Our reference
MK/COOP2260-9073840

Cooperative Bulk Handling Limited

Public Submission

Port Terminal Services Undertaking

Dated: 18 July 2011

1 Purpose of this submission

1.1 The purpose of this submission is to provide further information to the ACCC in relation to a number of issues under the proposed undertaking lodged on 31 March 2011 (**Undertaking**).

[Confidential]

2 Base Load Capacity system

Base Load Capacity – the rationale

2.1 As set out in its supporting submission dated 31 March 2011, CBH recognises the auction system is a superior system to first come first served. However, there were some issues with the auction system as set out in CBH's supporting submission dated 31 March 2011 (paragraphs 5.7 and 5.8). In particular, the auction system was impeding the efficient operation of the port and did not provide enough flexibility for larger exporters. Flexibility existed to a greater degree prior to deregulation with CBH able to request the two major exporters to move shipments to assist in operational matters. However, when capacity is auctioned and with a potential premium there needs to be certainty as to what is being offered.

2.2 Therefore, CBH designed a hybrid system which retained the auction system while providing a base load capacity system to capture some of the efficiencies for the port and to provide some flexibility to larger users in return for some flexibility for CBH.

[Confidential]

Base Load Capacity – the benefits

2.7 The base load capacity system was modelled on similar systems used by the mining industry with respect to the allocation of capacity. CBH has also had discussions with the Fremantle Port Authority who have implemented a similar system.

2.8 The issue for CBH was that the Port Terminal Rules provide for a half month shipping window of between 14 and 16 days. During peak periods, exporters will seek to have ships arrive at the beginning of shipping windows in order to maximise the likelihood of shipping the relevant grain with the least delay costs.

2.9 The base load capacity system provides an alternate mechanism for CBH to allocate capacity without affecting the auction system. It will reduce potential congestion at the port during peak periods by allowing CBH to:

(i) allocate a shipping window to a port with less congestion; and/or

(ii) narrow the shipping window in order to minimise overlap between shipping windows and therefore allowing CBH to load more ships during the month.

2.10 The base load capacity system will provide the following benefits:

(i) CBH will be able to operate the port more efficiently by:

(A) smoother allocation of large exporter's shipments across the entire year;

(B) having narrower shipping windows for base load capacity customers;

(C) having the ability to allocate a shipping window to another port which has less demand by agreement;

(D) better forward planning by CBH which will reduce bottlenecks and provide for more utilised capacity;

(E) getting additional flexibility when large exporters are due to narrow windows; and

(F) less pressure on staff, equipment and storage and transport during peak times.

(ii) Larger users will benefit by:

(A) increased flexibility from greater certainty of capacity allocation across the year;

(B) obtaining access to capacity over a month long period which is not tied to 15 days windows;

(C) better forward planning which will enable greater efficiencies.

(iii) Smaller exporters will benefit by:

(A) lower costs from CBH's greater efficiencies; and

(B) greater capacity during peak times as:

(1) larger exporters smooth their exports across the year; and

(2) larger exporters' shipping windows are allocated to a port with less demand.

2.11 It is difficult to quantify the benefits of base load capacity. However, CBH considers that the benefits of the base load capacity may be calculated by examining the cost to users of the port terminal services of inefficiencies. CBH has had first hand experience of such costs based on CBH Grain's experience as a grain marketer using the East Coast port terminal services.

2.12 In particular, CBH notes that as a result of coordination failures CBH Grain has incurred the following additional costs on the East Coast:

[Confidential]

Base Load Capacity – how determined

2.13 In the last 3 years:

(i) between 75% and 90% of shipping was done by the 4 largest shippers;

(ii) between 10% and 25% of shipping was done by the smaller shippers.[1]

2.14 Based on these figures, capacity is allocated:

(i) a **maximum** of 60% to be allocated as base load capacity – largest shippers (4 based on historical figures); and

(ii) a **minimum** of 40% to be allocated as auction capacity – smaller shippers and larger shipper overflow.

2.15 Base load capacity not acquired before 14 September must be allocated by auction (rule 4.4(h)).

[Confidential]

Key features of Base Load Capacity vs. Auction Capacity

2.17 The base load capacity system is designed to sit alongside the auction system and offer a **different** product for larger exporters.

