capacity system does not give CBH certainty over its upcountry logistics. However, the base load capacity system is designed to increase efficiencies in the *port*.
- Notice of the base load capacity system***
- 2.31 Gavilon submit that the base load capacity system should have been subject to industry consultation. CBH notes that the process of approval of the Undertaking provides ample time and opportunity for Gavilon to make submissions on the system.

### **3 Publish-negotiate-arbitrate model**

- 3.1 There has been little comment on this aspect of the Undertaking. AGEA states that there is a need for more measurable performance benchmarks. However, this is not consistent with AGEA's initial statement that the "*publish and negotiate' approach has worked..*" Nor is it consistent with CBH's history of no access disputes nor the evidence submitted by actual users of the port such as Emerald and Plum Grove, the latter noting that its experience regarding port access was "*positive*". Louis Dreyfus also supports the existing model (although notes there is no counterfactual).

### **4 Definition of available capacity**

- 4.1 CBH notes the submissions from Gavilon, Louis Dreyfus, The Pastoralists' and Graziers' Association of WA (**PGA**) and Emerald which take issue with the definition of available capacity. However, none of the submissions address the reasons why CBH defines capacity in this manner – namely it is unrealistic and misleading to offer to the market capacity that CBH knows cannot be used because the supply chain (Grain Express and others) will be unable to transport it to the port.
- 4.2 Determining capacity based on port capacity alone will mean that CBH's customers will acquire capacity that cannot be fulfilled. Without a planned capacity allocation method repeats of the delays that were unfortunately experienced in early 2009 may occur. CBH notes that it has offered more than 1.5 million tonnes of capacity in excess of the highest previous annual exports.
- 4.3 CBH considers that the determination of capacity is appropriate and transparent as it is determined in accordance with the principles set out in clause 3.2 of the Port Terminal Rules. CBH would not artificially restrict capacity as it would reduce port throughput and harm growers (who are also CBH members). In this regard, CBH's track record shows that capacity has always exceeded supply (see the table at paragraph 5.5 in CBH's submission in support of the Undertaking dated 31 March 2011).
- 4.4 Submissions from AGEA and Louis Dreyfus erroneously state that capacity is based on "CBH logistics capacity". In fact, as set out in its submission dated 18 May 2011, CBH determines capacity by estimating what *any* supply chain can bring to the port (including, but not limited to, CBH's supply chain) and makes that capacity available. As set out in CBH's submission in support of the Undertaking dated 31 March 2011, to date this method has not resulted in a shortage of available capacity.
- 4.5 Louis Dreyfus asserts that:
- "CBH artificially constrain capacity at their Port Terminal Facilities, thereby potentially forcing parties wishing to utilize Direct Port Access arrangements to pay excessive charges in the form of Auction Premiums."*



- 4.6 There is no basis for this statement and no evidence that CBH have ever engaged in such conduct. In fact, the history of available capacity and utilisation of that capacity demonstrates that CBH has never engaged in such conduct. CBH has offered more capacity at its Port Terminals than have ever been exported from Western Australia in a single year. However, the most telling rebuttal of this allegation is that CBH does not gain any financial recompense from the increasing of auction premiums. In fact, increased auction premiums could be perceived to reduce returns to growers (CBH's members) save that auction premiums are intended to work to allocate capacity to those exporters with the most efficient use of the port terminal service (and thus the greatest capacity to pay to acquire grain to put through the Port Terminal).
- 4.7 Emerald supports the determination of capacity. It notes that a "*monthly update highlighting performance and changes to assumptions to the capacity model should be provided*". CBH questions whether this is necessary given that it has always indicated spare capacity available following the auction process and notifies parties when spare capacity becomes available.
- 4.8 Gavilon states that CBH as a port operator does not have the requisite oversight of the harvest or transport task across the whole supply chain to appropriately determine capacity. As a storage operator, CBH has access to historical data regarding shipping, forecasts of crop yields, harvest deliveries, carryover stock, transport capacity and all parties forecast shipments. CBH notes that no party apart from CBH Grain has provided CBH with forecast annual shipments despite this being required under the Port Terminal Rules. Under base load capacity other marketers would be required to provide these forecasts in order to obtain base load capacity and therefore CBH will be able to better plan port operations than at any time in its history. This is the main reason why CBH is confident that the base load system will allow CBH to increase total port terminal capacity (which, to date, has never been fully utilised across the year). Requiring the ACCC to approve the capacity set by CBH is unnecessary and administratively unworkable.
- 4.9 Gavilon suggest that CBH should provide a rebate to all customers "*in the event that it overestimates available Capacity*". Such a requirement would incentivise CBH to be conservative in its determination of capacity which is in no-one's interests.
- 4.10 CBH notes PGA's submission which suggests that CBH's mechanism to define capacity is intended to "*protect marketers from bad decisions*". Of course, it is nothing of the sort. It is intended to ensure that CBH does not sell capacity which it will be unable to provide because the supply chain is incapable of delivering the grain.
- 4.11 Louis Dreyfus query whether CBH will publish the quantity of Annual Capacity it will make available. CBH has historically provided this information during the port terminal auctions. An examination of the auction logs for the relevant years of auctions will show the capacity that CBH offered. This information is available at [www.portcapacity.com](http://www.portcapacity.com).

