



**Australian
Competition &
Consumer
Commission**

Co-operative Bulk Handling Limited

Port Terminal Services Access Undertaking

Draft Decision

23 August 2011



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Glossary

ABA	Australian Bulk Alliance (ABN 087 280 260) – the operator of the Melbourne Port Terminal
ACCC	Australian Competition and Consumer Commission
AGEA	Australian Grain Exporters Association – representative body for exporters of Australian grain
BLASS	Base load annual shipping schedule
BHC	Bulk handling company
CBH	Co-operative Bulk Handling Limited – a vertically integrated port terminal operator
CBH Grain	CBH Grain Pty Ltd – accredited exporter of bulk wheat
CCA	<i>Competition and Consumer Act 2010</i> (Cth) (previously the <i>Trade Practices Act 1974</i>)
Emerald	Emerald Group Australia Pty Ltd
FLCWA	Freight and Logistics Council of Western Australia
Gavilon	Gavilon Grain Australia Pty Ltd
GrainCorp	GrainCorp Limited – a vertically integrated port terminal operator
GSA	Grain services agreement
Louis Dreyfus	Lois Dreyfus Commodities Australia Pty Ltd
mt	Metric tonne
mmt	Million metric tonnes
PC	Productivity Commission
PGA	Pastoralists and Graziers Association of Western Australia
Plum Grove	Plum Grove Pty Ltd
PTR	Port Terminal Rules
Proposed 2011 Undertaking	The access undertaking received from Co-operative Bulk Handling Limited on 31 March 2011 in relation to its grain port terminals in Western Australia
QRNF	Queensland Rail National Freight
Reference Prices	The prices for port terminal services as published on CBH’s website in accordance with clause 6.1(a)(i) of the Proposed

	2011 Undertaking
Revised Draft	Draft revised version of the Proposed 2011 Undertaking provided by CBH in August 2011
Shipping Stem	The stem of ships nominated by exporters for loading at CBH's port terminals as published by CBH
Standard Access Terms	The Reference Prices and Standard Port Terminal Terms in relation to CBH's supply of port terminal services, as published by CBH on its website
Standard Port Terminal Terms	The standard terms and conditions for the supply of port terminal services as published by CBH on its website in accordance with clause 6.1(a)(ii) of the Proposed 2011 Undertaking
Viterra	Viterra Operations Limited – a vertically integrated port terminal operator
WEMA	<i>Wheat Exports Marketing Act 2008</i> (Cth)
2009 Undertaking	The 2009 Port Terminal Services Access Undertaking submitted by CBH, which was accepted by the ACCC on 29 September 2009
2009 undertakings	The Part IIIA access undertakings that relate to the port terminal services of CBH, GrainCorp and ABB (now Viterra), approved by the ACCC on 29 September 2009

1 Summary

This Draft Decision details the preliminary view of the Australian Competition and Consumer Commission (ACCC) of the proposed Undertaking lodged by Co-operative Bulk Handling Limited (CBH) on 31 March 2011 (**Proposed 2011 Undertaking**) for consideration under Division 6 of Part IIIA of the *Competition and Consumer Act 2010* (the CCA). The 2011 Undertaking relates to the provision of access to services for the export of bulk wheat at four grain terminals operated by CBH in Western Australia. These terminals are: Albany, Esperance, Geraldton and Kwinana.

CBH has submitted the Proposed 2011 Undertaking to meet the access test provisions of the *Wheat Export Marketing Act 2008* (Cth) (**WEMA**), which is required for it to be re-accredited as a bulk wheat exporter from 1 October 2011.

The ACCC has a role in approving access undertakings for wheat exporters as part of the deregulation of the wheat industry. Access undertakings are intended to ensure that third party exporters are able to access the port terminals operated by vertically integrated port terminal operators, ensuring competition in the market for the export of bulk wheat.

CBH currently has in place a two-year Undertaking accepted by the ACCC in September 2009 (**2009 Undertaking**).

CBH's Proposed 2011 Undertaking is one of four wheat port terminal services access undertakings that are or have been considered by the ACCC in the 2011 round of undertakings. The ACCC has also received undertakings lodged by:

- Australian Bulk Alliance (**ABA**) in relation to its operations at the Port of Melbourne in Victoria
- GrainCorp Operations Limited (**GrainCorp**) in relation to its operations in New South Wales, Queensland and Victoria
- Viterra Operations Limited (**Viterra**) in relation to its operations in South Australia.

Viterra and CBH have in place access undertakings accepted by the ACCC in September 2009. GrainCorp has in place an undertaking for 2011-2014, which was accepted by the ACCC on 22 June 2011. ABA is proposing an undertaking to the ACCC for the first time. The ACCC considers each undertaking on its own merits and notes that, while undertakings accepted by the ACCC from each port operator will reflect the particular circumstances of that company, there are certain aspects of the undertakings for which the ACCC will be seeking a consistent approach across the bulk wheat export industry.

In considering whether to accept an undertaking the ACCC has regard to the matters set out in s. 44ZZA(3) of the CCA. These include, *inter alia*, the objects of Part IIIA which are to:

- (a) *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*
- (b) *provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.*

CBH's Proposed 2011 Undertaking includes a number of significant proposed changes from the arrangements under its 2009 Undertaking, particularly in relation to its allocation of port terminal capacity. Notwithstanding these significant changes, CBH's arrangements under the Proposed 2011 Undertaking continue to provide for a relatively 'light-handed' approach to the Undertaking, based on a publish-negotiate-arbitrate framework.

The ACCC considers that CBH's 2009 Undertaking appears to have worked relatively well, with no bulk wheat exporter having raised a formal dispute or substantial complaint with the ACCC under the provisions of the 2009 Undertaking.

It is therefore the preliminary view of the ACCC that it is appropriate to maintain the overall approach to access provision. However, the ACCC considers that there are a number of areas where amendments to the Proposed 2011 Undertaking are required. In particular, the ACCC considers that the capacity allocation arrangements proposed by CBH in its Proposed 2011 Undertaking in their current form are not appropriate. The preliminary view of the ACCC, therefore, is not to accept the Proposed 2011 Undertaking. This preliminary view has been formed after considering the matters that the ACCC is required to have regard to under s. 44ZZA(3), as discussed in this Draft Decision.

In order to address the concerns raised by the ACCC on a preliminary basis, CBH has provided a revised draft proposed 2011 undertaking (the **Revised Draft**). It is important to note however that the Revised Draft does not form part of the application submitted by CBH on 31 March 2011 pursuant to s. 44ZZA(1). Accordingly, this Draft Decision assesses the undertaking provided on that date.

References to the Revised Draft indicate the ACCC's preliminary views with regard to that undertaking if it is submitted for assessment pursuant to s. 44ZZA(1). The ACCC seeks views on the Revised Draft which includes the retention of the current auction capacity allocation system. The ACCC seeks comments from stakeholders by 5:00pm on **Tuesday 13 September 2011**, after which the ACCC will release a final decision. The ACCC seeks comments on CBH's proposed changes to the Proposed 2011 Undertaking and the issue of capacity management arrangements in particular, but welcomes comments on any other aspect of the proposed 2011 Undertaking.

The ACCC has formed a preliminary view not to accept the Proposed 2011 Undertaking as lodged by CBH on 31 March 2011. The ACCC notes however that CBH has addressed the ACCC's concerns in the Revised Draft. It is the ACCC's preliminary view that if the Revised Draft is submitted, the ACCC would accept the undertaking, subject to consultation.

1.1 The 2009 Undertaking

The 2009 Undertaking provides a publish-negotiate-arbitrate approach to access provision by CBH. The ACCC considered this approach to be relatively 'light-handed' but appropriate at the time the decision to accept was made in September 2009.

In forming this view, the ACCC noted in its Decision to Accept¹ that the approach was supported by robust non-discrimination, no hindering access and continuous disclosure and reporting provisions. The transitional phase of the bulk wheat export industry at that time and the two-year term of the 2009 Undertaking were also relevant to the ACCC's view on the appropriateness of the 2009 Undertaking.

However, the ACCC noted in its Decision to Accept that the continuing appropriateness of the approach of the 2009 Undertaking would be reviewed when considering subsequent undertakings from CBH. In particular the ACCC flagged in the 2009 Decision to Accept that future assessment would be made regarding:

- whether the publish-negotiate-arbitrate approach to access provision continues to be appropriate, or whether it is more appropriate to move to an ex ante price determination approach
- if the publish-negotiate-arbitrate approach to access provision is retained, whether it should be further strengthened by ring-fencing rules
- whether CBH's (auction) capacity allocation approach is appropriate or whether alternative arrangements should be required for future undertakings
- whether the degree of flexibility afforded to CBH by the 2009 Undertaking to vary its capacity management arrangements by varying its port terminal rules (PTR) is appropriate.

1.2 Proposed 2011 Undertaking

CBH's Proposed 2011 Undertaking continues the general approach of the 2009 Undertaking. Significant differences between the 2009 Undertaking and the Proposed 2011 Undertaking include changes to:

- CBH's port terminal capacity allocation system from the existing auction system to a two-tiered system
- provisions for the variation of the Standard Access Terms
- provisions for the variation of the PTRs
- other specific provisions of the Proposed 2011 Undertaking.

The ACCC released an issues paper on CBH's Proposed 2011 Undertaking on 21 April 2011. The ACCC invited submissions from interested parties by

¹ ACCC, *Co-operative Bulk Handling Limited Port Terminal Services Access Undertaking: Decision to Accept*, 29 September 2009, p. 230.

20 May 2011 and received nine public submissions. While views provided by these stakeholders differed, the ACCC notes in particular comments received stating that:

- the auction system has operated well and is the fairest and most transparent mechanism for the allocation of port terminal capacity
- the proposed two-tiered capacity allocation system is not appropriate mainly as it provides preferential treatment for large volume exporters to the detriment of smaller volume exporters
- the operational flexibility afforded by the transferability of port terminal capacity should be retained
- there is insufficient transparency in CBH's pricing or that there was no basis for assessing the reasonableness of prices charged
- CBH should publish further information on its total available port terminal capacity and information on stocks at port
- CBH should not be permitted to unilaterally vary its Standard Access Terms
- CBH should be subject to ring fencing, although some submissions noted that any potential for self-preferential treatment could be addressed by obliging CBH to publish further information (see above)
- CBH should be liable for despatch-demurrage or other performance-based penalties.

1.3 ACCC Draft Decision

The ACCC has formed a preliminary view not to accept the Proposed 2011 Undertaking, having regard to:

- the overall approach and specific provisions of the Proposed 2011 Undertaking
- the matters specified under s. 44ZZA(3) of the CCA, taking into account the wider context within which CBH has submitted the Proposed 2011 Undertaking (which is detailed in the Legislative Framework set out in Appendix 2 to this Draft Decision).

The ACCC notes that the matters specified under s. 44ZZA(3) of the CCA to which it may have regard when deciding the appropriateness of an undertaking include (but are not limited to):

- the objects of Part IIIA of the CCA which are, in summary, to promote the economically efficient operation of and use of the infrastructure and encourage a consistent approach to access regulation in each industry
- the legitimate business interests of the access provider (i.e. CBH)

- the public interest, including considerations related to fostering competition in related markets
- the interests of access seekers (e.g. exporters)
- any other matters that the ACCC thinks are relevant (such as the non-discrimination and no hindering provisions of the Proposed 2011 Undertaking).

1.3.1 Overall approach

The ACCC has reached a preliminary view that the overall approach to access provision as provided in the publish-negotiate-arbitrate arrangements of the Proposed 2011 Undertaking is appropriate and that prescriptive ex ante price regulation is not necessary in the case of CBH's Proposed 2011 Undertaking. Further, it is the preliminary view of the ACCC that it is not appropriate to strengthen the publish-negotiate-arbitrate arrangements with ring-fencing rules for CBH at this time, provided that CBH provides increased transparency of its port operations, as discussed at Chapter 4.3. The experience during the term of CBH's 2009 Undertaking and the ACCC's reasons for reaching these preliminary views are set out in Chapter 4 of this Draft Decision.

The ACCC also is of the preliminary view that the three-year term of the Proposed 2011 Undertaking is appropriate.

Notwithstanding its preliminary view that the overall publish-negotiate-arbitrate approach of the Proposed 2011 Undertaking to access provision is appropriate, the ACCC is of the view that there are particular aspects of the approach that are not appropriate. These issues are discussed in the following sections.

1.3.2 Publish-negotiate-arbitrate

The ACCC has reviewed the operation of the publish-negotiate-arbitrate provisions of the Proposed 2011 Undertaking and considers that, on balance, they have been effective in providing the transparency necessary for access seekers to obtain fair access to CBH's port terminal services. It is therefore the ACCC's preliminary view that more prescriptive provisions, such as pricing or ring-fencing rules are not required to be provided if certain amendments are made. Those amendments include:

- a requirement for CBH to provide to the ACCC a copy of the port terminal services access agreement entered into with its own trading division
- a requirement for CBH to publish detailed information on the available and remaining capacity at each of its port terminal facilities and information on stocks at port (i.e. tonnage and type of all commodities as well as the top three wheat grades at each port).

The ACCC notes that the Revised Draft has included an obligation for CBH to publish the abovementioned information on available capacity and stock at port.

These issues are discussed in Chapter 4 of this Draft Decision.

1.3.3 Capacity management

It is the ACCC's view that the auction arrangements for allocating port terminal capacity established in CBH's 2009 Undertaking have provided an effective basis for management of capacity at CBH's port terminals. In particular, the ACCC notes:

- the high level of transparency provided by the auction system
- the high level of flexibility available to exporters through the ability to transfer to other exporters any port terminal capacity that they are not able to utilise
- the allocation of port terminal capacity to those exporters that value a given shipping slot most (i.e. via the auction premium mechanism).

The ACCC considers that these auction arrangements promote economic efficiency at peak times when demand for port terminal capacity exceeds available port terminal capacity. The ACCC notes that the auction system has widespread industry support.

CBH has proposed to replace its existing auction system with a two-tiered system under which up to 60 per cent of capacity will be allocated to large volume customers (referred to as 'base load capacity' (BLC)) and the remaining capacity to remain available as auction capacity for all exporters. Only exporters with a minimum forecast shipping schedule of 800,000mt or more will be eligible for BLC. CBH's proposed two-tiered capacity allocation system, in contrast to the auction system, has raised significant third party concerns, including:

- the shrinkage of available auction capacity for small volume exporters that are not eligible for BLC, with this remaining available capacity falling as low as 28 per cent of total capacity during peak periods
- the possible 'wasted' or lost capacity resulting from the non-transferability of BLC
- the increased barrier to entry or expansion represented by the eligibility criteria for BLC – i.e. the requirement that a customer have a forecast shipping schedule of 800,000mt or more
- the potential for BLC customers to bid up the prices for auction capacity given the lower price they will pay for BLC (i.e. the base auction price excluding premium).

The ACCC considers that, in principle, there may be benefits in an appropriate BLC system, in terms of improved efficiency of port operations, promotion of efficient investment by exporters in complementary up-country infrastructure that requires certainty of access to port capacity and resulting promotion of competition in upstream markets.

The BLC proposal reflects practices in some other sectors, such as the mining industry, where port operators have arrangements that provide them with a high level of management of shipping schedules to facilitate co-ordination along the supply chain.

The ACCC recognises that, in proposing the two-tiered approach to capacity allocation, CBH is seeking to achieve operational efficiencies as compared with the auction system. However, it is the ACCC's preliminary view that, while recognising the potential efficiency benefits of BLC arrangements, the proposed two-tiered approach to capacity allocation, in its current form, is not appropriate. The ACCC has formed this preliminary view having regard to s. 44ZZA(3) and has the following main concerns:

- the approach is unlikely to lead to an efficient allocation of capacity, so that it is used by those who value it most highly
- the claimed benefits of increased operational efficiency of port operations are uncertain
- the imposition of an eligibility criterion for BLC raises concerns of discrimination, which would be inconsistent with the obligation in the undertaking not to discriminate between CBH's trading arm and third-party exporters
- negative impacts on competition in related markets arising from differential treatment of exporters in accessing the port.