2.18 Large volume users are able to plan vessel arrivals over the full year, have significant stock positions across most port zones and have a high degree of assurance of using a substantial amount of capacity. Unlike smaller customers, large volume customers can flexibly deploy large grain stocks between cargoes, and flexibly deploy vessels to use capacity. For smaller users, annual planning is not as flexible and may not be as necessary, they are exposed to lost capacity risks and auction-based capacity allocation is appropriate.

2.19 Key features compared to the auction system are below:

Feature	Base load Capacity	Auction Capacity
Eligibility	800,000 tonnes per year (approximately 4 exporters).[2]	No minimum criteria.
Allocation	10% of customer's entitlement in a singe month allocated prior to auction. Remainder allocated after auction.	Allocated after auction.
Restrictions on acquisition	Capped at 60% of annual capacity, 20% for an individual customer.	No restrictions (other than ability to pay price).

[1] Question 9 – Confidential response to the ACCC's request for information dated 18 May 2011; paragraph 5.17 of CBH's supporting submission dated 31 March 2011.

[2] Question 3 – Confidential response to the ACCC's request for information dated 18 May 2011.

Lost Capacity Fee	$10 per tonne.	$7 per tonne.
Price	Must not exceed auction price (excluding auction premium).	Auction price.
Tradeable	No.	Yes.
Shipment size	20,000 to 50,000 tonnes.	No minimum.
Shipment plan	Annual shipment plan. Revised quarterly.	No annual plan.
Shipping window	10 days.	15 days.

Protection for smaller exporters

2.20 CBH was concerned to ensure that smaller exporters were not disadvantaged by the base load system as:

(i) CBH members (growers) use smaller exporters;

(ii) CBH's ports rely on throughput; and

(iii) CBH has non discrimination obligations to all port users.

2.21 Therefore, CBH was careful to ensure that the auction system, which has worked well under the existing undertaking for smaller exporters, remained in the Undertaking and was not rendered ineffective by the base load capacity system. It achieved this as follows:

(i) Auction capacity is a **minimum** of 40%. Historically, smaller shippers ship between 10% and 25% of shipping. The 40% provides a buffer and ensures that there will be sufficient auction capacity available.

(ii) Base load capacity is take or pay and requires large shippers to smooth out deliveries as a maximum of 10% of the capacity will be able to be allocated in a month. This means that a base load customer will be incentivised to book less auction capacity during peak times as the base load customer has paid for capacity across the year (and will pay and lose it if not taken).

(iii) Base load capacity is acquired prior to auction capacity. This gives rise to concerns that larger shippers will have access to the "best" shipping slots. In order to prevent this, a customer cannot allocate more than 10% of their base load capacity into a given month prior to the completion of auctions. This prevents a larger exporter from booking out all port capacity.

(iv) Base load capacity is not transferrable. This means larger users will only acquire the capacity they need (and are likely to be conservative) to

avoid the take or pay risk. This means there is no incentive to hoard base load capacity or use it strategically to hinder access.

Why can't CBH use the auction system to achieve this?

2.22 The base load capacity system provides for the exporter to provide annual shipping plans (rule 4.5(a)). The shipping plans must then be revised and accepted by CBH at least once each quarter (rule 4.5(c) and (d)). Each shipping window must then be narrowed to a 10 day window (rule 4.7(a)). This is then accepted or rejected by CBH in accordance with the criteria in rule 4.7(b). In effect, this provides a negotiation between CBH and the exporter as to the appropriate shipping window. This provides flexibility for CBH which is not in the auction system.

2.23 This flexibility is something which only the largest exporters can provide. For example, it is only the largest exporters which will have stock at each port which would allow CBH to negotiate the transfer of the shipping window to another port.

2.24 Even if the negotiations fail, the base load capacity exporter is still required to provide a 10 day shipping window which provides greater certainty for CBH and some mitigation of the overlap of shipments.

2.25 The Port Terminal Rules previously tried to capture some of the potential efficiencies. For example, requiring exporters to provide CBH with forecast annual shipments. However, no exporters, other than CBH Grain, complied with this obligation. It may be too onerous for smaller exporters or they feel that there is no need to inform CBH prior to 21 days before the shipment.