## **5 Port Capacity and Grain Express**

- 5.1 The submission from QRNF suggests that the Port Terminal Rules link the port to CBH's logistics supply chain. This is not the case. As set out under "capacity" above, CBH determines capacity by looking at the entire supply chain not just CBH's logistics.
- 5.2 The Port Terminal Rules differentiate between a CBH supply chain agreement and another form of supply chain agreement under clause 4.1, clause 4.2 and clause 9 due to the fact that CBH will have the relevant information in its system if the grain is transported under a CBH supply chain agreement. For example, under clause 9.1(a)(iii) CBH requires a pre-delivery sample of grain because it does not have a sample in its system. It will, of course, have that information for grain transported under Grain Express.
- 5.3 QRNF state that the requirement to nominate whether capacity is serviced by a GSA "potentially limits" the effectiveness of the secondary market. CBH notes that without knowledge of the supply chain that will deliver the grain, it is difficult (and costly) for CBH to process the transfer.

## **6 Pricing**

- 6.1 AGEA, QRNF, PGA, Emerald and Louis Dreyfus raise the issue of pricing.
- 6.2 AGEA notes that charges are transparent but exporters have no guide as to whether they are reasonable in terms of the cost of providing the service. CBH has addressed this point in Part 4 of its initial submission in support of the Undertaking dated 31 March 2011. As part of that submission, CBH set out the determination of its prices including how the cost of individual pricing would far exceed any alleged benefit (especially when, other than the PGA submission, the other submissions do not mention itemised pricing as an issue).
- 6.3 As stated in CBH's initial submission in support of the Undertaking dated 31 March 2011, 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 (paragraph 4.12). This is also consistent with evidence from port users. CBH notes Emerald's comment:
- "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".*
- 6.4 Louis Dreyfus notes that the prices are "transparent as they are clearly expressed in Schedule 1 of the Port Terminal Services Agreement". Louis Dreyfus queries the following prices:
- (i) Upfront Marketer Fee. This fee is charged at the time of booking capacity. The total upfront marketer fees contribute to the costs of running CBH's processes and ensuring that customers are bona fide

about booking capacity. The fee does not cross subsidise other parts of CBH's business.

- (ii) Lost Capacity Fee. Louis Dreyfus state that it cannot determine whether the fee is appropriate. The total lost capacity fees contribute to CBH's fixed costs and lost opportunity to earn revenue. The fee does not cross subsidise other parts of CBH's business.
- (iii) Remedial Fumigation Services fee – Louis Dreyfus suggests that this fee should not be payable where bulk wheat has been delivered to the port by CBH. This is a matter which is more appropriately dealt with under the relevant logistics contract. To provide for this in the Undertaking would discriminate against non CBH logistics solutions. In any event, CBH does not pass on the charge for remedial fumigation if the grain came from Grain Express as it considers it should have delivered insect free grain. Other storage and handling / logistics providers are free to adopt the same policy and bear this cost.