The ACCC notes that the Revised Draft has not included the two-tiered capacity allocation model and retains the auction system for the allocation of port terminal capacity. The ACCC notes that it is open to CBH to propose a variation to an accepted undertaking, under s. 44ZZA(7)(b) of the CCA and it may in future following consultation with industry wish the ACCC to consider a revised version of a BLC system, which addresses ACCC concerns with the approach as contained in the Proposed 2011 Undertaking.

These issues are discussed in Chapter 5 of this Draft Decision.

1.3.4 Variation of port terminal rules

Each of the 2009 undertakings accepted by the ACCC applying to GrainCorp, CBH and Viterra contain a version of the PTRs, with a process for their variation. These differ to some extent between the different undertakings. Each port operator has varied its PTRs since acceptance by the ACCC and different issues have arisen with these variation processes.

In assessing the PTRs submitted by CBH and the PTR variation process, the ACCC has taken into consideration the experience of each of the port operators' variation processes because it considers that a consistent approach across the industry is appropriate. Chapter 6.1 of this Draft Decision sets out the minimum standards the ACCC considers necessary for an efficient and transparent PTR variation process.

The ACCC notes that the PTR variation process provisions included in CBH's Proposed 2011 Undertaking fulfil the minimum standards and are appropriate. However, the ACCC considers that the PTRs must be, and continue to be, a comprehensive statement of CBH's policies and procedures for managing demand for the port terminal services – this minimum standard is not fulfilled and redrafting by CBH is required.

The ACCC notes that the Revised Draft seeks to address the issue outlined above with the inclusion of a new clause 10.1. The ACCC is of the preliminary view that this new provision fulfils the minimum standard outlined above and is appropriate.

This is discussed further in Chapter 6 of this Draft Decision.

1.3.5 Variation to the Standard Access Terms

Each of the 2009 undertakings accepted by the ACCC applying to GrainCorp, CBH and Viterra contain provisions that enable the port operator to vary their standard terms for access to port terminal services. However, in contrast to the undertakings of Viterra and GrainCorp, CBH has included a new provision to its Proposed 2011 Undertaking (at clause 6.1(c)) which enables CBH to vary its Standard Access Terms on a *unilateral* basis (i.e. without a requirement for stakeholder consultation or prior notice to access seekers).

The Standard Access Terms, which include the Reference Prices and the Standard Port Terminal Terms for port terminal services provide a clear starting point for negotiations between access seekers and CBH. The Standard Access Terms are critical in ensuring access seekers can effectively negotiate with CBH and also assist in ensuring that the costs of negotiation and/or arbitration are not excessive.

The ACCC considers that while all elements of the Standard Access Terms are subject to negotiation between CBH and access seekers, the Standard Access Terms represent an important starting point for those negotiations and provide an appropriate level of certainty and clarity for the parties seeking to access port terminal services.

The ACCC is of the preliminary view that it is not appropriate for CBH to be able to unilaterally vary the Standard Access Terms because this would result in a significant reduction in the clarity and certainty provided to customers through the provision of the Standard Access Terms in their negotiations with CBH for access to port terminal services.

The ACCC notes that the Revised Draft seeks to address the issue outlined above with the amendment of subclauses 6.1(a), (c) and (d) and is of the preliminary view that the proposed changes adequately address its concerns.

This is discussed further in Chapter 6 of this Draft Decision.

1.3.6 The ACCC's role under the Proposed 2011 Undertaking

The ACCC considers that the Proposed 2011 Undertaking should provide for certain powers and functions of the ACCC. These include a mechanism allowing the ACCC to object to a proposed variation by CBH, a specific information gathering provision, an approval power acknowledging that decision making functions under the undertaking may be undertaken by particular Commissioners, and inclusion of an explicit reference to the ACCC's monitoring role. The ACCC considers that these powers and functions should be consistent across the Undertakings of all the port operators.

CBH has proposed drafting in its Proposed 2011 Undertaking to include an objection notice power for the ACCC. However, the ACCC is of the preliminary view that the proposed drafting by CBH is not appropriate. The ACCC objection notice provisions included in CBH's Proposed 2011 Undertaking should be amended to remove the mechanism allowing CBH to seek arbitration should it dispute an objection notice issued by the ACCC with regard to a proposed variation of the PTRs. The ACCC considers that it is not appropriate that regulatory decisions of an independent regulator be appealed through private arbitration. Rather, this is the proper role of the Court.

The ACCC is of the preliminary view that an information gathering power is necessary to enable it to properly discharge the functions required by the Proposed 2011 Undertaking and this is an issue for which the ACCC considers a consistent approach across the industry is appropriate.

CBH has proposed drafting in its Proposed 2011 Undertaking to address these issues. The ACCC's preliminary view is that the proposed drafting is appropriate.

These issues are discussed in Chapter 4 of this Draft Decision.

1.3.7 Approach to pricing

Each of the 2009 undertakings accepted by the ACCC applying to GrainCorp, CBH and Viterra contain provisions requiring the port operator to publish reference prices for the supply of port terminal services. As the proposed 2011 undertakings of each of the port operators do not include ex ante pricing, the ACCC is not assessing the appropriateness of particular prices for port terminal services.

However, the ACCC has considered the prices under the 2009 undertakings in order to determine whether the publish-negotiate-arbitrate approach to determining access pricing has been effective. The assessment of prices in this context was particularly important in the case of CBH given the concerns that were raised by third parties in relation to CBH's pricing methodology. These concerns focused mainly on the following related issues:

- the level of transparency provided by CBH's pricing (e.g. the extent to which prices are provided on an itemised basis)
- the ability for exporters to determine the reasonableness of CBH's pricing on a cost basis.

The ACCC is of the preliminary view that the CBH's approach to pricing under the Proposed 2011 Undertaking is not appropriate as it does not provide a sufficiently transparent baseline or starting point for effective negotiations between CBH and access seekers.

The ACCC is of the preliminary view that a relatively 'light-handed' approach to pricing be maintained in the Proposed 2011 Undertaking, and that CBH provide additional information on the range of services covered by the reference prices and the criteria required to qualify for those prices. This would provide an enhanced level of transparency around the baseline prices and therefore provide a greater level of

certainty and clarity for access seekers in negotiations. The ACCC notes that access seekers seeking to utilise non-CBH supply chain arrangements to bring grain to port will also be in a better position to assess the reasonableness of any price differentials they are charged by CBH for access to port terminal services compared to those that utilise CBH’s up-country supply chain services. Access seekers who are unable to negotiate prices will be able to use the arbitration provisions in the undertaking.

The ACCC notes that the Revised Draft seeks to address the issue outlined above by including a new clause 12.5 requiring that CBH will publish the required details on its website. The ACCC is of the preliminary view that the proposed changes adequately address its concerns.

These issues are discussed in Chapter 7 of this Draft Decision.

A summary of the amendments that the ACCC considers are required to the Proposed 2011 Undertaking is provided below at table 1.1.

Table 1.1: Required changes to the Proposed 2011 Undertaking

Issue and ACCC proposed amendments to the Proposed 2011 Undertaking	Draft Decision reference
<p>Publication of information on Available Capacity and Stock at Port at each of CBH’s port terminals</p> <p>In order to address issues relating to the sharing of information between CBH and its trading arm, the ACCC proposes the amendment of clause 12 to include:</p> <ul style="list-style-type: none"> ▪ subsection (e): relating to information on Available Capacity ▪ subsection (f): relating to information on Stock at Port 	pp. 29-35
<p>ACCC objection notice</p> <p>The ACCC proposes the amendment of the objection notice provision drafted by CBH to remove the mechanism allowing for CBH to seek arbitration should it dispute the issuing of an objection notice by the ACCC in relation to a proposed variation by CBH.</p>	pp. 35-39
<p>Capacity management – proposed two-tiered capacity allocation system</p> <p>ACCC has weighed the matters it is required to have regard to under s. 44ZZ(3) when deciding whether to accept an undertaking under Part IIIA and formed the preliminary view that the Proposed 2011 Undertaking is not acceptable with respect to the capacity management arrangements because it considers that the identified concerns outweigh any potential benefits likely to flow from the proposed arrangements.</p> <p>The ACCC proposes that CBH not proceed with the two-tiered system and that it maintain the auction system for the allocation of port terminal capacity.</p> <p>The ACCC also proposes that CBH publish its total available port terminal capacity independent of any up-country supply chain elements utilised to bring grain to port.</p>	pp. 42-64

Issue and ACCC proposed amendments to the Proposed 2011 Undertaking	Draft Decision reference
<p>Variation of Port Terminal Rules</p> <p>To ensure clarity and certainty for access seekers, the ACCC takes the preliminary view that clause 10.1 of the Proposed 2011 Undertaking should be amended to provide that the PTRs must be, and continue to be, a comprehensive statement of CBH's policies and procedures for managing demand for the port terminal services</p>	pp. 65-70
<p>Variation of Standard Access Terms</p> <p>The ACCC considers that an appropriate alternative mechanism should be drafted, which provides CBH with an ability to unilaterally vary the Reference Prices but requires it to obtain ACCC approval for proposed changes to the Standard Port Terminal Terms (as contained in the Port Terminal Service Agreement at Schedule 2 of the Proposed 2011 Undertaking).</p>	pp. 70-74
<p>Increased transparency measures in relation to port terminal service pricing</p> <p>The ACCC proposes to insert a provision to provide increased transparency around the specific services that are covered by the service charges imposed by CBH, including the criteria (if any) that must be satisfied in order to qualify for any charges set out in the Reference Prices.</p>	pp. 75-82

1.4 Stakeholder views

The ACCC welcomes comments on the preliminary views on this Draft Decision regarding the Proposed 2011 Undertaking lodged by CBH.

Submissions must be forwarded by 5:00pm on **Tuesday 13 September 2011** to:

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

Email: transport@acc.gov.au

2 Procedural overview

This chapter explains the process for the consideration by the Australian Competition and Consumer Commission (ACCC) of the access undertaking received from Co-operative Bulk Handling Limited (CBH) on 31 March 2011 for consideration under Division 6 of Part IIIA of the CCA (the **Proposed 2011 Undertaking**).

2.1 CBH's Proposed 2011 Undertaking

Under Division 6 of Part IIIA of the *Competition and Consumer Act 2010* (Cth) (CCA) (previously the *Trade Practices Act 1974* (Cth)), the 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.

The ACCC received the Proposed 2011 Undertaking on 31 March 2011.

The Proposed 2011 Undertaking relates to the provision of access to services for the export of bulk wheat at grain port terminals operated by CBH in Western Australia.

CBH has submitted the Proposed 2011 Undertaking in accordance with legislative requirements under the *Wheat Export Marketing Act 2008* (Cth) (WEMA), further details of which are set out in Appendix 2.

In addition to the Proposed 2011 Undertaking, CBH has provided a Revised Draft in order to address the concerns raised by the ACCC on a preliminary basis. The relevant amendments proposed by CBH in the Revised Draft to the Proposed 2011 Undertaking are detailed under each relevant chapter of this Draft Decision. A preliminary view as to the appropriateness of the amendment proposed is also discussed.

2.2 Submissions from CBH

CBH has provided the following information in respect of the Proposed 2011 Undertaking:

- initial supporting information provided on 31 March 2011
- a response to an ACCC s. 44ZZBCA request for information issued on 6 May 2011, provided 13 May 2011
- a submission in response to the ACCC's Issues Paper on 20 May 2011
- a submission in response to third party submissions on 14 June 2011
- a response to an ACCC s. 44ZZBCA request for information issued on 30 June 2011, provided 5 July 2011
- a response to an ACCC s. 44ZZBCA request for information issued on 7 July 2011, provided 12 July 2011
- a submission following a meeting with the ACCC on 7 July 2011, provided on

18 July 2011.

CBH has also referred to information it submitted in relation to the 2009 Undertaking, provided on 14 April 2009.

2.3 Public consultation process to date

Section 44ZZBD(1) of the CCA provides that the ACCC may invite public submissions on an access undertaking application.

The ACCC published an Issues Paper on 21 April 2011 inviting submissions on the Proposed 2011 Undertaking. The ACCC directly notified approximately 200 stakeholders, including accredited wheat exporters, grain growers, farming organisations and state regulatory bodies, of the public consultation process.

2.3.1 Submissions received

The ACCC received public submissions from the following parties in relation to the Proposed 2011 Undertaking:

- Australian Grain Exporters Association (**AGEA**)
- Emerald Group Australia (**Emerald**)
- Freight and Logistics Council of Western Australia (**FLCWA**)
- Gaviion Grain Australia Pty Ltd (**Gaviion**)
- Louis Dreyfus Commodities Australia (**Louis Dreyfus**)
- Pastoralists' and Graziers' Association of WA (**PGA**)
- Plum Grove Pty Ltd (**Plum Grove**)
- Queensland Rail National Freight (**QRNF**)
- Wheat Exports Australia (**WEA**).

2.4 Confidential submissions

The ACCC acknowledges the need for a balance between permitting the provision to a regulator of relevant information on a confidential basis, where that information is commercially sensitive or otherwise confidential, and the need to allow parties whose legitimate interests are likely to be affected by an administrative decision the opportunity to respond to relevant material. In this regard, the ACCC notes that a party may request that the ACCC not make the whole or part of a submission available for confidentiality reasons.²

In the current context, the ACCC considers that this balance is adequately found by giving weight to comments made in public submissions, and considering comments made in confidential submissions only where such comments are relevant,

² *Competition and Consumer Act 2010* (Cth), s. 44ZZBD.

determinative of a particular issue and contribute considerations not already dealt with in a public submission.

The ACCC strongly encourages parties who intend to provide submissions on the ACCC's Draft Decision to make public submissions, whether or not they wish to make a confidential submission as well. Unless a submission is marked confidential, it will be made available to any person or organisation on request. The sections of submissions that are confidential should be clearly identified, with reasons as to why they are confidential.

Further details as to how the ACCC deals with information provided to it are available in the *Australian Competition and Consumer Commission Australian Energy Regulator Information policy* published on the ACCC's website.

2.5 Indicative timeline

Under the CCA, the ACCC must make a decision on an access undertaking application within 180 days of the day it received the application. The clock may be stopped during the 180 day period when:

- a notice is given under s. 44ZZBCA(1) requesting information in relation to the application
- a notice is published under s. 44ZZBD(1) inviting public submissions in relation to the application
- an agreement in writing between the ACCC and the provider of the service is made in relation to the application (s. 44ZZBC(4)).

The clock has thus far been stopped twice and the statutory time limit for the ACCC decision has been extended by:

- 29 days for consultation on the ACCC Issues Paper
- 7 days for the ACCC's request for information under s. 44ZZBCA
- 21 days for consultation on this Draft Decision.

The statutory time limit for the ACCC decision now expires on 9 December 2011.

2.6 Consultation on the Draft Decision

The ACCC invites submissions from interested parties on its Draft Decision regarding CBH's Proposed 2011 Undertaking. Submissions must be forwarded by 5:00pm on **Tuesday, 13 September 2011** to:

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

Email: transport@acc.gov.au

Submissions are to be sent preferably by email, in Microsoft Word or other text readable document form.

2.6.1 Confidentiality of submissions

As indicated above, the ACCC acknowledges the need for a balance between permitting the provision to a regulator of relevant information on a confidential basis, where that information is commercially sensitive or otherwise confidential, and the need to allow parties whose legitimate interests are likely to be affected by an administrative decision the opportunity to respond to relevant material.

However, the ACCC strongly encourages parties who intend to provide submissions on the ACCC's Draft Decision to make public submissions. Unless a submission is marked confidential, it will be published on the ACCC's website. The sections of submissions that are confidential should be clearly identified, and reasons for the claim for confidentiality provided.