2.26 There is also an issue as to the credibility of the shipping plans. CBH may seek to enforce the requirement to provide a credible shipping plan but how does it do this? What constitutes a "credible" shipping plan (exactly right, a few days slippage)? What is the sanction for submitting an incorrect plan (forfeit shipping window)? CBH is concerned that any such measures will disproportionately impact on smaller shippers (who have less flexibility to adjust their operations to fit with a shipping plan). Further, unless the Port Terminal Rules contain prescriptive requirements as to when a shipping plan is incorrect, sanctions etc then CBH may be criticised for exercising discretion. Of course, the more prescriptive the Port Terminal Rules, the less flexibility they have to deal with extraordinary situations.

2.27 CBH considers that the better way is to provide for a flexible system where exporters take ownership of the issue. The base load capacity system provides this through the take or pay mechanism and the inability to trade capacity. In this way, exporters are incentivised to use capacity (or else they lose it) and therefore incentivised to negotiate with CBH to provide flexibility. The auction system does not have this feature.

2.28 The auction system is also available to all exporters. However, the flexibility which CBH is seeking may only be provided by the larger exporters. Therefore, without a separate system, CBH will have a universal capacity allocation system but would only be seeking to narrow/transfer shipping slots from larger exporters. This means CBH will be discriminating against larger exporters (which it cannot do

under the Undertaking) and, even if it could be done, provides less incentive for a larger exporter to negotiate in good faith or co-operate with CBH.

Section 44ZZA(3) of the CCA

2.29 Base load capacity is consistent with the objectives of section 44ZZA(3) of the CCA as:

(i) It is consistent with the objects of Part IIIA as it promotes the economically efficient operation and use of the port terminals which promotes greater competition in the supply of bulk wheat.

(ii) It is in the legitimate business interests of CBH as a storage and handling provider in addressing customer concerns whilst meeting its business needs.

(iii) It is in the public interest as:

(A) It provides for greater efficiencies (and therefore less costs) to growers and exporters.

(B) It has wide industry support. For example, the submissions received by the ACCC to date (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 10% 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).

(iv) It is in the interests of persons who might want access to the service (see the benefits to all users in paragraph 2.10 above).

3 Definition of Capacity

3.1 CBH has neither commercial nor operational incentives to restrict the supply of port capacity because:

(i) CBH would not profit from limiting capacity. Encouraging the scarcity of port capacity at peak periods would not extract monopoly profit or raise barriers to entry because CBH does not retain the auction premium. Restricting capacity would reduce CBH's revenue and lower profit margins as scale economies are eroded. It may also lead to pressure for CBH to prematurely expand terminal capacity.

(ii) CBH is constrained by the threat of new entry. If CBH artificially limited export capacity at times when exporters wish to ship, the reduction in farm gate returns for growers would encourage competitors to build competitive facilities. Because CBH relies on volume for its scale efficiencies, it would make no sense for CBH to restrict capacity.

(iii) CBH has a commercial incentive to attract volume through its ports.

3.2 Port capacity is a function of the following factors:

(i) port intake capacity;

(ii) intra-port transport capacity;

(iii) labour deployment;

(iv) fumigation demands;

(v) port terminal storage;

(vi) outloading speed; and

(vii) berth capacity and utilisation.

3.3 In order to allocate port capacity, CBH begins with its assessment of the theoretical maximum capability of a Port Terminal to load vessels in any given half month operating at peak operating levels.

3.4 However:

(i) harvest size and characteristics vary between years and between zones;

(ii) Port Terminal Facilities are connected to supply chains which bring grain to port (either the CBH Grain Express supply chain or third party supply chains); and

(iii) depending on the harvest, and other factors that are difficult to predict and often beyond the control of transporters, storage & handling operators or individual supply chain participants, those supply chains may not deliver grain at a speed or in a form that allows the Port Terminal to achieve the maximum port capacity.

3.5 For these reasons, the ability of a Port Terminal to achieve its theoretical capability is inherently uncertain.

[Confidential]

3.10 Regarding the posting of information of capacity at port, CBH has addressed this issue in item 4 of its submission in response to submissions received on the ACCC's issues paper dated 14 June 2011. In particular, CBH publishes full details of the capacity it offers at www.portcapacity.com.