- 6.5 QRNF notes that CBH has *"the capacity to increase port charges on the basis of increased costs"*. However, *"there is no transparency regarding whether there is any cross subsidisation between ports or between the ports and the logistics supply chain"*. CBH's charges must be consistent with the principles of the Undertaking. Further, as set out in the submission in support of the Undertaking dated 31 March 2011, the Undertaking is consistent with the principles in section 44ZZCA of the *Competition and Consumer Act 2010*.
- 6.6 There is no justification for further price regulation or ring fencing in the form of separation of accounts. Other than its assertion, QRNF does not address any of the issues put forward by CBH in its submission in support of the Undertaking dated 31 March 2011 as to why further price regulation is not appropriate. There is also no evidence that cross subsidisation is occurring between port and up-country receival points.
- 6.7 CBH does not cross subsidise its up-country storages or CBH Grain. The pricing model is designed to prevent cross subsidisation. If CBH was cross subsidising CBH Grain then this would be a breach of CBH's non discrimination obligations under the Undertaking. If CBH was cross subsidising its up-country storages it would be challengeable by arbitration.
- 6.8 The PGA submission's contains no evidence with respect to the allegations made, relies on misrepresentations and selective quotations and contains a number of *ad hominem* attacks on CBH. Much of the PGA's submission is a direct "copy and paste" from its submission to the Productivity Commission.
- 6.9 There are many examples of the submission's misrepresentations, however there are a number which are illustrative. The submission relies on an extract from a book quoting the McColl Royal Commission (not quoting the Commission's report itself) criticising bulk handling companies in 1988 (before significant industry change and deregulation) and a report commissioned by GrainCorp criticising the then single desk arrangements held by AWB (again, something that has since

been deregulated). Passing off these comments as being comments on the 2011 industry structure and relevant to CBH's Undertaking and CBH's conduct is grossly misleading.

- 6.10 Another example is the comparison of Australian bulk handling companies to United States' bulk handling companies. US terminals on average export 20 times their storage capacity having the benefit of different grain storage structures and environment, a more robust and larger transport system and a significantly larger harvest and marketplace. In comparison, Australian terminals export about 4 times their storage capacity so the capital component of the charge is necessarily larger. There is 90 million tonnes of grain exported from New Orleans alone which is nearly 13 times the average Western Australian wheat harvest.
- 6.11 Further, CBH is aware that the Novorossiysk Grain Terminal in Russia charges 550 roubles per tonne (currently AUD18.53 per tonne), was recently challenged on its pricing and has had the pricing determination upheld.
- 6.12 The PGA also makes unsubstantiated allegations that CBH ports are not being used efficiently and claims there are Marketer complaints about slow ship loading. No such complaints have been received by CBH.
- 6.13 The ACCC should place no weight on any of the unsupported allegations contained in the PGA's submission.

## **7 CBH's ability to amend the Undertaking**

- 7.1 Emerald, Gavilon and AGEA have referenced CBH's power to amend the Undertaking pursuant to clause 6.1(c). As set out in CBH's response to the ACCC's request for information dated 18 May 2011 (question 15) it is important to recognise that CBH's ability to amend the standard access terms is an existing power (of which there have been no complaints) and subject to the non discrimination provisions in the Undertaking. Further, the Port Terminal Rules, which contain a substantial amount of the terms and conditions of access, can only be amended in accordance with clause 10 of the Undertaking (which includes a role for the ACCC). CBH considers that this satisfies the concerns of Emerald which seeks significant variations to the Undertaking to be approved by the ACCC.
- 7.2 Gavilon suggests that monitoring CBH's compliance with the non-discriminatory requirements will be difficult. However, the ACCC has broad auditing powers under clause 6.3 to determine compliance with this obligation.
- 7.3 CBH notes that independent reviews of CBH's conduct in non-discrimination under the Grain Express notification have confirmed CBH's diligent approach to ensuring compliance. CBH has also complied with its non-discrimination obligations under the existing undertaking. CBH takes its obligations of non discrimination seriously. There is no need for further regulation.
- 7.4 Regarding Gavilon's comment about the ACCC's powers to issue an objection notice for an exceptional circumstances amendment, CBH considers that the

Undertaking does not prevent this. The ten business day timeframe must be read in context with the timeframes in clause 10.4.

- 7.5 CBH rejects the contention by AGEA that it did not consult effectively nor in good faith with respect to previous variations of its Port Terminal Rules. Such a statement is contrary to CBH's information and submissions such as Emerald's which state that CBH's amendments were directed at "*improving the efficiency or fairness of the system*" and the consultation was reasonable.
- 7.6 When CBH amended the Port Terminal Rules in 2010, the AGEA did not put in a submission concerning either the April/May 2010 discussion paper or the July 2010 Port Terminal Rules Variation Notice. CBH actually had to proactively solicit customer submissions on the proposed amendments to the Port Terminal Rules. The amendments to the Port Terminal Rules proposed changes that made it more flexible and were a direct response to customer feedback. The changes did not benefit CBH. As such, to say that CBH did not listen or consult effectively is not correct or supported by the evidence.