2.7 Further information

The Proposed 2011 Undertaking and other relevant material, including supporting submissions from CBH and submissions by interested parties, are available on the ACCC's website at www.acc.gov.au by following the links to 'For regulated industries' and 'Wheat Export,' or via the following link: [Wheat Exports: Port Terminal Services Access Undertakings](#).

If you have any queries in relation to the ACCC's process, or to any matters raised in this Draft Decision, please contact:

Ms Lyn Camilleri
Director
Transport & General Prices Oversight
Ph: (03) 9290-1973
Email: lyn.camilleri@acc.gov.au
Fax: (03) 9663-3699

3 Decision framework

3.1 ACCC Draft Decision

The ACCC may reject an undertaking offered under Part IIIA if it thinks it appropriate to do so having regard to the matters specified under s. 44ZZA(3) of the CCA. These matters include the economically efficient operation of, use of and investment in the infrastructure and encouraging a consistent approach to access regulation in each industry. Other matters specified in s. 44ZZA(3) are the pricing principles specified in s. 44ZZCA, the legitimate business interests of the access provider, the public interest, including the public interest in having competition in markets, the interests of access seekers and any other matters the ACCC thinks are relevant.

The ACCC recognises that CBH has provided the Proposed 2011 Undertaking to meet the access test provisions of the WEMA and considers that the WEMA, and in particular the rationale for inclusion of the access test in the WEMA, is a relevant matter in assessing whether it is appropriate to accept the 2011 Undertaking (refer to Appendix 2 for further discussion on the legislative framework). The ACCC further considers that the experience under the 2009 Undertaking is a relevant matter in assessing the appropriateness of the Proposed 2011 Undertaking.

In reaching its Draft Decision the ACCC has had regard to all matters in s. 44ZZA(3), and is of the preliminary view that the 2011 Undertaking is not appropriate to accept having regard to each of those matters. The ACCC has considered the views of stakeholders in reaching this draft decision to not accept the 2011 Undertaking. Submissions were received in response to an Issues Paper released on 21 April 2011.

This chapter sets out the framework the ACCC has applied in making its Draft Decision not to accept.

3.2 Part IIIA Access Undertaking

Division 6 of Part IIIA of the CCA requires that in assessing the Proposed 2011 Undertaking the ACCC must apply the test set out in s. 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 (s. 44ZZA(3)(aa)), which are to:
 - promote the economically efficient operation of, use of an investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets
 - provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry
- the ‘pricing principles’ specified in s. 44ZZCA of the CCA (s. 44ZZA(3)(ab)), which provide that:

- regulated 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
- regulated prices should be set so as to include a return on investment commensurate with the regulatory and commercial risks involved
- allow multi-part pricing and price discrimination when it aids efficiency
- 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
- access pricing regimes should provide incentives to reduce costs or otherwise improve productivity
- the legitimate business interests of the provider of the service (s. 44ZZA(3)(a))
- the public interest, including the public interest in having competition in the markets (whether or not in Australia) (s. 44ZZA(3)(b))
- the interests of persons who might want access to the service (s. 44ZZA(3)(c))
- whether the undertaking is in accordance with an access code that applies to the service (s. 44ZZA(3)(da))
- any other matters that the ACCC thinks are relevant (s. 44ZZA(3)(e)).

A key concept underpinning a number of the relevant factors listed in s. 44ZZA(3) is certainty and clarity. Sufficient certainty and clarity in relation to the terms, effect and operation of the access undertaking is important to both CBH and access seekers so that all parties understand CBH's obligations and are able to enforce their rights.

Other matters

WEMA

The *Wheat Export Marketing Act 2008* (Cth) (**WEMA**) requires that, in order to export bulk wheat from Australia, exporters must first be accredited by Wheat Exports Australia (**WEA**) as 'fit and proper'.³ The WEMA also provides that parties seeking bulk wheat export accreditation that also provide 'port terminal services' must satisfy an additional 'access test'.

The access test is satisfied *inter alia* if 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 and that undertaking relates to the provision to accredited wheat exporters of access to port terminal services for purposes relating to the export of bulk wheat.

³ *Wheat Export Marketing Act 2008*, s. 24.

On 29 September 2009, the ACCC accepted an undertaking from CBH. The 2009 undertaking is due to expire on 30 September 2011.

2009 Undertakings

In addition, the ACCC considers that the operation of CBH's 2009 Undertaking, and the performance of the 2009 undertakings for other port operators, are relevant matters in the assessment of CBH's Proposed 2011 Undertaking. Through the operation of the 2009 Undertakings, the ACCC has gained insight into the effect of the undertakings in practice. Further, many of the provisions CBH proposes be included in its 2011 undertaking are the same provisions found in its 2009 Undertaking.

Further discussion of the decision-making framework can be found in Appendix 2.

3.3 Proposed 2011 Undertaking

The Proposed 2011 Undertaking lodged by CBH on 31 March 2011 is in essence a roll over of the 2009 undertaking attaching the Port Terminal Rules as varied in accordance with the 2009 undertaking released on 14 October 2010.

The Proposed 2011 Undertaking includes changes to:

- accommodate potential changes to the regulatory framework for exporting bulk wheat
- provide greater clarity in relation to the process for issuing notices and other communications
- CBH's port terminal capacity allocation system
- provisions for the variation of the Standard Access Terms
- the definition of 'dispute'
- provisions for the variation of the PTRs
- other specific provisions of the Proposed 2011 Undertaking.

Where a change is a material departure from the 2009 undertaking, the effect of the change is described and discussed in this Draft Decision.

In addition to the changes proposed by CBH, the ACCC has, having regard to the operation of the 2009 Undertakings and the relevant factors that are prescribed by s. 44ZZA(3), determined that some provisions of the 2009 Undertaking rolled over into the Proposed 2011 Undertaking are no longer appropriate. The relevant provisions are discussed in the relevant the chapters of this Draft Decision. Further, in relation to some matters, increased transparency is required in order to provide sufficient certainty and clarity to CBH and access seekers. As discussed above, such certainty and clarity is in the interests of both CBH and access seekers. Suggestions on how this could be achieved by way of amendments to the Proposed 2011

Undertaking, for example to the price and services provided, are discussed in the relevant chapters.

It is in the interests of access seekers, and of competition in related markets, that CBH's operations in relation to the export of bulk wheat are conducted on a non-discriminatory basis, in a manner that is clear and transparent, and with recourse to adequate and swift dispute resolution procedures in the event of dispute between CBH and access seekers. Such measures could be further strengthened by increased oversight by the ACCC. Suggestions on how that increased oversight could be achieved, while having regard to CBH's legitimate business interests to have flexibility in managing its operations, are discussed in Chapter 4 of this Draft Decision.

4 Overall approach of Proposed 2011 Undertaking

4.1 CBH's Proposed 2011 Undertaking

The Proposed 2011 Undertaking relates to the provision of access to port terminal services for the export of bulk wheat at four grain terminals operated by CBH in Western Australia. These terminals are Albany, Esperance, Geraldton and Kwinana.

The Proposed 2011 Undertaking lodged by CBH on 31 March 2011 rolls over many of the provisions of the 2009 Undertaking but also includes a wide range of proposed changes. In particular, the Proposed 2011 Undertaking includes changes to:

- CBH's port terminal capacity allocation system
- provisions for the variation of the Standard Access Terms
- the definition of 'dispute'
- provisions for the variation of the PTRs
- other specific provisions of the Proposed 2011 Undertaking.

CBH submits that these changes are necessary to:

- improve the clarity and utility of the access undertaking
- address concerns or implement suggested changes made by the ACCC, Productivity Commission (PC) and/or interested parties
- enable the Proposed 2011 Undertaking to replace the 2009 Undertaking without undue uncertainty or disruption to business.⁴

Where a change is a material departure from the 2009 Undertaking, the effect of the change is described and discussed in this Draft Decision. The appropriateness of each of the relevant material changes to the 2009 Undertaking is considered with reference to the factors listed under s. 44ZZA(3) of the CCA.

This chapter considers the general approach adopted in the Proposed 2011 Undertaking, including whether it is appropriate that the relatively 'light-handed' approach to access provision established in the 2009 Undertaking be maintained.

4.2 General application of the publish-negotiate-arbitrate framework

CBH has proposed to roll forward the 'publish-negotiate-arbitrate' model from the 2009 Undertaking. This model provides that:

⁴ CBH, *Public submission to the ACCC: Port Terminal Service Undertaking*, 31 March 2011, p. 2.

- CBH will offer to supply the standard port terminal services to access seekers on standard **published** non-price terms and conditions (Standard Port Terminal Terms). In providing access to port terminal services, CBH must not discriminate between access seekers and its own trading arm, CBH Grain.
- CBH must, for access to each standard port terminal service, **publish** the Standard Port Terminal Terms and Reference Prices (**Standard Access Terms**) on the CBH website.
- CBH will enter into **negotiations** with access seekers for the provision of access to port terminal services on terms that vary from the Standard Port Terminal Terms and/or reference prices. Both parties must negotiate in good faith in accordance with the terms of the Proposed 2011 Undertaking. The negotiations will be finalised by the execution of an access agreement.
- Any dispute, except those in relation to executed access agreements, the PTRs or price variations to reflect CPI changes, will be resolved in accordance with clause 8 of the Proposed 2011 Undertaking. Clause 8 provides a process whereby disputes may be escalated from negotiation to mediation to **arbitration**.

4.2.1 Publication

Under the publish-negotiate-arbitrate approach, the Proposed 2011 Undertaking provides that CBH will publish:

- the Standard Access Terms (which includes Reference Prices and Standard Port Terminal Terms) on which it will provide access to its port terminal services
- other information in relation to the operation of CBH's port terminals, including key port information and performance indicators.

The ACCC considers that the broad approach of the obligations under the 2009 Undertaking relating to the publication of information are appropriate having regard to s. 44ZZA(3)(c). This is mainly on the basis that the publication of the relevant information, particularly in relation to the overall operation of the port and service standards, provides access seekers with an appropriate level of clarity and certainty in their negotiations with CBH. However, the ACCC considers that the obligations concerning publication of information need to be strengthened in some respects. These areas are discussed later in this chapter.

Some of the provisions contained in the Proposed 2011 Undertaking which relate to the publication of the Standard Access Terms have been redrafted by CBH from the 2009 Undertaking. The details of the relevant changes are addressed below.

Publication of Standard Access Terms

Subclause 6.1 of the Proposed 2011 Undertaking relating to the publication of the Standard Access Terms has been revised from the 2009 Undertaking with:

- the replacement of all references to 'price and non-price' terms with 'Standard Access Terms'

- the replacement of the term ‘PTSA’ with ‘a standard set of terms and conditions for the supply of Port Terminal Services (Standard Port Terminal Terms)’
- the inclusion of a provision at subclause 6.1(c) that allows CBH to unilaterally amend the Standard Access Terms (this issue is addressed in detail at Chapter 6.2 below)
- the replacement of ‘an indicative PTSA’ with ‘Standard Port Terminal Terms’.

The Standard Port Terminal Terms are set out in Schedule 2 of the Proposed 2011 Undertaking.

The Standard Access Terms on which CBH will offer to provide access are to be published on its website no later than 31 August of each year in accordance with subclause 6.1(a) and will apply for the season commencing that year, unless varied under subclause 6.1(c). Where CBH varies its Standard Access Terms, it must provide copies to the ACCC within two business days of publication.

A detailed discussion on the Standard Access Terms and the proposed ability for CBH to vary these unilaterally follows in Chapter 6.2 below.

Publication of other information

The provisions relating to the publication of key port information in the Proposed 2011 Undertaking are unchanged from the 2009 Undertaking.

Clause 12(a) of the Proposed 2011 Undertaking requires that CBH publish on a monthly basis the total amount of bulk wheat and other grain situated at each of its port terminal facilities.

Clause 12(b) of the Proposed 2011 Undertaking requires that CBH publish an updated shipping stem on a daily basis. This provision reflects the continuous disclosure rules contained in the WEMA.

Publication of key service standards

Clause 12(c) of the Proposed 2011 Undertaking requires that CBH will publish on its website a range of key performance indicators, on a quarterly basis. The indicators that will be published include:

- average number of days between the ETA (as defined in the PTRs) on original vessel nomination and the date of the presentation of the Notice of Readiness (as defined in the PTRs)
- average number of days between presentation of a Notice of Readiness and Commencement of Loading (as defined in the PTRs) for vessels that arrive within their contracted Shipping Window (as defined in the PTRs)
- average number of days between presentation of a Notice of Readiness and Commencement of Loading for vessels that arrive outside their contracted Shipping Window

- number of vessels rejected in the year to date
- number of vessels presenting a Notice of Readiness outside of the contracted Shipping Window in the year and month to date
- quantum of tonnes of wheat exported in the year and month to date
- number of vessels loaded in the year and month to date.

CBH has included an additional provision at clause 12(d), which provides that CBH will notify the ACCC within five business days that it has published a report on its website under clause 12(c).

Voluntary information

In addition to the information which CBH is required to publish pursuant to the 2009 Undertaking, CBH publishes certain information on its website on a voluntary basis. This includes the publication of:

- a ‘Harvest Shipping Capacity’ table that indicates the total available capacity in relation to each of CBH’s port terminals during specified periods
- an ‘Estimated Annual Shipping Period Capacity’ table that indicates the total available capacity in relation to each of CBH’s port terminals during specified periods
- an ‘Annual Period Spare Capacity’ table that provides an indication of the ‘spare capacity’ that is available at each of CBH’s port terminals during specified periods.

Neither the 2009 Undertaking nor the Proposed 2011 Undertaking imposes a requirement on CBH to publish the above capacity information.

Revised Draft

In order to address preliminary concerns raised by the ACCC in relation to the provision of information, CBH has:

- provided amended drafting of clause 6.1(a) in order to clarify provisions regarding publication of the Standard Access Terms
- included new provisions at clause 12.4 (in relation to available capacity) and 12.5 (in relation to stock at port).

These new provisions are discussed in further detail below.

4.2.2 Negotiation

Clause 7 of the Proposed 2011 Undertaking provides that access seekers may agree to acquire port terminal services from CBH on the Standard Access Terms (under clause 7.5) or negotiate for terms and conditions that vary from the Standard Access Terms (under clause 7.6). The Standard Access Terms act as a ‘default’ set of terms and conditions for the supply of port terminal services by CBH.

Clause 7 of the Proposed 2011 Undertaking further provides that each of CBH and the access seeker must negotiate in good faith for the access seeker's access to port terminal services or in relation to a request by CBH to vary an access agreement in accordance with clause 7.6.

Clause 7 also prescribes the process that negotiations must follow. In brief, the process requires the access seeker to make a Preliminary Inquiry followed by the lodgement of a formal Access Application. The access seeker and CBH then enter into a formal period of negotiation which culminates in the execution of an Access Agreement.

If the parties are not able to reach agreement on the terms of the Access Agreement, then pursuant to clause 7.6(e), the matter will constitute a Dispute which CBH or the access seeker may refer to arbitration under clause 8.4.

The negotiation process in the Proposed 2011 Undertaking contains a number of material changes to that in the 2009 Undertaking, including:

- (a) the addition of clause 7.6(e)(ii), which effectively states that where an applicant has negotiated in good faith but does not consider CBH has negotiated in good faith, the matter will constitute a Dispute under the provisions of the Proposed 2011 Undertaking
- (b) the inclusion of clause 7.7, which imposes a 15 September deadline for any Access Agreements to be executed, otherwise the applicant must resubmit its application after the conclusion of the initial auction process (i.e. after the first auction of the season for port terminal capacity has been completed).