[Confidential]

4 Lost capacity fees

[Confidential]

4.3 **[Confidential]** raised the issue of the cost to CBH Grain of not using capacity, particularly whether the lost capacity fee is a dis-incentive for CBH Grain given that it is paid to CBH. CBH has provided detail on this issue in items 2.13 to 2.16 of its submission in response to submissions received on the ACCC's issues paper dated 14 June 2011.

4.4 In addition, under this argument any demurrage paid by a marketer to a related party that charters vessels for it, or losses on a contract to a related party arising from a CBH default are not really losses. CBH has never endeavoured to advance that proposition and considers that the same applies in relation to the lost capacity fee.

4.5 CBH considers it inappropriate to penalise CBH for its vertical integration where it engages in non-discriminatory conduct. Here other marketers propose that either CBH Grain should be discriminated against or CBH should be penalised because it is vertically integrated.

4.6 CBH notes that the CBH Group as a whole does not benefit from foregone capacity as no new revenue flows into the CBH Group and therefore no new margin can be made off those revenues.

4.7 Lastly, CBH Grain will retain a significant exposure to the auction system in order to acquire additional capacity to meet its requirements and will retain an exposure to lost premium to the extent that it fails to ship auction capacity that it has acquired.

[Confidential]

5 Pricing

5.1 CBH provides a single fee for standard "port terminal services". These are set out in clause 5.1 of the Undertaking and include:

(i) Unloading and receival by CBH at the port;

(ii) Sampling;

(iii) Weighing;

(iv) Storage at the port;

(v) Accumulating and assembling the wheat for the purpose of loading the cargo;

(vi) Administrative and logistics services;

(vii) Access to inspectors; and

(viii) Loading bulk wheat.

5.2 The port terminal services are all of the services required to ship bulk wheat. CBH does not itemise the cost of each service as they cannot realistically be split. That is, an exporter could not "pick and choose" the services because an exporter requires them all to export bulk wheat. Therefore, CBH does not consider that further itemisation is required or justifies the cost to CBH to calculate.

5.3 In the Port Terminal Services Agreement, CBH has separate fees for a range of services which may not strictly be required for the export of bulk wheat. These fees are separately detailed together with the applicable service. An example of this is fumigation of bulk wheat which has a separate charge because it does not have to be performed at the port terminal.

5.4 CBH's pricing is determined based on the operational costs of the port terminal service, the capital cost attributable to the port terminal service and the appropriate share of head office administration costs which are attributable to the port terminal service. CBH's pricing does not cross subsidise other parts of CBH's business (such as CBH Grain). Further, were CBH to cross subsidise CBH Grain then this would leave CBH open to allegations that it was in breach of the non discrimination provisions of the Undertaking. See further, item 6 in CBH's submission in response to submissions on the ACCC's issues paper dated 14 June 2011.

[Confidential]

5.8 **[Confidential]** CBH conducted an extensive review of the cost and value of its port terminal facilities and services and implemented a new pricing structure as part of CBH's obligations to ensure compliance with its obligations to provide open, non discriminatory access to its port terminal services. This was undertaken in 2009 as part of its development of the existing undertaking.

5.9 CBH also notes the comments by Emerald in its submission to the ACCC dated 25 May 2011 and set out in paragraph 6.3 of CBH's submission to the ACCC dated 14 June 2011 that:

> *[i] n 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.*

5.10 This aligns with CBH's own research which indicated that the cost of exporting grain from Western Australia is the lowest in Australia (see paragraph 4.12 of CBH's submission to the ACCC dated 31 March 2011).

5.11 These facts are inconsistent with CBH cross subsidising its upcountry network.

5.12 CBH notes that at the meeting on 7 July 2011, ACCC staff queried whether CBH would be prepared to accept an amendment to the Undertaking which provided that CBH would not cross subsidise its upcountry network.

5.13 CBH is already doing this. However, CBH is concerned that to include such an amendment in the Undertaking would:

(i) expose CBH to extreme reputational risk in that it would suggest that CBH has cross subsidised its up country storage network (and potentially leave CBH open to accusations of breach of the current undertaking and/or the Act); and

(ii) invite CBH's competitors and/or access seekers to make unsubstantiated allegations of breaches of the Undertaking in order to seek access to CBH's confidential pricing methodology or as part of a strategy to negotiate a non standard access agreement.