## **8 Direct Port Access**

- 8.1 Emerald and Louis Dreyfus submit that there is not enough information regarding direct port access. The Undertaking does not contain more detail in respect of direct port access because access to port does not depend on the logistics solution which transported the bulk wheat to port. CBH does not discriminate on the basis of up country transport.

## **9 Dispute resolution**

- 9.1 There has been little comment on this aspect of the Undertaking. AGEA notes that in principle no issues are expected with the process. Emerald submits that executed access agreements should be capable of being disputed. As set out in its submission in response to the issues paper dated 18 May 2011, CBH included this requirement to prevent a party from re-opening negotiations which have already been agreed between the parties. Further, disputes in relation to the operation of the executed access agreement will be dealt with under the provisions of the agreement itself and not the Undertaking.
- 9.2 Similarly, with respect to escalation of prices in accordance with CPI, as set out in its submission in response to the issues paper dated 18 May 2011, this is a standard escalation of prices in accordance with objective criteria. As such, it should not be the subject of a dispute resolution process. If CBH increases costs above the CPI rate then the option remains for a user to dispute the increase. This also provides an incentive for CBH not to increase costs above the CPI rate which is of benefit to users.
- 9.3 QRNF submit that the Undertaking and the Port Terminal Rules should contain an ability to seek expert determination in the event disputes cannot be resolved. QRNF does not provide reasons why arbitration under the Undertaking is not

sufficient particularly given the lack of disputes under the existing arrangements. It is always open for a party to seek judicial review or interpretation of a provision of a contract.

## **10 Ring fencing and information sharing**

10.1 Three submissions request the ACCC to consider:

- (i) ring fencing the port terminal facilities from the rest of CBH (Louis Dreyfus);
- (ii) ring fencing the trading arm from the up country operations (WEA); or
- (iii) non specific ring fencing (PGA).

10.2 Two submissions, Emerald and Freight Council, reject ring fencing or support the current proposed Undertaking (without ring fencing). Emerald also notes 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"*. Notwithstanding its submission on ring fencing, WEA makes the same point in its submission. This is further support that the provisions in the Undertaking are appropriate.

10.3 Emerald and AGEA submit that instead of ring fencing consideration should be given to introducing an information *sharing* obligation.

10.4 The lack of consistent submissions demonstrates that ring fencing is not a major issue for users of the port terminal services. Concerning the submissions that seek a specific ring fencing regime, what is consistent about these submissions is the lack of any supporting evidence as to *why* such ring fencing is necessary particularly given the reasons set out in CBH's response to the ACCC's request for information dated 18 May 2011 and CBH's submission in support of the Undertaking dated 31 March 2011.

10.5 WEA's submission, which seeks CBH to ring fence CBH Grain from its general operations, is grounded on the basis that without ring fencing CBH Grain and CBH will be at liberty to share information. Of course, as set out in CBH's response to the ACCC's request for information dated 18 May 2011 appropriate controls and procedures already exist to prevent this happening. For example, under the terms of the Port Terminal Services Agreement and the Undertaking, CBH must keep information provided by CBH Grain's competitors confidential (including from CBH Grain). The Undertaking also specifically prohibits CBH from discriminating in favour of CBH Grain (or anyone else).

10.6 Louis Dreyfus submission provides no material in support of ring fencing, it simply states that "consideration" should be given to ring fencing the port terminal facilities from the rest of CBH. This is counterintuitive to the accepted practice of logistical planning in a holistic sense with all available information at hand. The PGA's submission provides no evidence to support its contention instead preferring to rely on rather offensive references such as CBH considers marketing should be a "sheltered workshop".

- 10.7 Concerning the submissions seeking an information sharing obligation, Emerald states that ring fencing is not appropriate and suggests that *"any notifications to CBH Grain regarding spare capacity should only occur as part of an "all customer" email"*. As noted in its response to the ACCC's request for information dated 18 May 2011 (question 20), CBH publishes details of port capacity changes to all users.
- 10.8 CBH notes AGEA's submission that *"anything that a BHC trading team sees/receives should be made available to the market"*. CBH has addressed this issue in its response to the ACCC's request for information dated 18 May 2011 (question 20). CBH Grain is subject to confidentiality provisions. Further, to require CBH Grain to disclose all of the information it receives would breach its obligations of confidentiality and put it (and its customers) at a competitive disadvantage to other marketers (who have no such obligation). AGEA do not provide a basis on what relevance upcountry storage statistics have to a port access undertaking (which is to provide non discriminatory port access not regulate upcountry activities).