4.2.3 Arbitration

Clause 8 of the Proposed 2011 Undertaking contains the dispute resolution mechanism. 'Dispute' is defined by the Proposed 2011 Undertaking to exclude any disputes that are raised with relation to:

- executed Access Agreements
- the terms of the initial Standard Port Terminal Terms or the Standard Port Terminal Terms applying at the time of the Access Application
- a decision by CBH to vary the prices at which Port Terminal Services are provided to reflect changes to the Perth (All Groups) Consumer Price Index.

The Port Terminal Services Agreement and the Port Terminal Rules include internal dispute resolution procedures.

The Proposed 2011 Undertaking is a roll forward of the dispute resolution procedures as they appear in the 2009 Undertaking with some changes, including:

- the inclusion of additional text at clause 8.4(e), which provides that the ACCC may not make a determination which would have the effect of setting the terms and conditions of access to Port Terminal Services in respect of any period following the expiry of the Proposed 2011 Undertaking

- the inclusion of clause 8.5(g), which stipulates that the *Commercial Arbitration Act 1985* (WA) will apply to any arbitrations conducted
- the inclusion of clause 8.6(c), which provides that an arbitrator may not make a determination which would have the effect of setting the terms and conditions of access to Port Terminal Services in respect of any period following the expiry of the Proposed 2011 Undertaking.

In brief, the Proposed 2011 Undertaking requires parties to trigger the dispute resolution mechanism by issuing a dispute notice. The parties are then required to negotiate in good faith in an attempt to reach resolution.

If the parties are not able to reach resolution through informal negotiation, the parties may then agree to either or both informal and formal mediation. If mediation is unsuccessful, then the parties can elect to have the dispute escalated to arbitration. If a dispute is escalated to arbitration, the ACCC must be advised and may elect to arbitrate the dispute.

To date, no formal disputes have been raised pursuant to clause 8 of the 2009 Undertaking.

4.2.3 Non discrimination - no hindering access provisions

Key features of the 2009 undertaking are the robust non-discrimination and no hindering access provisions. These provisions have been rolled forward in the Proposed 2011 Undertaking. In summary:

- the non-discrimination provision (clause 6.2) stipulates that CBH must not discriminate in favour of its own trading business or differentiate between customers except to the extent that the cost of providing services to a customer is higher than the cost of providing the same services to other customers. The ACCC notes that clause 6.2(c) is a new provision proposed by CBH in response to issues raised in the ACCC's GrainCorp Draft Decision, which obliges CBH to provide a copy of its access agreement with its trading arm to the ACCC
- the no hindering provision (clause 10.8) stipulates that CBH shall not engage in conduct for the purpose of preventing or hindering access to port terminal services by existing customers or applicants.

4.2.4 Audit provision

Clause 6.3 of the Proposed 2011 Undertaking provides that the ACCC may appoint an auditor to provide a report in relation to CBH's compliance with the non-discrimination clause up to twice in a year.

Schedule 8 of the Proposed 2011 Undertaking prescribes the manner in which an auditor is appointed (including qualifications), the scope of that audit and the limitations on the audit process.

To date, the ACCC has not directed an audit to be carried out on CBH's compliance with the non-discriminatory access provision.

4.2.5 CBH and third party submissions

A summary of all CBH's public submissions and submissions received from interested third parties in relation to the publish-negotiate-arbitrate framework is provided at Appendix 4 (section A).

4.2.6 ACCC view

4.2.6.1 Publish-negotiate-arbitrate approach

In the 2009 Final Decision to accept the CBH proposed undertaking, the ACCC took the view that the 'publish-negotiate-arbitrate' approach was appropriate as opposed to ex ante price regulation, provided that the mechanisms giving effect to the publish-negotiate-arbitrate model are robust and supported by non-discrimination obligations and appropriate transparency measures.

In taking the view that the less prescriptive 'publish-negotiate-arbitrate' approach was appropriate, the ACCC noted the specific features of the bulk wheat export industry at that time. Specifically, the ACCC noted in its Final Decision that:

The ACCC acknowledges that in regulating the industry during a transitional phase there is a risk that regulation that is not appropriate may distort the effective development of that industry, and that the ACCC considers that this risk is particularly pertinent to the regulation of prices. That is, the ACCC is mindful of the possibility that, despite best intentions, setting regulated prices for port terminal services at the current time may unnecessarily constrain the ability of the industry to develop and effectively respond to changing circumstances that are not foreseeable at the present, and that such an outcome would not be in the public interest.⁵

The ACCC also noted the limited duration of the 2009 Undertaking and the possibility of more prescriptive regulation in the event that the 'publish-negotiate-arbitrate' model proved ineffective.

The ACCC considered that the 'publish-negotiate-arbitrate' approach adopted in the 2009 Undertaking was appropriate as it balanced the business interests of CBH (refer s. 44ZZA(3)(a)) with the interests of access seekers (refer s. 44ZZA(3)(c)). This is because the 'publish-negotiate-arbitrate' model provides a framework within which:

- an appropriate level of information is provided via publication to enable access seekers to negotiate from a sufficiently informed position
- a defined process is set out for the conduct of negotiations
- parties can seek mediation or arbitration should any disputes arise during the negotiation process.

However, the ACCC considered that a lack of clarity in the drafting of clause 6.1(a) could result in confusion and lack of certainty for access seekers and that it was in their interests and the interests of CBH that the obligation to publish Standard Access Terms be clarified. The ACCC is of the preliminary view that the Revised Draft includes amendments to clause 6.1(a) that adequately address these concerns.

⁵ ACCC, *Co-operative Bulk Handling Ltd Port Terminal Services Access Undertaking: Decision to Accept*, 29 September 2009, p. 138.

The second objective of Part IIIA provided for in s. 44AA is to provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry. In maintaining the publish–negotiate–arbitrate model across each of the bulk wheat access undertakings, it is the ACCC’s view that this provides a consistent approach to access regulation in the bulk wheat export industry.

In the absence of a compelling reason to depart from this model, it is the ACCC’s preliminary view that the publish–negotiate–arbitrate framework, as embodied in the Proposed 2011 Undertaking, supported by robust non-discrimination and no hindering access provisions, is appropriate. Such a framework is in the interests of access seekers, given that those provisions promote fair access to port terminal services, and is also in the legitimate business interests of CBH since it can negotiate terms and conditions that allow for the efficient operation of its business of providing port terminal services.

However, there are a number of issues where the ACCC considers amendments are required from the approach adopted in the 2009 Undertaking to the Proposed 2011 Undertaking. The relevant changes are considered appropriate having regard to various factors under s. 44ZZA(3), which are discussed below.

4.2.6.2 Non discriminatory access – No hindering access

In its decision to accept the 2009 undertaking, the ACCC was of the view:

...that it is appropriate that CBH’s April Undertaking includes a non-discriminatory access clause obliging it to not discriminate against access seekers in favour of its affiliated trading business.

A robust non-discriminatory access clause is an important regulatory tool that can be used to constrain the behaviour of a vertically integrated owner of a key infrastructure facility. This is because many of the benefits of access to infrastructure can be lost if measures are not put into place to control potential anti-competitive leverage into related markets.⁶

In relation to the no hindering access provision, the ACCC took the view that such a clause is consistent with the objective of the WEMA of ensuring that vertically integrated bulk handling companies provide fair and transparent access to their facilities to other accredited exporters.

The ACCC remains of the view that it is appropriate that the non-discriminatory access and no hindering access provisions remain having regard to the public interest in having competition in markets (refer s. 44ZZA(3)(b)) and the interests of access seekers (refer s. 44ZZA(3)(c) and s. 44ZZA(3)(e)), to the extent that these provisions prevent CBH from discriminating in favour of its related trading firm, CBH Grain, and enable access seekers to obtain access on a fair and transparent basis. In addition, it remains appropriate that such provisions are underpinned by the audit provision as proposed in the Proposed 2011 Undertaking as this will provide an enhanced level of transparency around CBH’s supply of port terminal services.

⁶ ACCC, *Co-operative Bulk Handling Limited Port Terminal Services Access Undertaking: Decision to Accept*, 29 September 2009, pp. 201-202.

However, consistent with the ACCC's approach in its Decision to Accept the GrainCorp proposed 2011 undertaking and its ongoing assessment of the proposed 2011 undertakings of ABA and Viterra, the ACCC considers that in order to determine if CBH is discriminating between third party access seekers and its own trading arm, it is necessary to know what those terms of trade are. The ACCC takes the view that this is a common issue across industry and considers a consistent regulatory approach to be appropriate, consistent with s. 44AA(b) of the CCA. This is because each of the port operators will have an executed access agreement with their respective trading arms – and access to those agreements will enable the ACCC to audit each port operator's compliance with their respective non-discrimination provisions, which are key provisions underpinning each of the proposed 2011 undertakings. Additionally, each of the port operators' 2011 proposed undertakings contain a similar non-discrimination clause. Hence there will be a significant level of similarity between the information required to monitor compliance across all of the port operators.

In response to this issue, CBH has drafted a new provision to the Proposed 2011 Undertaking requiring CBH to provide the ACCC with a copy of the access agreement entered into with its own trading arm, CBH Grain. The relevant provision is at clause 6.2(c), which states that:

Within five Business Days of executing an Access Agreement with its own trading business, the Port Operator must provide to the ACCC a copy of that Access Agreement.

The ACCC is of the preliminary view that the inclusion by CBH of clause 6.2(c) in the Proposed 2011 Undertaking is appropriate having regard to s. 44ZZA(3)(b), (c) and (e) to the extent that it prevents CBH from self-preferential treatment at the port and enables access seekers to obtain access on a fair and transparent basis. The ACCC considers that clause 6.2(c) will assist in preventing CBH from discriminating in favour of CBH Grain and will assist access seekers in obtaining access on non-discriminatory terms. Furthermore, the proposed provision will assist the ACCC in determining whether CBH has complied with its non-discrimination obligations by enabling the ACCC to compare the terms and conditions of service offered to third parties, relative to what CBH offers CBH Grain.

4.2.6.3 Audit

The ACCC notes that the audit provision at clause 6.3 of the 2009 Undertaking, and rolled forward in the Proposed 2011 Undertaking, has yet to be used.

In its decision to accept the 2009 Undertaking, the ACCC took the view that:

In order to assist the ACCC to monitor compliance with the non-discrimination clause and assist in ensuring access to port terminal services is fair and transparent, the ACCC considers that it would be appropriate for CBH's Undertaking to provide for an annual audit of compliance with the non-discrimination clause.⁷

However 'in order to avoid the undesirability of imposing regulation that is not appropriate at a time when the industry is newly liberalised and in transition', the ACCC thought that the 2009 Undertaking would be appropriate if:

⁷ ACCC, *Co-operative Bulk Handling Limited Port Terminal Services Access Undertaking: Decision to Accept*, 29 September 2009, p. 210.

- an audit could be carried out at the direction of the ACCC (which may occur, for example, in response to allegations of discrimination)
- the audit is not carried out more than twice in every twelve months.⁸

The ACCC remains of the view that it is appropriate to retain the audit provisions as drafted having regard to the interests of access seekers, since this provision and the non-discrimination provisions will act to deter CBH from discriminating in favour of its own operations to the detriment of third party access seekers. In particular, the audit provisions will assist the ACCC in determining whether CBH has complied with its non-discrimination obligations, and therefore whether access seekers have been able to access port terminal services on a fair and transparent basis.

4.3 Publication of information and ring fencing

4.3.1 The Proposed 2011 Undertaking

4.3.1.1 Publication of port information

Clause 12 of the Proposed 2011 Undertaking requires CBH to publish certain information relating to the provision of port terminal services. This information will assist access seekers in their negotiation of the terms of access, and increase the transparency of CBH's port terminal service operations.

Sub-clauses 12(a) and (b) of the Proposed 2011 Undertaking are unchanged from the 2009 Undertaking, and require CBH to publish information on:

- the total amount of bulk wheat and total amount of grain other than Bulk Wheat situated at each of CBH's port terminals on a monthly basis
- vessel nominations received by CBH on its shipping stem on a daily basis.

CBH also voluntarily publishes certain additional information on its website in relation to total capacity at each of its port terminals and available spare capacity (see 4.2.1).

4.3.1.2 Information Sharing between CBH and CBH Grain

At the time of lodgement of the CBH Notification in 2008,⁹ interested parties expressed the concern that there was a potential for the notified exclusive dealing conduct to confer an information advantage within the CBH Group to the anti-competitive detriment of other grain traders. In response to these concerns, CBH developed ring-fencing arrangements to separate CBH's marketing subsidiary, CBH Grain Pty Ltd (**CBH Grain**), from CBH's other businesses. These ring-fencing arrangements do not separate CBH's up-country storage and handling operations from its port terminal operations but are aimed at restricting the flow of information between CBH and its trading arm.¹⁰

⁸ ACCC, *Co-operative Bulk Handling Limited Port Terminal Services Access Undertaking: Decision to Accept*, 29 September 2009, p. 210.

⁹ CBH notification N93439, 11 June 2008.

¹⁰ CBH, *Submission to the ACCC*, 31 March 2011, p. 23.

On 29 June 2011, the ACCC revoked CBH Notification N93439 from 1 May 2012. CBH has sought review of that decision by the Australian Competition Tribunal. CBH is able to continue to engage in the notified conduct while the application for review is considered but will not be able to engage in the conduct if the Tribunal affirms the ACCC's decision to revoke the notification. In a submission made prior to the ACCC's revocation of the notification, CBH submitted that if the notification was revoked it may retain some of the ring fencing measures in order to assure itself of compliance with its contractual obligations and to manage risk under the CCA.

CBH has submitted that it may retain some of the ring fencing measures in order to assure itself of compliance with its contractual obligations and to manage risk under the CCA.¹¹

Notwithstanding the absence of ring-fencing arrangements, CBH submits that robust mechanisms are already in place to prevent the sharing of non-public marketing related information between CBH and CBH Grain. For example, the Proposed 2011 Undertaking contains a non-discrimination provision, outlined at clause 6.2, which relates to the provision of access to CBH's port terminal services to third party clients. In particular, this provision stipulates that CBH must not discriminate between different access seekers and its own trading arm. CBH further submits that using information it obtains by virtue of being a vertically integrated port terminal operator to provide its own trading arm with preferential treatment would be considered a breach of the Proposed 2011 Undertaking.

Furthermore, CBH states that the operation of confidentiality obligations under its access agreements with exporters also prevents CBH from sharing the confidential information of those exporters, which CBH receives as port operator, with any other third party (including CBH Grain).¹²

4.3.2 CBH and third party submissions

A summary of all CBH's public submissions and submissions received from interested third parties in relation to information publication and ring fencing is provided at Appendix 4 (section F).

4.3.3 ACCC view

4.3.3.1 Ring fencing and access to information

In its Final Decision on CBH's 2009 Undertaking, the ACCC noted that it was not necessary for ring-fencing measures to be included in the 2009 Undertaking at that time since the 2009 Undertaking contained:

- robust non-discrimination and no-hindering access clauses
- fair and transparent PTRs
- an obligation to publish certain information to deal with the potential for information about port terminal services to be used to the advantage of CBH's wheat exporting division.

¹¹ CBH, *Response to ACCC information request*, 13 May 2011, p.13

¹² CBH, *Response to ACCC information request*, 13 May 2011, p.11

In assessing the Proposed 2011 Undertaking, the ACCC notes that no formal disputes or substantial complaints have been raised in relation to the potential sharing of information between CBH and its trading arm. Having regard to CBH's legitimate business interests, as required under s. 44ZZA(3)(a), the ACCC also acknowledges the substantial costs involved in implementing such arrangements.

An alternative to imposing formal ring-fencing mechanisms is to require greater transparency of information to all exporters in relation to both available port terminal capacity and disaggregated stock at port information. Imposing a formal obligation on CBH to make such information available to all stakeholders is likely to be an effective mechanism to prevent CBH from obtaining any unfair competitive advantage it possesses by virtue of its vertical integration and is therefore appropriate having regard to the interests of access seekers in obtaining fair and transparent access to port terminal services (refer s. 44ZZA(3)(c) and (e)).