5.14 CBH considers that such a risk is unacceptable. Particularly, as there is no basis for such an amendment.

5.15 As set out in its submission dated 14 June 2011, paragraph 6 and following, CBH's charges must be consistent with the principles in section 44ZZCA of the Act. If CBH was cross subsidising CBH Grain then it would be a breach of CBH's non discrimination obligations. If CBH was cross subsidising its up country storage network it would be challengeable by arbitration. It would also leave CBH open to an action under the Act.

5.16 Further, CBH has no incentive to cross subsidise its up country network, as the same people are ultimately paying the charges. That is, if CBH were to cross subsidise its storage network, given the large volume of exports, higher port costs would ultimately be paid for by growers (who are the same party that would "benefit" from subsidised storage charges). In effect, growers would be subsidising themselves and CBH would be open to an enormous risk of breach of the Undertaking and possible action under the Act.

5.17 CBH has been transparent with its pricing for port terminal services and, as set out above, has been praised for the low costs of the service. CBH is not aware of any allegation that it subsidises its up country storage network save for two submissions.

QR National Freight

5.18 QR National Freight stated in its submission dated 27 May 2011 that there was no transparency as to whether there is any cross subsidisation between ports or between ports and the logistics supply chain. The basis for this statement was that "*as a result of recent changes to CBH's contracted rail operations there is a risk of increased supply chain costs over the term of the [Undertaking]*". There is no basis for this statement (and none is given). QR National is, of course, the parent company of ARG, who lost the tender to provide CBH's rail logistics. In fact, as a result of changes to CBH's contracted rail operations, rail logistics will be cheaper not because they are subsidised but because the new entrant to the market, Watco, is a more efficient provider of the services. CBH also notes that the allegation centres around transport *not* up country storage.

PGA

5.19 CBH has dealt extensively with them PGA submission dated 20 May 2011 in its submission dated 14 June 2011, particularly the lack of evidence, misrepresentations, selective quotes and *ad hominem* attacks on CBH (see paragraph 6.8 and following). CBH notes that even the PGA concedes that CBH's claim that there has been no complaints from users about CBH's port terminal service pricing is "technically true" (page 4).

[Confidential]

6 [Confidential]

7 Ring fencing

[Confidential]

7.2 There are two types of ring fencing:

(i) ring fencing the port terminal facilities from the up country operations of CBH;

(ii) ring fencing the trading arm from the rest of CBH (predominantly up country operations).

7.3 Neither is appropriate. Given the time and expense involved with ring fencing CBH's operations (whether the port terminal services or CBH Grain), it is important for the ACCC to clearly determine exactly what conduct ring fencing is intended to prevent. The imposition of significant operational and financial detriment to CBH should not be done lightly or on the basis of an unsubstantiated fear.

7.4 The purpose of ring fencing is to prevent preferential self dealing. This will not occur under the proposed Undertaking for the following reasons.

The Undertaking has robust mechanisms to prevent preferential self dealing

7.5 The Undertaking has robust mechanisms to prevent preferential self dealing. In particular:

(i) the Undertaking has robust non discrimination provisions (clause 6.2);

(ii) the ACCC can audit CBH's compliance with the non discrimination provisions (clause 6.3);

(iii) the Undertaking has robust non hindering provisions (clause 10.8);

(iv) CBH must provide the ACCC with a copy of any access agreement with CBH Grain (clause 6.2(c));

(v) the Undertaking preserves the shipping stem, which is an effective means of ensuring that there is no preferential self dealing in the provision of port terminal services. The main information held by CBH as port terminal operator is posted on the stem (see CBH's response to the ACCC's request for information dated 18 May 2011 (question 19);

(vi) the auction system removes the benefit of "insider information" (the base load capacity system does not detract from this) (see Emerald and WEA submissions).[3]

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[3] Submission to the ACCC by Emerald Group Australia Pty Ltd dated 25 May 2011, page 3; Submission to the ACCC by Wheat Exports Australia dated 20 May 2011, page 4.

Confidentiality arrangements

7.6 CBH does not share information with CBH Grain. CBH does not share third party information received by CBH by virtue of its role as port terminal operator unless CBH is explicitly authorised to do so. See CBH's response to the ACCC's request for information dated 18 May 2011 (questions 20, 21 and 22).