The ACCC is cognisant of calls by a number of interested parties for robust ring-fencing measures to be included in the Proposed 2011 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.

The ACCC therefore considers that, provided CBH publishes sufficient information on the total available capacity and stock quality at its port terminals, ring-fencing arrangements are not necessary at this point in time. The reasons for this preliminary view are detailed below.

4.3.3.2 Publication of key port terminal information

The ACCC notes submissions from third parties indicating that CBH should be required to publish information relating to the total available capacity at each of its port terminals, determined on the basis of each port's ability to load grain onto vessels and not on the up-country supply chain's ability to bring grain to port. The ACCC considers that port terminal capacity information forms a part of the benchmark for the commencement of negotiations around port terminal access, service pricing and performance. The ACCC also considers that the publication of total available port capacity information would provide an appropriate level of clarity and certainty for access seekers.

The ACCC considers that the obligation on CBH to publish key port terminal information under clause 12 of the 2009 Undertaking has appropriately balanced the legitimate business interest of the provider and the interests of persons who might want access to the service by increasing transparency of nominations that have been made and lessening the opportunity for CBH's marketing arm to misuse key port terminal information relating to other wheat exporters. The ACCC considers that clause 12 of the 2009 Undertaking, in combination with information voluntarily provided by CBH on the available capacity at its port terminals, has provided access seekers with sufficient information on key operational matters at CBH's port terminals whilst not imposing unduly prescriptive regulation on CBH.

Currently, the voluntary information on available port terminal capacity published by CBH on its website includes information on: Estimated Annual Shipping Period Capacity; Harvest Capacity; and Spare Capacity (on the shipping stem).¹³

The ACCC acknowledges that any concerns relating to the sharing of information on total available capacity between CBH and CBH Grain are in part alleviated by its voluntary provision of this capacity information as well as by the operation of the auction system itself, which provides a high level of transparency in relation to the capacity made available by CBH for allocation.

The ACCC considers that the combination of the voluntary information published by CBH in relation to total available capacity with the transparency provided by the auction system has been of significant assistance to exporters seeking to acquire port terminal services. However, the ACCC notes that the available capacity information provided by CBH voluntarily may be withdrawn at any time. Accordingly, the ACCC considers that the obligation to publish information on total and remaining available capacity on a weekly basis at each of its port terminals should be included under the Proposed 2011 Undertaking.¹⁴

The ACCC does not consider that a formal obligation under the Proposed 2011 Undertaking to publish information on total available and remaining capacity at each of its port terminals will impose too onerous an obligation on CBH, particularly as this is information that is already voluntarily provided by CBH.

In response to this issue, the Revised Draft proposes the inclusion of a new clause 12.4, which provides for the following:

12.4 Capacity

- (a) The shipping stem will provide information about the total capacity in relation to the shipping windows available at each Port Terminal Facility and the amount of capacity currently allocated at each Port Terminal Facility.
- (b) Where the Port Operator varies capacity in relation to a shipping window available at a Port Terminal Facility by more than + / - 5% from the previously published capacity, it will publish the revised capacity on the shipping stem within 2 Business Days together with a brief explanation for the variation.

The ACCC has formed a preliminary view that the operation of clause 12.4 and rule 11.4, together with changes as to how CBH determines the estimated port terminal capacity in 12.4(a), which are set out in 5.2.2, are likely to address the ACCC's concerns regarding publication of information on available capacity.

4.3.3.3 Publication of information on stock at port

The PC reported that in relation to publication of stock information:

Many in the industry thought that further detailed information on stocks (for example by grade and port zone) should also be made available.

¹³ These capacity tables can be found at <https://www.cbh.com.au/our-business/operations/port-services.aspx>

¹⁴ The ACCC notes that this issue is also a key consideration of an efficient capacity allocation system as discussed in chapter 5.

In this regard, the PC report recognised that having access to such information, while other exporters do not, confers a commercial advantage on CBH's vertically integrated operations:

the Commission acknowledges that unequal access to more disaggregated stocks information confers a marketing advantage on the trading bulk handling companies and expects that greater disclosure of this information to all participants would improve the operation of the wheat market.¹⁵

However, the PC Report concluded that:

the cost of imposing a mandatory information disclosure requirement on the bulk handlers is expected to exceed the associated benefits. The Commission encourages the bulk handling companies to disclose more disaggregated stocks information on a voluntary basis.¹⁶

The ACCC does not consider that a formal obligation under the Proposed 2011 Undertaking to publish information on stocks at port at each of its port terminals will impose too onerous an obligation on CBH, particularly as this is information that it is already likely to compile as port operator.

The ACCC agrees with the PC's conclusion that possessing information on stocks at port (which is not available to all marketers) conveys a marketing advantage to CBH. The ACCC considers that imposing a formal obligation under the Proposed 2011 Undertaking requiring CBH to publish disaggregated information on stocks at port for each of its port terminals (as well as the other key port information required for publication) would be an appropriate means of reducing the opportunity for CBH's marketing arm to misuse information it possesses by virtue of being vertically integrated. In particular, the ACCC considers that CBH should publish information on the tonnage and type of all commodities, as well as the top three wheat grades, at each port. This level of disaggregation would provide an appropriate level of transparency to access seekers for whom access to such information would be of assistance in their business planning.

In response to this issue, the Revised Draft proposes the amendment of clause 12.1 to provide for the following:

12.1 Stocks at port

- (a) Subject to clause 12.1(b), each week during the term of the Undertaking, the Port Operator will publish in a prominent place on its website a statement of:
- (i) the total amount of Bulk Wheat situated at each of the Port Terminal Facilities;
 - (ii) the total amount of grain other than Bulk Wheat situated at each of the Port Terminal Facilities; and
 - (iii) the three grades of Bulk Wheat contributing the largest tonnage at each of the Port Terminal Facilities.

¹⁵ Productivity Commission, *Wheat Export Marketing Arrangements – inquiry report no.51*, 1 July 2010, p.294

¹⁶ Productivity Commission, *Wheat Export Marketing Arrangements – inquiry report no.51*, 1 July 2010, p.294

The Port Operator must use reasonable endeavours to ensure that the statement is accurate within + / - 5%.

- (b) The Port Operator will not be obliged to publish any of the information referred to in clause 12.1(a) where the Port Operator, acting reasonably, considers that the disclosure of such information may:
 - (i) enable particulars relating to any person to be ascertained; or
 - (ii) adversely affect the interests of a User or the Port Operator.

The ACCC has formed a preliminary view that the inclusion of clause 12.1 is likely to address the ACCC's concerns regarding publication of information on stock at port.

Accordingly, the ACCC is of the preliminary view that it is appropriate that CBH will continue to have an obligation to publish key port terminal information under clause 12 of the Proposed 2011 Undertaking. Additionally, the ACCC is of the preliminary that the amendments proposed by CBH in its Revised Draft (as outlined above) are appropriate insofar as they require CBH to publish additional information on the total available capacity, including the quantum of capacity that remains available for customers, at its port terminals and information on the stocks at port at each of its port terminals, on a disaggregated basis.

4.3.3.4 Conclusion on ring fencing

For the reasons outlined above, the ACCC considers that it would not be appropriate to include formal ring-fencing requirements under the Proposed 2011 Undertaking so long as CBH is formally required to publish sufficient port terminal information. As above, this information would include information on total available capacity, including the quantum of capacity that remains available for customers, at each of its port terminals and disaggregated information on stock at port (i.e. tonnage and type of all commodities as well as the top three wheat grades at each port). In coming to this preliminary view, the ACCC has had particular regard to s. 44ZZA(3)(b), which relates to the public interest, including the public interest in having competition in markets, and s. 44ZZA(3)(c) relating to the interests of access seekers.

The ACCC notes that this preliminary view is consistent with the ACCC's approach in its Final Decision on the GrainCorp proposed 2011 undertaking and its ongoing assessment of the proposed 2011 undertakings of ABA and Viterra.

The ACCC further notes its preliminary view that the amended draft provisions provided by CBH in its Revised Draft are appropriate and adequately address the ACCC's concerns in relation to ring-fencing and the publication of information.

4.4 The ACCC's role under the Proposed 2011 Undertaking

The ACCC considers that the Proposed 2011 Undertaking should provide for certain powers and functions of the ACCC. These include a mechanism allowing the ACCC to object to a proposed variation by CBH (an 'objection notice'), a specific information gathering provision, an approval power acknowledging that decision making functions under the undertaking may be undertaken by particular Commissioners, and inclusion of an explicit reference to the ACCC's monitoring role.

The ACCC considers that these powers and functions should be consistent across the Undertakings of all the port operators. As such, the drafting in each should follow a similar format.

4.4.1 The ACCC's role in the process for varying the PTRs

In the Final Decision to accept CBH's 2009 Undertaking, the ACCC considered that it was appropriate for port operators to retain flexibility for varying the PTRs without ACCC input on the appropriateness of the proposed variation, noting that the variation mechanism could be strengthened in any future undertaking, if necessary.¹⁷

The ACCC acknowledges that the PTRs are operational and, as such, a degree of flexibility is required to ensure operational efficiency at port having regard to s. 44ZZA(3)(a) and the legitimate business interests of CBH. However, the wide scope of the PTRs means that significant aspects of port operations, such as capacity allocation, can be altered through a PTR variation process without the ACCC having a role. The ACCC remains of the view that port operators require sufficient flexibility to manage operations at port. However, in certain circumstances the ACCC considers that the lack of regulatory oversight is inappropriate. These circumstances are where the proposed variation is material and gives rise to concerns under either the anti-discrimination (clause 6.2) and/or the no hindering access (clause 10.8) provisions of the Proposed 2011 Undertaking. If such concerns arise, then the ACCC suggests that it be able to object to the proposed variation. The proposal is that the ACCC may send a written notice to the port operator outlining its concerns, with reasons. Upon receipt of the notice the port operator must withdraw the proposed variation. The ACCC considers it necessary for the ACCC to be able to gather the necessary information in order to issue such a notice.

As the ACCC considers that certainty, flexibility and timeliness regarding the operation of the PTRs are of critical importance to both CBH and access seekers, given the PTRs set out how the port operates, an approval role in respect of each proposed variation may be inappropriate. The suggested role would be specifically limited to the circumstances set out above for the purposes of a 2011 – 2014 undertaking.

Accordingly, the ACCC takes the preliminary view that the Proposed 2011 Undertaking is unlikely to be appropriate unless it includes:

- the ability of the ACCC to:
 - gather the necessary information to assess whether the 'limited circumstances' exist
 - issue a notice that the proposed variation raises concerns in relation to the port operator's anti-discrimination and/or no hindering access obligations
- an obligation on the port operator to withdraw the proposed variation upon receipt of the notice.

¹⁷ ACCC, *GrainCorp/Viterra/CBH Operations Limited Port Terminal Services Access Undertaking Further Draft Decision*, 23 December 2009, p. 288.

The ACCC is of the preliminary view that the inclusion of an objection notice under clause 10.6, combined with the proposed ACCC information gathering power under clause 6.4, is appropriate having regard to s. 44ZZA(3)(c) and the interests of access seekers. This increased oversight by the ACCC will deter CBH from making inappropriate changes to the PTRs, which are the key rules governing the operation of the port and the provision of port terminal services. Access seekers will therefore benefit from an enhanced level of clarity and certainty in relation to the PTRs and the ACCC's enhanced oversight over CBH's compliance with its obligations.

This approach to an ACCC role in the variation process is appropriate for all port terminal services access undertakings, particularly given that the same issues will be relevant to each of the different port operators in this context. In proposing this consistent approach in relation to the PTRs across the industry, the ACCC has had particular regard to s. 44ZZA(3)(aa) of the Act.

4.4.2 The mechanics of an ACCC role in the PTR variation process

4.4.2.1 How the proposed ACCC role would be applied to the variation process

Where the ACCC has concerns with the port operator's proposed variations to the PTRs, it would raise those concerns with the port operator, and access seekers if appropriate, prior to issuing a notice.

In practice, the ACCC considers that the assessment and notification would be applied within the current timeframe for variation. Clause 10.4(a)(vi) of the Proposed 2011 Undertaking provides that consultation on the proposed variation must commence at least 30 days prior to the date it is to become effective (the effective date). As noted earlier, the ACCC is acutely aware of the importance of timeliness in the variation process and of operational certainty for both the port operator and access seekers.

The ACCC considers that it would be required to issue the notice no less than ten days before the effective date, taking into account the overall period of time specified for the variation process in the Proposed 2011 Undertaking. Such a notice would include the ACCC's reasons.

4.4.2.2 Effect of the proposed ACCC role once exercised

The effect of the ACCC issuing an objection notice and the proposed variation to the PTRs not taking effect will depend on whether the notice relates to the entire variation or only part of it. If the notice relates to the entire variation, the variation cannot take effect and the port operator will be required to commence a new variation process (if it still wishes to vary the PTRs), as amended to address the ACCC's concerns. Correspondingly, if only part of the proposed variation is the subject of a notice, it will not prevent the variation of changes that are not a subject of the notice. It will only be possible for the ACCC to disallow the variation in part where the proposed varied terms are not intrinsically related.

4.4.3 CBH's proposed ACCC objection notice provision

In response to this issue, CBH has included a draft provision at clause 10.6 of the Proposed 2011 Undertaking, which provides the ACCC with the right to issue an objection notice in relation to any PTR variations proposed by CBH. Under the Proposed 2011 Undertaking, clause 10.6 states that:

10.6 Objection notice

- (a) If the Port Operator seeks to vary the Port Terminal Rules in accordance with **clause 10.4** or **clause 10.5**, the ACCC may object to the proposed variation (or part thereof). If the ACCC objects to a proposed variation (or part thereof), it must issue a notice to the Port Operator stating that it objects to the proposed variation and providing reasons for its objection. The ACCC will publish any notice issued under this **clause 10.6(a)** on the ACCC's website.
- (b) Any notice issued under **clause 10.6(a)** must be issued at least ten Business Days prior to the date on which the variation is proposed to become effective.
- (c) At least five Business Days before issuing a notice under **clause 10.6(a)**, the ACCC must provide the Port Operator with a draft notice stating that it objects to the proposed variation and providing reasons for its objection.
- (d) The ACCC may only issue a draft notice under **clause 10.6(c)** or a final notice under **clause 10.6(a)**, where the ACCC considers, acting reasonably, that the proposed variation amounts to a breach of the anti-discrimination provision in **clause 6.2** or the no hindering access provision in **clause 10.8**.
- (e) The ACCC may withdraw a draft notice under **clause 10.6(c)** or a final notice under **clause 10.6(a)** if in all the circumstances it becomes aware that the reasons specified in the draft notice issued under **clause 10.6(c)** or the notice issued under **clause 10.6(a)** no longer exist.
- (f) If the ACCC issues a notice under **clause 10.6(a)**, the Port Operator will, within three Business Days:
 - (i) withdraw the proposed variation and commence a new variation process by placing a notice to that effect in a prominent place on the Port Operator's website and notifying the ACCC in writing; or
 - (ii) withdraw the proposed variation and confirm the status of the existing Port Terminal Rules by publishing a notice in a prominent place on the Port Operator's website and notifying the ACCC in writing.
 - (iii) notify the ACCC that it disputes the ACCC's objection and refer the matter to arbitration in which case:
 - (A) the provisions of **clause 8.5** to **clause 8.11** (inclusive) will apply with the following modifications:
 - (2) the ACCC will be one party and the Port Operator will be the other party;
 - (3) the references to the date of the ACCC giving notice in **clause 8.5(b)** will be the date on which the Port Operator notifies the ACCC that it disputes the ACCC's objection;
 - (4) **clause 8.5(c)** will not apply. The arbitration will be conducted in private unless the parties otherwise agree; and
 - (5) **clause 8.5(e)(i)**, **clause (e)(vii)**, **clause (e)(xi)**, **clause 8.6(a)(iv)** and **clause 8.7(d)** will not apply.
 - (iv) If the Port Operator disputes the ACCC's objection and refers the matter to arbitration in accordance with **clause 10.6(f)**, the proposed variation to the Port Terminal Rules:
 - (A) will come into effect on the date determined by the arbitrator (if any); unless,

- (B) the proposed amendment was due to Exceptional Circumstances in which case the proposed variation to the Port Terminal Rules will remain in effect unless and until modified by the arbitrator's determination.

The ACCC considers that the above clause 10.6 of the Proposed 2011 Undertaking fulfils the minimum requirements for an ACCC objection notice provision. However, in addition to the minimum requirements for an ACCC objection notice, which are provided for under clause 10.6(a) to (f)(ii) above, CBH included in the Proposed 2011 Undertaking a mechanism under which it had the right to seek arbitration in the event that it disputes an objection notice issued by the ACCC in relation to a PTR variation proposed by CBH (under subclauses 10.6(f)(iii)-(iv)).

The ACCC considers that it is inappropriate for regulatory decisions of an independent regulator to be appealed through private arbitration. Rather, this is the proper role of the Court. Accordingly, the ACCC considers that the objection notice provision proposed by CBH would only be appropriate if it was amended to delete the arbitration mechanism at subclauses 10.6(f)(iii)-(iv).

In response to this issue, the Revised Draft proposed by CBH includes a redrafted clause 10.6 which excludes the arbitration mechanism at subclauses 10.6(f)(iii)-(iv). The ACCC is of the preliminary view that the redrafted clause 10.6 under the Revised Draft is appropriate.

4.4.4 Approval power and monitoring

The ACCC notes that clause 6.3(c) of the Proposed 2011 Undertaking provides for the ACCC to authorise a member of the ACCC to exercise its powers regarding audit of CBH's compliance with the non-discrimination provisions at clause 6.2. Additionally, clause 8.4(d) of the Proposed 2011 Undertaking provides for the ACCC to authorise a member of the ACCC to exercise its powers regarding the arbitration of disputes.

The ACCC considers that the introduction of a decision making role into the Proposed 2011 Undertaking and the short timeframes attaching to that role, warrant an extension of the existing authorisation provisions under the 2009 Undertaking. The ACCC notes that the Proposed 2011 Undertaking includes such a provision at clause 1.3(b). Having regard to s. 44ZZA(3)(c) and the interests of access seekers, this authorisation mechanism will facilitate the ACCC's monitoring role in relation to CBH's compliance with the provisions of the Proposed 2011 Undertaking, particularly the non-discrimination and no hindering provisions, and will deter CBH from engaging in self-preferential treatment. The ACCC takes the preliminary view that the Proposed 2011 Undertaking is unlikely to be appropriate unless the approval provision extends to all ACCC functions under the undertakings.

In response to this issue, CBH has included the draft provision at clause 1.3 of the Proposed 2011 Undertaking, which provides that:

1.3 ACCC

- (a) The ACCC monitors compliance with the undertakings accepted under Part IIIA of the CCA.

- (b) The ACCC may authorise a Member of the ACCC to exercise a decision making function under this Undertaking on its behalf and that authorisation may be subject to any conditions which the ACCC may impose.

However, use of the word ‘approve’ is preferred to ‘authorise’ to avoid any confusion for either the access provider or the access seeker which may arise with the use of the term authorisation which has specific meaning in the *Competition and Consumer Act 2010* (Cth).

The ACCC considers that in clauses 1.3(b), 6.3(c) and 8.4(d) the term ‘authorise’ should be replaced with the term ‘approve’. In response to this issue, the Revised Draft proposed by CBH includes redrafted clauses 1.3(b), 6.3(c) and 8.4(d) which the ACCC considers appropriate.

4.4.5 Information gathering

The ACCC considers that it is necessary to increase the ACCC’s current ability to obtain relevant information, in a timely manner, under the Proposed 2011 Undertaking. The ACCC considers this to be appropriate as it will assist the ACCC in making effective and timely decisions when exercising its powers under the Proposed 2011 Undertaking, for example, in issuing an objection notice (see section 4.4.2).

At present, the ACCC can obtain information from the port operator through an ACCC directed audit or on a voluntary basis. The ACCC considers that neither of these methods represents an appropriate way for the ACCC to obtain the relevant information it requires to exercise the objection notice power.

An ACCC directed audit assesses whether CBH has complied with clause 6.2, which requires it not to discriminate between access seekers in favour of its own trading business, except to the extent that the cost of providing access to the other access seekers is higher. Assessing the port operator’s performance against the non-discrimination clause may be a relevant consideration for the decision on whether to issue the objection notice; however, it does not encapsulate all the information that the ACCC would need in making the decision. For example, it does not provide information on the port operator’s compliance with the no hindering access requirements in clause 10.8.

The ACCC further notes that, while an audit may provide the ACCC with relevant information on whether to issue an objection notice, it may not be possible for it to receive the information within the variation timeframe. The ACCC considers that any extension of the variation timeframe, even for the ACCC to investigate whether or not to issue an objection notice, may give rise to uncertainty regarding port operations and should be avoided if possible.

For the reasons outlined above, the ACCC considers that the Proposed 2011 Undertaking is unlikely to be appropriate unless it includes information gathering powers to assist the ACCC in determining whether CBH has complied with its various obligations under the Proposed 2011 Undertaking.

In response to this issue, CBH has drafted a new information gathering provision at clause 6.4 of the Proposed 2011 Undertaking, which provides that the ACCC may request information from CBH within 14 days of its receipt of the request.

The ACCC notes that since the information gathering powers are inserted into the Proposed 2011 Undertaking, a failure by the port operator to provide the information requested by the ACCC would result in a breach of the undertaking.

The ACCC is therefore of the preliminary view that the inclusion by CBH of clause 6.4 in the Proposed 2011 Undertaking is appropriate because the ability for the ACCC to request information in a timely manner will assist the ACCC to exercise its powers or perform its functions under the Proposed 2011 Undertaking in a timely and fully-informed manner. This will assist CBH in managing its operations in a timely and efficient manner and is therefore in its legitimate business interests (refer s. 44ZZA(3)(a)), particularly given that an audit may be an onerous means by which to obtain information from CBH. The inclusion of clause 6.4 will also be in the interests of access seekers as it will enable the ACCC to assess CBH's compliance with its various obligations under the Proposed 2011 Undertaking, in particular the non-discrimination and no hindering provisions (refer s. 44ZZA(3)(c)), and to thereby deter CBH from engaging in self-preferential treatment to the detriment of non-affiliated exporters.

5 Capacity allocation method

This chapter sets out the ACCC's views on the capacity allocation methodology set out in the Proposed 2011 Undertaking and in CBH's Revised Draft, in light of s. 44ZZA(3) of the Act.

5.1 CBH's Proposed 2011 Undertaking

5.1.1 Capacity management

The Proposed 2011 Undertaking contains significant changes to the capacity management provisions of the 2009 Undertaking. The key change relates to the introduction of a proposed two-tiered capacity allocation model under which up to 60 per cent of port terminal capacity will be offered on a one year take-or-pay basis and the remainder offered as auction capacity. However, as detailed in section 5.2.4.5, CBH has not included the two-tiered approach to capacity allocation in the Revised Draft.

Further detail on the proposed changes to CBH's capacity allocation system in the Proposed 2011 Undertaking is provided below.

5.1.2 CBH's existing auction capacity allocation system under the 2009 Undertaking

5.1.2.1 The auction system

Under the 2009 Undertaking, CBH operates an auction system for the allocation of capacity, under which port terminal capacity is offered to the highest bidder for a given shipping window at port. Access seekers pay an 'auction premium' above a base amount depending on how highly a particular shipping slot is valued; this auction premium is rebated to exporters that ship through CBH's ports at the end of the season on a pro rata basis (less CBH's administration costs).

Any residual port terminal capacity that is not booked by exporters via the auction mechanism is subsequently offered to exporters as 'spare capacity' on a first-come first-served basis.

5.1.2.2 The Port Terminal Rules

The PTRs set out the manner in which shipping capacity is allocated to exporters, including CBH Grain. The PTRs prescribe that capacity is allocated in the first instance on the basis of auctions conducted throughout the shipping season, to the exporter that values the particular shipping slot the most. Only exporters who have an executed Port Terminal Services Agreement are able to participate in auctions or acquire spare capacity.

Once a winning bidder is identified, a booking is placed onto the Shipping Stem. The successful bidding exporter is currently charged a base fee of \$17.10 per tonne (which comprises an upfront \$3.00 per tonne marketer's fee and \$14.10 per tonne export fee) and the final auction premium amount.

The reference prices found in the *Bulk Export Capacity & Port Outloading Service Charges* specify that a non-refundable ‘lost capacity’ fee of \$7 per tonne is charged in the event that the booked capacity is not utilised.¹⁸

Currently, bookings accepted by CBH may be transferred to other exporters on the secondary market under rule 7.1 of the PTRs. The PTRS specify that exporters must obtain CBH approval for any such transfers to occur. Exporters are also provided some flexibility to reposition capacity under the conditions specified at rule 7.2.

There are also capacity management arrangements which function outside of the requirements of the 2009 Undertaking and the Proposed 2011 Undertaking relating to information on available capacity. These arrangements are discussed below.

5.1.2.3 Information on available capacity

Currently, CBH publishes information on capacity at each its port terminals on its website under the following headings: ‘Harvest Period Capacity’, ‘Annual Shipping Period Capacity’ and ‘Spare Capacity Bookings’. The ACCC notes that CBH has published this information in addition to the requirements contained in either the 2009 Undertaking and/or the Continuous Disclosure Rules as prescribed by WEMA. The publication of this information is therefore voluntary and may be withdrawn by CBH in the future without breaching the Proposed 2011 Undertaking.

The information on capacity is published alongside the CBH Shipping Stem. The ‘Harvest Period Capacity’ and ‘Annual Shipping Period Capacity’ tables indicate the total amount of capacity that is to be offered in relation to each port terminal – they make no reference to what capacity remains available. The ‘Spare Capacity Bookings’ table, however, provides an indication of the amount of spare capacity that remains available at each CBH port terminal.

In addition, CBH utilises the concepts of ‘core’ capacity and ‘surge’ capacity. Core capacity is the capacity made available under the criteria and processes for estimating available capacity set out in rule 4.2(a) of the PTR and is based on normal operating conditions. Surge capacity is capacity in excess of core capacity that can be made available if additional resources are deployed so that supply-chains deliver grain at a more accelerated pace (rule 4.2(b)).

5.1.2.4 Transferability of shipping slots

Under the 2009 Undertaking and PTRs, customers are permitted to trade booked port terminal capacity on the secondary market, subject to the approval of CBH. Although CBH indicated that around 63 transfers occurred in the 2009/10 season,¹⁹ none appear to have taken place during the 2010/11 year largely due to low overall demand for port terminal capacity resulting from the poor harvest.

5.1.3 CBH’s proposed two-tiered capacity allocation system under the Proposed 2011 Undertaking

Under the Proposed 2011 Undertaking, CBH proposes to replace its existing auction capacity allocation model with a ‘two-tiered system of capacity allocation’. Under this two-tiered system, CBH will offer up to 60 per cent of its available capacity to access

¹⁸ CBH, *Port Terminal Services Agreement*, Schedule 1.

¹⁹ CBH, *Submission to the ACCC*, 1 April 2011, p. 11.

seekers that are ‘high-volume customers’ on a one year take-or-pay basis referred to as base load capacity (BLC). CBH will offer the remaining 40 per cent of capacity (or more depending on what is taken up by high-volume customers) for auction to all access seekers throughout the year in line with the published auction schedule. The ACCC notes that customers that acquire BLC will also be able to bid for auction capacity as it becomes available.

5.1.3.1 Eligibility for and management of BLC

To be eligible for BLC a customer must have a forecast shipment schedule in excess of 800,000 tonnes and satisfy CBH that it has reasonable grounds to represent that it has the intention and ability to use BLC. CBH will determine whether the customer has those reasonable grounds with reference to the customer’s forecast of export requirements and whether the customer has previously shipped eight per cent of total grain exports from Western Australia or has accumulated more than eight per cent of the grain produced in Western Australia in the preceding twelve months.

Under Rule 4.3 of the proposed 2011 PTRs, eligible customers are required to provide CBH with expected gross tonnages of bulk wheat; expected tonnage of grains other than bulk wheat; expected tonnage of grain to be delivered to the port via a GSA (grain supply agreement with CBH in relation to supply of storage and handling services (other than port terminal services)); expected tonnage of grain to be delivered to the Port pursuant to storage and handling or supply chain arrangements other than those supplied by CBH pursuant to a GSA; and expected shipping programme by tonnage by month by port.

As set out in Rule 4.5 of the PTR, base load customers must provide an annual shipment schedule (BLASS) at the time of accepting capacity and a revised BLASS four times through the year. CBH will either accept or reject the revised BLASS (if detrimental impacts on the operation of the port terminal facilities are anticipated). CBH may propose changes to a revised BLASS if it would incur additional costs or result in undue impacts on a previously nominated vessel or capacity of another customer. Eligible customers will be restricted from using more than 10 per cent of their BLC in any single month to prevent customers from ‘blocking out’ particular periods on the shipping stem.

Other relevant conditions applying to the provision and acquisition of BLC are that shipment sizes must be in the range of 20,000 to 50,000 mt; capacity is not transferable unlike capacity acquired through auction or spare capacity allocation methods; and the price must be the same for all eligible customers and must not exceed the price for auction capacity (excluding any auction premium).

A number of other different terms and conditions will apply to BLC, including:

- both BLC and auction capacity is subject to take-or-pay risk; however this risk is reduced in the case of auction capacity because it is transferable between shippers
- the higher take-or-pay ‘lost capacity fee’ of \$10 per tonne for BLC compared to \$7 for auction capacity
- the prohibition on customers with BLC using more than 10 per cent of their capacity entitlement in any given month

- BLC has an initial 30 day scheduled laycan²⁰ which must be narrowed to a 10 day period no later than 21 days prior to the first day of the laycan. This contrasts with auction capacity for which the slots (laycan) are set at 15 days and are not subject to narrowing.

Submissions received from CBH and third parties on the capacity management arrangements of CBH's Proposed 2011 Undertaking are available on the ACCC website and a summary of the submissions is provided at Appendix 4 to this draft decision.

5.2 ACCC view

This section sets out the ACCC preliminary views regarding the new arrangements proposed for capacity allocation and management by CBH. In forming its preliminary views on the capacity management proposals, the ACCC has had regard to the matters it is required to have regard to under s. 44ZZA(3) when deciding whether to accept an undertaking. Appendix 2 sets out the legislative framework within which the ACCC makes its decision on undertakings in relation to port terminal services for the export of bulk wheat.

The structure of the section is to set out the ACCC's:

- approach to assessment of capacity management proposals for the bulk wheat export industry
- preliminary views on determination of capacity to which the Proposed 2011 Undertaking relates
- preliminary views on the current capacity management arrangements under the auction system
- preliminary views on the BLC and two-tiered approach proposed by CBH.

5.2.1 Approach to assessing port terminal capacity management

5.2.1.1 Consistency in ACCC approach

The ACCC is required to form a view regarding capacity management arrangements proposed in undertakings offered by the four port operators. The ACCC notes that circumstances differ as between the four port operators (GrainCorp, Vitol, CBH and ABA) and the markets in which they operate. For this reason, the ACCC considers that capacity management arrangements should be assessed for each BHC on the basis of its circumstances and the characteristics of the market within which it operates.