7.7 CBH has strict obligations of confidentiality under its agreements with access seekers (and indeed throughout the supply chain). These obligations prevent CBH from providing confidential information to third parties unless authorised (other than in well recognised circumstances, for example to provide information to the ACCC or to publish the information which forms part of the shipping stem).

CBH's past conduct does not warrant ring fencing

7.8 CBH's conduct does not warrant ring fencing. Users were able to obtain access to CBH's port terminal services on acceptable terms for the 2009/2010 and 2010/2011 seasons without formal disputes or substantial complaints of breaches of the Undertaking or the Port Terminal Rules.

7.9 There is no evidence of supra-competitive pricing, gold-plating of assets or preferential self-dealing by CBH.

The detriment to CBH would be significant and threaten supply chain efficiencies

7.10 There are no benefits of ring fencing the port terminal facilities from the rest of CBH. Ring fencing would:

(i) impose significantly higher regulatory and compliance costs on CBH which would be passed through to exporters; and

(ii) destroy the efficiencies of the efficient integration of port and up-country functions.

7.11 The interaction between up-country and port facilities is essential to the efficient management of the supply chain. CBH has limited labour resources and business systems. Ring fencing the port terminals would inflict substantial duplication of these resources, imposing substantial increase in costs. At the same time, separation would complicate communications and other operations between up-country and port, which would risk serious disruption to the flow of grain to port. There is also the difficulty posed for grains other than wheat, which could potentially be subject to regulation that is intended to apply to bulk wheat only.

7.12 If the ACCC proposed to ring fence CBH Grain from CBH:

(i) it is not clear what power the ACCC has to insist on such ring fencing;

(ii) the significant cost of the Grain Express ring fencing arrangements is offset by the efficiencies of the Grain Express system; and

(iii) if the immunity is removed, CBH's contractual obligations and the CCA are sufficient to address any concerns that were previously the subject of the ring fencing arrangements.

The industry does not see it as an issue

7.13 Only two submissions sought ring fencing. Louis Dreyfus stated that ring fencing the port terminal operations from upcountry should be "considered" and the WEA stated that ring fencing CBH Grain from CBH should be required.[4] The remaining submissions sought greater information or supported the proposed Undertaking (and existing arrangements).

7.14 The Productivity Commission has recommended against further regulation of bulk wheat exports, primarily on the basis that the costs of regulation outweigh the benefits.

CBH' structure provides no incentive to preferentially self deal

7.15 There are a number of features that are unique to CBH which constrain any theoretical incentive to gain monopoly rents or reduce competition.

(i) CBH is regulated under the *Bulk Handling Act 1967*. This provides for access obligations (section 19 of the Act). If CBH abuses its position it is open to the Government to impose a more onerous regime.

(ii) CBH is owned by growers who are collectively and individually active in ensuring the supply chain is efficient and beneficial for their respective farming businesses.

(iii) CBH is a grower-owned co-operative, with approximately 4,800 shareholders who are grain growers in Western Australia. Each shareholder can own a maximum of 5 shares so CBH does not have a dominant shareholder.

(iv) CBH is a non profit organisation and therefore has no incentive to make monopoly profits as ultimately the profits are subtracted from those members (in fact its articles specifically prohibit CBH from distributing income or profit to members).

(v) CBH's Memorandum and Articles mandate CBH use its income to achieve its objectives of establishing and conducting systems for handling grain in bulk, and not to pay dividends to shareholders.

ACCC does not propose to ring fence other ports

7.16 The ACCC's draft decision on GrainCorp Operations Limited's Port Terminal Services Access Undertaking does not require ring fencing of GrainCorp's Port Terminal operations from its other business activities. The ACCC noted that:

> *"based on the practical experience under GrainCorp's 2009 Undertaking, that the non-discrimination, no hindering access and dispute resolution provisions of the Proposed 2011 Undertaking are sufficiently robust to*

[4] Submission to the ACCC by Louis Dreyfus Commodities Australia Pty Ltd dated 26 May 2011, paragraph 2.4; Submission to the ACCC by Wheat Exports Australia dated 20 May 2011, page 3.