While the ACCC is not of the view that capacity management arrangements should necessarily be the same for all operators, it does consider that it should apply a consistent approach when forming its view on each of the proposed undertakings. In regard to this consistent approach, the ACCC notes that s. 44ZZA(3)(aa) includes as a matter to which the ACCC is required to have regard the object of Part IIIA at

²⁰ Laycan is the term used by CBH to describe the specific period applicable to an allotment of port terminal capacity provided to users (i.e. the shipping window).

s. 44ZZAA(b) to provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

To ensure that its views regarding capacity management arrangements are made on a consistent basis across undertakings, the ACCC has analysed the similarities and differences between the port operators and the markets in which they operate. This analysis is detailed in Appendix 3.

The ACCC considers two key market characteristics relevant to the view formed on the appropriateness of particular capacity management arrangements in specific market circumstances:

- the relationship between total port elevation capacity and average annual and seasonal demand for it
- the extent to which the incentive exists for vertically integrated port operators to pursue self preferential treatment—including hindering other exporters from accessing port services.

In relation to the first of these factors, generally the more constrained is capacity relative to the demand for it, the greater the imperative on economic efficiency grounds for market based allocation arrangements. As the PC stated in its Inquiry Report on Wheat Export Marketing Arrangements, auctions can play a significant role in efficiently allocating limited port capacity.²¹ This general economic principle, that allocative efficiency is best achieved through a price mechanism, has greatest application when supply is limited relative to demand. When no binding capacity constraint exists the demands of all users can be met and the means by which allocation occurs is not as critical to achieving efficiency.

In all Australian states from which wheat is exported there are periods when port capacity is more highly valued. These periods follow harvest when new season grain is available to be shipped and can vary from season to season and between the ports operated by the port operators. The extent to which each port operator's port capacity is constrained relative to the demand for it is relevant to the view the ACCC forms regarding whether capacity allocation and management arrangements are appropriate having regard to promotion of economically efficient use of the port terminal facilities (i.e. allocative efficiency)(s. 44ZZA(3)(aa)).

On the issue of the incentive for self preferential treatment, the ACCC is of the view that a vertically integrated operator has an incentive to utilise infrastructure it controls to hinder access by competitors in upstream or downstream markets in order to gain market share in those markets. The strength of such an incentive is determined by the existence, or threat, of competition to the integrated monopolist's position. Where actual or potential competition exists, the incentive to hinder competitors is moderated by the threat that the hindering behaviour may result in loss of business to an alternative supply chain rather than increased market share for the integrated operator in upstream or downstream markets.

However, where competition is weak and the incentive to hoard capacity so as to hinder others from accessing export capacity is strong, this will inform an assessment

²¹ Productivity Commission, *Wheat Export Marketing Arrangements*, 1 July 2010, p. 205.

as to the appropriateness of proposed capacity allocation arrangements. Where the incentive to block out access seekers is strong, so too is the argument that allocation arrangements should incorporate measures to prevent such behaviour.

Auctions are one approach that provides such a mechanism as they are a fair, transparent and efficient means of allocating capacity.

5.2.1.2 CBH port capacity and the Western Australia wheat export market

In forming its preliminary view regarding the capacity management arrangements proposed by CBH, the ACCC considered that the following conclusions from its analysis regarding the extent capacity is constrained are relevant:²²

- CBH's port terminals are subject to peak periods of excess demand driven by seasonal movements in the supply and demand for wheat and other grains (a shifting peak demand problem) as evidenced by the auction premiums
- the duration and extent of the periods in which there is excess demand vary depending on annual production
- while capacity constraint is an issue at certain times at ports operated by CBH, the overall level of capacity is sufficient to meet annual demand by grain exporters in Western Australia; CBH states that, under normal operating conditions, port terminal services capacity at its port facilities is 14 million metric tonnes (mmt) while tonnes shipped over the past three years are 10.6 mmt in 2008/09, 9.8 mmt in 2009/10 and an estimated 6 mmt in 2010/11.²³

Nevertheless, seasonal peak periods, during which capacity is constrained relative to demand at CBH ports, can extend over a number of months in years of high production and exports. In addition, as discussed below, CBH limits the capacity available to exporters during periods when demand is low.

In regard to the incentive for self preferential treatment at port, CBH has a dominant position in the Western Australian grain supply chain. CBH's grain supply chain assets include:

- all four grain export terminals located in Western Australia
- all 193 up-country bulk grain receival, storage and handling sites in Western Australia (excluding the port receival sites)
- a grain receival, storage and distribution complex at Forrestfield, which also offers grain container loading services, and
- recently acquired above-rail assets to be used to transport grain in Western Australia from April 2012.

CBH controls around 90 per cent (in excess of 20 million tonnes) of total grain storage capacity in Western Australia. The remaining 10 per cent (2 million tonnes) is on farm storage. However, a substantial proportion of on-farm storage is for farm use

²² See Appendix 3 for further analysis of conditions in the WA wheat export market.

²³ CBH, *Submission to the ACCC*, 1 April 2011, p. 12.

(saved seed and on-farm livestock feeding) and is not available for the storing of grain for commercial sale. The ACCC considers that CBH has a cost advantage over on-farm storage options for bulk export grain, which accounts for around 90 per cent of grain harvested in Western Australia each year.²⁴ The ACCC also considers that there are high barriers to entry for alternative off-farm storage services for bulk export grain in Western Australia.²⁵

The ACCC acknowledges a CBH statement regarding the potential for investment in grain storage and elevation capacity at existing or new port facilities that enables wheat exporters to bypass its port terminal facilities. However, the ACCC also notes that suggested developments have not proceeded to date and considers that effective competition from facilities that bypass those of CBH is weak at this time. This contrasts with the situation on the east coast where, for example, Louis Dreyfus has commissioned storage facilities that enables it to bypass GrainCorp's Carrington port facility in Newcastle.

In forming its preliminary view on the Proposed 2011 Undertaking, the ACCC recognises that CBH has market power in relation to the provision of port terminal services to wheat exporters and an incentive to advantage its bulk handling activities upstream of port, and the wheat export activities of its Trading Division downstream.

CBH also has significant market power in the provision of up-country grain storage and handling services, and competition to its grain logistics and freight services is restrained by conduct that is the subject of Notification to the ACCC (N93439). The Notification relates to exclusive dealing conduct by CBH that requires growers that use CBH's grain storage and handling services to also use transport services supplied by CBH to transport grain to port. On 29 June 2011 the ACCC revoked the Notification, effective from 1 May 2012.²⁶ In revoking the notification the ACCC concluded that the notified conduct allowed CBH to prevent competition in the supply of transport services for bulk export grain. CBH has sought a review of that decision by the Australian Competition Tribunal (Tribunal). CBH is able to continue to engage in the notified conduct while the application for review is considered but will not be able to engage in the conduct if the Tribunal affirms the ACCC's decision to revoke the notification.

In summary, the ACCC considers that CBH ports are subject to capacity constraint at peak times. Further, as a vertically integrated monopolist, CBH has incentive for self-preferential treatment to advantage its upstream logistics and freight activities and its downstream export activities. These conclusions informed the ACCC's preliminary view with regard to the capacity allocation and management arrangements in the Proposed 2011 Undertaking discussed in the next section.

5.2.2 Capacity available for allocation

The Proposed 2011 Undertaking includes in the PTR provisions regarding the determination of the capacity that CBH makes available at its port terminal facilities

²⁴ ACCC Notice, 29 June 2011 para. 7.1.3

²⁵ Ibid.

²⁶ On 29 June the ACCC revoked notification N93436 relating to, among other things, CBH requiring growers that use CBH's up-country storage facilities to also use transport services supplied by CBH to transport grain to port.

to provide the services to which the proposed undertaking relates. These are unchanged from the 2009 Undertaking and the ACCC has considered the operation and effectiveness of the current arrangements in forming a preliminary view regarding the determination of available capacity under the Proposed 2011 Undertaking.

The capacity that CBH makes available to customers under the 2009 Undertaking has varied from year to year depending on CBH's assessment of a number of factors. This available capacity is published on the CBH website for two periods—harvest shipping capacity (from 1 November to mid January) and annual shipping period capacity (the remainder of the year) (see 5.1.2.3 above)—and is the capacity that has been auctioned under the current auction arrangements. CBH is required to publish, for each of its port terminal facilities, the proposed amount of capacity it intends to offer for the following harvest shipping period by no later than 15 September and to publish the proposed amount of core capacity it intends to offer for the following shipping period by 15 October 2011. In addition, CBH is required to publish on a rolling monthly basis details of surge capacity it intends to offer.²⁷

The ACCC notes that this capacity available through the auction system is not total port terminal capacity, but rather a quantum determined by CBH on the basis of a number of factors, set out in the PTRs and discussed below. The ACCC also notes that CBH rejects the PC's finding²⁸ that port capacity should be determined without reference to the land-based supply chain on the grounds that it may result in customers paying for port capacity that the supply chain cannot deliver.

The PTRs at Schedule 3 to the 2009 Undertaking set out that, in calculating the capacity to be auctioned under the current arrangements, CBH must:

- estimate the size and characteristics (including geographic distribution) of the upcoming harvest
- review the past performance of the port terminal facilities in loading vessels in high demand periods
- consider the efficient deployment of labour and other resources in Port Terminal Facilities over the year
- take into account the Services Forecast (provided by customers intending to acquire BLC) in order to estimate:
 - the likely shipping requirement of customers
 - the supply chain arrangements likely to be used to get grain to the port terminal facilities
- estimate the likely distribution of the transport task between road and rail in each port zone

²⁷ CBH 2009 Undertaking – Port Terminal Rules, 1 March 2011, clause 4.3.

²⁸ CBH, *Submission to the ACCC*, 1 April 2011, p. 11.

- take into account the risk of unforeseen events such as transport shortages, breakdowns or accidents reducing the speed with which grain is delivered to the port terminal facilities.²⁹

The same criteria and processes for estimating available capacity are to apply under the Proposed 2011 Undertaking allocation arrangements and are set out in clause 3.2 of Schedule 3.

Clarity regarding the determination of the capacity made available and certainty and transparency regarding that capacity are factors relevant to whether access seekers have access to port terminal services on fair and reasonable terms and is thus in the interests of persons seeking access to port terminal services. Under s. 44ZZA(3)(c) the interests of persons who might want access to the services is a matter to which the ACCC must have regard in making a decision whether it is appropriate to accept an undertaking.

The ACCC has the following concerns in relation to the limits that CBH places on the capacity it makes available currently and under the Proposed 2011 Undertaking as set out in the PTRs at Schedule 3:

- The Proposed 2011 Undertaking relates to port terminal services, not supply chain services. However, it has been the practice of CBH to limit capacity made available to exporters to less than the maximum possible at its port terminal facilities.
- The criteria and processes CBH follows under the current and proposed PTRs when estimating capacity provide no certainty for access seekers but rather create considerable discretion for CBH to set capacity; in particular, it is unclear how harvest estimates and supply chain factors impact the amount of capacity made available.
- In this regard, while CBH has in the past limited available capacity in line with production and/or supply-chain factors, it has informed the ACCC that available capacity under the Proposed 2011 Undertaking will be the 14 mmt that CBH offered in 2009/10³⁰ (subject to any events that limit the operational capacity of the infrastructure used to provide port terminal services) notwithstanding that the criteria and processes CBH follows when determining available capacity are unchanged between the 2009 Undertaking and the Proposed 2011 Undertaking.
- CBH has stated that it limits capacity made available to avoid a situation where an exporter acquires capacity that it is unable to use because of the lack of up-country supply-chain capacity. The ACCC considers that this approach is not appropriate as the market has transitioned away from centrally managed arrangements. Ordinarily, competitive markets are highly effective in transmitting information to efficiently coordinate activities within a supply chain. The premise that CBH is in a unique position to be fully informed of all supply-chain options available to its customers fails to recognise this. During the term of the Proposed 2011 Undertaking it will be the responsibility of wheat exporters that acquire capacity at port to ensure that necessary supply-chain services are in place or available.

²⁹ CBH Proposed 2011 Undertaking – Port Terminal Rules, 31 March 2011, clause 3.2.

³⁰ CBH, Submission, 1 April 2011, p. 12.

The ACCC is of the preliminary view that it is not appropriate for CBH to restrict the capacity it makes available to access seekers in the manner proposed. The ACCC considers that clarity and transparency regarding available **port terminal services** is a requisite for an access undertaking in relation to port terminal services for the export of bulk wheat to be acceptable. The ACCC has formed this view having regard to the matters it is required to have regard to under s. 44ZZA(3) as follows:

- Clarity and certainty regarding the port terminal services to which access is available is in the interests of access seekers as it helps to ensure that exporters have information necessary to plan export tasks and hence compete in the wheat export market (s. 44ZZA(3)(c)).
- Provision by vertically integrated port terminal operators of fair and transparent access to their facilities to other accredited exporters³¹ and for access seekers to obtain access to port terminal services on fair and reasonable terms³² are explicit policy intents of the WEMA which is a matter that the ACCC considers to be relevant under s. 44ZZA(3)(e).
- Provision of market information reduces information asymmetries and hence helps reduce market inefficiencies and promote competition within markets, including upstream and downstream markets. The ACCC therefore considers that clarity and transparency in relation to port terminal capacity is a matter relevant to both s. 44ZZA(3)(a) regarding promotion of the economically efficient operation of and use of the infrastructure by which port terminal services are provided; and s. 44ZZA(3)(b) regarding the public interest in having competition in related markets.
- Restricting capacity available may constrain the market and inhibit competition in related markets and achievement of economically efficient operation of and use of the infrastructure by which port terminal services are provided; these are relevant under s. 44ZZA(3)(a) regarding promotion of the economically efficient use of infrastructure; (b) regarding the public interest in having competition in markets; (c) regarding the interests of persons who may want access to port terminal services to export wheat; and (e) regarding the objects of the WEMA which include to promote the development of a bulk wheat export marketing industry that is efficient, competitive and advances the needs of wheat growers.

For the reasons above, the ACCC is of the preliminary view that CBH should publish the total available capacity of its port terminals independent of the up-country supply chain elements that may be utilised to bring grain to port. If the total available capacity changes from time to time, CBH should publish the reasons for that change.

The ACCC notes that the PTRs of the Revised Draft provided by CBH provides amended criteria and process for estimating available capacity at rule 3.2. These revised criteria and process are for core capacity to be determined without reference to either harvest size or up-country supply chain factors, but with the discretion for CBH to include additional core capacity if it considers that to be warranted given harvest and supply chain factors.

³¹ Explanatory Memorandum, *Wheat Export Marketing Bill 2008*, p. 31.

³² Commonwealth, Parliamentary Debates, House of Representatives, 29 May 2008, 3860 (Tony Burke, Minister for Agriculture)

The ACCC is of the view that the proposed changes to the criteria and process CBH is to follow when determining available port terminal capacity and the inclusion of a publication requirement (see 4.3.3.2 above) in the Revised Draft provide greater certainty and transparency for access seekers and are appropriate. Notwithstanding the above, the ACCC notes that its preliminary views in relation to the determination and transparency regarding available port terminal capacity do not preclude CBH from also publishing information on the availability of its bundled supply chain product, Grain Express.

5.2.3 The auction system under the 2009 Undertaking

The ACCC considers that an assessment of the effectiveness of the capacity management arrangements under the 2009 Undertaking is relevant to forming a view on the appropriateness of the Proposed 2011 Undertaking.

Under s. 44ZZA(3)(aa) the ACCC must have regard to the objects of Part IIIA when deciding whether it is appropriate to accept an undertaking; the objects of the Part include to:

- (a) 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.³³

The ACCC is of the view that the auction system under the 2009 Undertaking has been effective in achieving economically efficient outcomes and has enabled exporters to obtain access to port terminal services on fair and reasonable terms. In particular, allocation of capacity through auction arrangements ensures that it goes to its highest valued use which is a necessary condition for economic efficiency when capacity is limited relative to the demand for it.