> *ensure fair access for access seekers... formal ring-fencing rules to support these arrangements are not appropriate at this time..."*[5]

7.17 The ACCC has further supported this decision by noting the "competitive pressures" GrainCorp faces.[6] This decision was confirmed in the ACCC's final decision.[7]

7.18 The ACCC's decision is based on 5 factors:

(i) Non discrimination provisions;

(ii) No hindering provisions;

(iii) Dispute resolution provisions;

(iv) GrainCorp's past conduct;

(v) Competitive pressures.

7.19 Four of these factors are as compelling, or more compelling, in the case of CBH. CBH also has an auction system which removes the benefit of "insider information", as acknowledged by WEA and Emerald.[8]

7.20 Regarding competitive pressures, the competitive pressures on CBH listed in Appendix B of the GrainCorp Draft Amendment Notice Explanatory Statement are understated. In particular:

(i) James Point (greenfields port at Kwinana) has just announced that there is a development schedule for them to open a bulk and general cargo port which has a stated aim of exporting grain;

(ii) Geraldton port has trialled grain loading using another shiploader and thus there is existing capacity to compete with CBH;

(iii) Bunbury Port is capable of exporting grain and is a potential competitor to CBH's ports;

(iv) Albany Port is capable of exporting grain through the woodchip loader and is a potential competitor to CBH's ports; and

(v) Fremantle Port is capable of exporting grain though its bulk loading facilities and is a potential competitor to CBH's ports.

7.21 This aligns favourably with the competitive pressures on GrainCorp and thus this factor should not require ring-fencing of CBH.

7.22 The ACCC concluded its consideration of ring fencing by GrainCorp as follows.

> *In forming this view the ACCC has had regard to matters listed in section 44ZZA(3) of the Act. In particular, the ACCC is of the view that wheat exporters can obtain access to GrainCorp's port terminal facilities on an*

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

[6] ACCC Draft Amendment Notice – Explanatory Statement, 2 June 2011, page 46.

[7] ACCC Final Decision, 22 June 2011, page 31.

[8] Submission to the ACCC by Emerald Group Australia Pty Ltd dated 25 May 2011, page 3; Submission to the ACCC by Wheat Exports Australia dated 20 May 2011, page 4.

> *equitable basis and that their interests are adequately met without further measures to ensure competitive neutrality.*[9]

7.23 It provided a similar view in its final decision.[10] Given the factors set out above, and that exporters have obtained access to CBH's port terminal facilities on an equitable basis and that their interests are adequately met under the existing undertaking and proposed Undertaking, ring fencing is not required.

8 Limitation of liability

8.1 CBH limits its liability under its Port Terminal Services Agreement. Relevantly, CBH is liable for:

(i) shortfalls at a port terminal facility if it cannot outturn the customer's bulk wheat entitlement (either by replacement or payment of a fair market price) (clause 13.1); and

(ii) $100,000 for a single event and $250,000 for the term of the agreement (clause 13.3).

8.2 Limitations of liability are usual for the industry. There are two main risks for exporters; they cannot access the wheat at port and demurrage (delays in shipping). CBH will compensate the exporter in the first instance and has limited liability in the second instance. CBH is not aware of any port terminal services agreement which does not cap liability (in both instances).

8.3 CBH's limitations also compare favourably with the approved GrainCorp undertaking which provides at clause 8.3 of the Indicative Access Agreement:

> *GrainCorp's maximum liability in respect of any Claim shall not exceed $500,000 for Wheat outloaded on any shipping vessel and $25,000 for Wheat outloaded on to rail or road trucks on any one day for the Port Terminal, capped at 7 days.*

8.4 This liability is also further limited under clause 9 of the Indicative Access Agreement contained in the approved GrainCorp undertaking.

8.5 CBH notes that Viterra's liability to outturn Bulk Wheat is limited under proposed clauses 13.3 (a) and (b) of its indicative access agreement to damage, destruction and contamination caused by the gross negligence and wilful default of Viterra's employees and then up to a maximum of $250,000 per event or series of events.

[Confidential]

9 [Confidential]

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[9] ACCC Draft Amendment Notice – Explanatory Statement, 2 June 2011, page 46.

[10] ACCC Final Decision, 22 June 2011, page 31.