In forming this view, the ACCC notes that, while there were some difficulties when CBH introduced the auction system, these appear to have largely been transitional and have not persisted once exporters gained an understanding of the operation of the system and CBH made some adjustments in response to industry needs. This is reflected in the widespread endorsement from access seekers and industry as detailed in Appendix 4, section B. Support was also expressed by access seekers to the PC during its inquiry into Wheat Export Marketing Arrangements.³⁴

As set out in its Decision to Accept an undertaking from GrainCorp, the ACCC is of the view that auctions and transferability are preferred mechanisms on economic efficiency grounds to allocate capacity, particularly when capacity is constrained relative to demand and administered approaches—such as a first come, first served system—are unlikely to result in economically efficient outcomes.³⁵ Auctions and transferability promote economic efficiency by ensuring that capacity is used by those that value it most highly at times when demand for port terminal services exceeds capacity.

³³ Section 44AA(a) of the CCA.

³⁴ Productivity Commission, *Wheat Export Marketing Arrangements – inquiry report no.51*, 30 June 2010.

³⁵ ACCC, *GrainCorp Operations Limited Port Terminal Services Access Undertaking - Decision to Accept*, 22 June 2011, p. 8.

In addition, auctions are transparent, fair and provide non-discriminatory access to services, and hence promote competition within markets. Port terminal capacity management arrangements based on auction and transferability are, therefore, appropriate having regard to:

- the objects of Part IIIA that include promotion of the economically efficient operation of, use of and investment in infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets (s. 44ZZA(3)(aa))
- the public interest, including the public interest in having competition in markets, including the bulk wheat export market and the wheat production market (s. 44ZZA(3)(b))
- the interests of persons who might want access to port terminal services to have a system of allocating access to port terminal services that is transparent and non-discriminatory (s. 44ZZA(3)(c))
- other matters to which the ACCC may have regard, including the rationale for the access test in the WEMA to ensure integrated bulk handlers provide fair and transparent access and avoid regional monopolies unfairly controlling infrastructure necessary to export wheat in bulk quantities to the detriment of other accredited exporters³⁶ (s. 44ZZA(3)(e)).

CBH itself considers auction is preferred to first come, first served as a capacity allocation method and has retained its auction arrangements as part of its proposed two-tiered approach. However, CBH also listed a number of difficulties which it considers are associated with the use of auctions:

- (i) auctions incur substantial costs
- (ii) demand can fluctuate markedly from year to year as a result of crop size and global market conditions
- (iii) in low-demand years, auctions are regarded by participants as unnecessary
- (iv) participants are unable to acquire certainty of capacity until the auctions are held, which inhibits longer term planning for both marketers and CBH
- (v) the auction system has resulted in accumulation periods that are shorter than would be possible with a more flexible system
- (vi) reliance on the auction system has reduced flexibility in port capacity management because users have been confined to 'hard' shipping windows.

The ACCC is of the preliminary view that, while aspects of these statements may be factually correct, in most cases it is not clear how these are different under the proposal by CBH to change capacity management arrangements. This view is explained below.

³⁶ Explanatory Memorandum, *Wheat Export Marketing Bill 2008* –, p. 31; Commonwealth, Parliamentary Debates, House of Representatives, 29 May 2008, 3860 (Tony Burke, Minister for Agriculture)

On the first issue of the cost of auctions, the ACCC considers that the costs of the auction are likely to be set up or fixed costs, including informing and educating market participants and fine tuning the arrangements with lower marginal costs and therefore the two-tiered system may not significantly reduce costs. Ongoing costs of operating the auctions may not be significant relative to CBH total costs or to costs of maintaining alternative systems.

Moreover, as the proposed two-tiered arrangements include the retention of the auction system, the ACCC is of the preliminary view that the savings of having the auction apply to a possible 40 per cent of allocated capacity, rather than 100 per cent are not likely to be significant. While the cost of auctions may be a relevant consideration in circumstances where introduction of an auction is under consideration, the ACCC is of the preliminary view that it is not a significant factor in forming a view regarding the appropriateness of the proposed change in capacity management arrangements.

With respect to the second issue—the year to year variability of demand for port terminal services—the ACCC recognises that longer term take-or-pay capacity arrangements provide a mechanism for sharing that risk between an access provider and access seeker in circumstances of variable demand. In contrast, annual auctions enable access seekers to defer decisions regarding capacity and, hence, minimise the risk of lost capacity, leaving the access provider to bear the consequences of variable demand. Under the changed arrangements proposed by CBH, the Base Load take-or-pay contracts relate to one year only. The ACCC considers that this does not provide a significantly different ability for access seekers, or CBH, to respond to year-to-year demand variability than does an auction system.

A related issue for access seekers is their ability to adjust when market conditions vary from those anticipated when export plans are formed. The ACCC notes that auctions and transferability provide flexibility for access seekers to adjust to changed circumstances by transferring capacity to another user but not by changing load port or time, other than within the allowed grace period. Take-or-pay contracts provide some flexibility with respect to load port and time which do not allow for allocated capacity to be transferred to other users.

The third point raised by CBH is that auctions are regarded as unnecessary by participants in low demand years. As noted above, it is a feature of the grain export market that demand can vary significantly from year to year, depending on harvest conditions. These circumstances are different to those in other sectors—such as the mining sector—where production is less variable and more readily predictable in the medium and longer term. The ACCC is of the preliminary view that the view regarding appropriate arrangements for capacity allocation may be different for markets with greater unpredictability as compared to markets where demand is more certain.

While recognising that the capacity allocation task is quite different in low demand years, as compared to more normal or high demand years, the ACCC notes that capacity management arrangements must be capable of producing efficient allocation outcomes in all likely market conditions. The ACCC notes that, in low demand years such as 2010/11 in Western Australia, minimal capacity is taken up through auctions with exporters acquiring capacity as required. The arrangements therefore default to a

simple booking system in the absence of capacity constraint under CBH's auction arrangements. The ACCC considers that the year to year variability in demand is not relevant to the assessment that auctions are an effective mechanism for allocating port terminal capacity.

With respect to the issue of certainty regarding acquisition of capacity by access seekers, the ACCC recognises that in principle a BLC system may be capable of providing certainty for investment and hence competition along the supply chain. However, the ACCC is not persuaded that the particular scheme proposed by CBH will actually provide the requisite degree of certainty and, therefore, is of the preliminary view that this is not a persuasive argument for the proposed change in capacity management arrangements. In forming this preliminary view the ACCC has considered that the take-or-pay base load arrangements are only for one year and that they are only locked in a short period (one month) before the first auction. Certainty could also be achieved by adjusting the timing of the auction and ensuring that all capacity—or at least capacity sufficient to meet anticipated demand—is offered at the first auction.

CBH also states that the auction system has implications for operational efficiency (points (v) and (vi)). The potential for the capacity management arrangements of the Proposed 2011 Undertaking to achieve improved operational efficiency are discussed in 5.2.4 below.

In conclusion, the ACCC is of the preliminary view that the auction system has worked well and is well supported by industry and access seekers. Accordingly, the auction system does appear to be a capacity allocation method that can be accepted as an appropriate method at this point in time.

The ACCC is of the preliminary view that, having regard to the matters in s. 44ZZA(3), a system of allocating port terminal capacity via auction and transferability is appropriate under the 2009 Undertaking and would be appropriate under a future undertaking.

The second question is whether the two-tiered arrangement proposed by CBH can also be accepted as an appropriate method having regard to the matters listed in s. 44ZZA(3). This is addressed in 5.2.4 below.

5.2.4 The two-tiered capacity allocation system

The capacity management arrangements in the Proposed 2011 Undertaking for port terminal services are discussed in this section.

5.2.4.1 Port terminal services provided

CBH has stated that the BLC is designed to sit alongside the auction system and offer a different product for larger exporters.

The port terminal services to which the Proposed 2011 Undertaking applies are defined in the PTRs and the indicative access agreement as the services provided by means of the Port Terminal Facilities, for the purpose of loading onto a vessel scheduled to arrive at the Port terminal Facility, including:

- unloading and receipt by the Port Operator of a User's Bulk Wheat at the Port Terminal Facilities, for the purpose of loading onto a vessel scheduled to arrive at the Port Terminal facility
- sampling by the Port Operator of a User's Bulk Wheat received and Outturned, to check for visible evidence of the presence of residue, insect activity, live insects or other contaminants, and providing the User with a composite shipping sample of the User's Bulk Wheat
- weighing by the Port Operator of the User's Bulk Wheat received and Outturned, using the Port Operator's weighing facilities, and providing the User with a weighbridge ticket or other statement certifying the weight and quantity of Bulk Wheat delivered
- storage by the Port Operator of a User's Bulk Wheat at the Port terminal facility for the purpose of export accumulation in a restricted time period and loading onto vessels at the Port terminal Facility
- fumigation in response to evidence of insect infestation
- accumulating and assembling Bulk Wheat for the purpose of loading cargo onto a vessel scheduled to arrive at the Port Terminal Facility
- administrative and logistics services required for shipping nomination, acceptance, booking and cancellation
- access to inspectors from the AQIS, for inspection of the User's Bulk Wheat received and held at the Port Terminal Facility
- outturning by the Port Operator of a User's Bulk Wheat at the Port Terminal Facility and loading onto the User's nominated vessel.

The ACCC is of the preliminary view that the services proposed to be provided by CBH under both the BLC and the auction allocation are the port terminal services to which the Proposed 2011 Undertaking will apply and that these services are the same in both circumstances. However, the terms under which access to these services is to be provided to customers that are eligible for allocation under clause 4 of the PTR at Schedule 3 to the Proposed 2011 Undertaking differ in a number of significant respects from the terms under which non-eligible customers will receive access to CBH port terminal services.

The ACCC's view on whether these differences constitute discriminatory access is discussed in section 5.2.4.3 below.

5.2.4.2 Determination of total capacity and BLC

The methodology to be used to determine the total available capacity to be shared between customers eligible for BLC and other customers is unchanged from the methodology under the 2009 Undertaking and detailed in 5.2.2 above. In simple terms there are three key factors which CBH will consider when determining the total volume of core capacity under this methodology, in accordance with rule 3.2(a) in the PTR of the Proposed 2011 Undertaking. These are:

- the demand for port terminal services, determined largely by estimates of the characteristics of the upcoming harvest, but also Services Forecasts³⁷ where those are provided by customers
- the capacity of the supply chain to deliver grain to port
- the port terminal services capacity.

In past years this has meant in practice that, in years of poor harvest—such as experienced in 2010/11—CBH restricts the capacity offered to align with estimated demand for it. In contrast, in years of high production, CBH considers whole of supply chain factors in determining capacity made available as otherwise ‘customers may acquire capacity that they are unable to utilise’.³⁸

Were CBH to apply a flat estimate of capacity at the port terminal each year to provide a certainty of system, this would result in a BLC share offered to eligible customers of 8.4 mmt per annum.

This base load share of total capacity may equate to significantly more than 60 per cent of the tonnage shipped through CBH port terminal facilities. For example, in the most recent three years, base load entitlement would have ranged from 79 per cent to 135 per cent of shipped tonnes as Table 5.1 shows:

Table 5.1: Base load capacity to tonnage shipped

Shipping year (Nov-Oct)	Tonnage shipped (mmt)	BLC to tonnage shipped ^a
2010/11 ^b	6.2	135%
2009/10	9.8	86%
2008/09	10.6	79%

^a Assuming capacity offered as BLC equates to 8.4 mmt (60% of 14 MT)

^b CBH estimate at July 2011

As Table 5.1 illustrates, the lower the size of the export task, the more significant is the amount of BLC offered relative to that task. However, even in years when the harvest is large, base load customers will be able to command more than the indicative 60 per cent of total core port capacity in peak periods. This is because customers can take up to 10 per cent of their BLC in any given month. In years of strong demand, if eligible customers acquire the maximum entitlement of 60 per cent of core capacity as BLC and use 10 per cent of that entitlement in peak months, the result will be that the remainder of core capacity available through the auction allocation will be 28 per cent.

Further, the proposed arrangements do not place restrictions on how that 10 per cent must be spread across ports so that auction capacity at preferred ports may be less than 28 per cent.

³⁷ See rule 3.2(a)(iv) of the PTRs.

³⁸ CBH, *Submission to the ACCC*, 1 April 2011, p.11.

Schedule 3 of the PTR sets out that all annual BLC offers and negotiations must be finalised by close of business on 14 September and that capacity not acquired as BLC must be allocated by auction. Base load customers may participate in the auctions and spare capacity allocation methods.

The PTR at Schedule 3 to the Proposed 2011 Undertaking requires CBH to publish its auction timetable no later than 31 August. However, it does not set out any requirements regarding that timetable. The practice under the current arrangements may provide an indication of likely timing.

The auction schedule used by CBH in 2010/11 reflects the separation of the shipping year into the harvest period and the annual shipping period with the auction of slots in the harvest period commencing on 28 September followed by the first auction of slots for the remainder of the year on 1 November. Subsequent auctions are scheduled depending on demand. In 2010/11, when demand was impacted by a poor harvest, only two auctions of annual shipping period slots were held and exporters met further needs through the spare capacity allocation method.

Thus, under this program, customers not eligible for BLC would have no certainty regarding the amount of capacity that will be available after base load is taken up in mid-September and are less able to obtain certainty regarding capacity than are eligible customers.

5.2.4.3 Assessment of the two-tiered approach to capacity management

As noted above, the ACCC has considered the capacity management arrangements under the Proposed 2011 Undertaking having regard to the various matters listed in s. 44ZZA(3). In forming its view the ACCC has considered the position put by CBH in regard to the operational benefits that will result, the consequences for access seekers that are eligible for BLC, the consequences for access seekers who are not eligible for BLC, and the consequences for related markets—including for wheat producers.

The ACCC recognises that, in proposing the two-tiered approach to capacity allocation, CBH is seeking to achieve operational efficiencies associated with the proposed BLC arrangements as compared with the auction system. The proposal reflects practices in some other sectors, such as the mining industry, where port operators have arrangements that provide them a high level of management of shipping schedules to facilitate co-ordination along the supply chain. The ACCC also recognises that certainty of acquisition by customers acquiring BLC may promote up country investment and, hence, competition along the supply chain. For these reasons the ACCC considers that such arrangements have in-principle merit but notes that it is necessary to consider the details of the specific two-tiered approach proposed by CBH in forming a view as to its appropriateness. The ACCC's preliminary views on the arrangements proposed by CBH are discussed below.

Economically efficient allocation of capacity under proposed arrangements

As noted in 5.2.3 above, the ACCC is required to have regard to the promotion of the economically efficient operation of, use of and investment in the infrastructure by which services are provided when deciding whether to accept an undertaking. These

correspond to the three components of economic efficiency—productive efficiency, allocative efficiency and dynamic efficiency—which are further explained in Appendix 2 which sets out the legislative framework within which the ACCC is required to make its decision.

The ACCC has noted above that allocation of capacity at times when capacity is limited relative to demand via auction arrangements promotes economically efficient use of port facilities by ensuring that allocative efficiency is achieved. There is no assurance under the proposed base load allocation arrangements that capacity will go to its highest valued use at times of constrained capacity. Up to 72 per cent of capacity may go as BLC at these times, and, as with any administered allocation arrangement, there can be no presumption that an economically efficient use of this capacity results. A consequence of any allocative inefficiency, given that it cannot be corrected through subsequent transfer of BLC from low to higher value in use, is that demand for capacity remaining to be allocated by auction for periods subject to excess demand will result in higher auction premia than would be the case under auction only arrangements.

The ACCC is of the preliminary view that capacity management arrangements under the Proposed 2011 Undertaking are unlikely to promote economically efficient use of port terminal services in the form proposed. It may be possible that a proposal could be designed that avoided or minimised these concerns.

Operational benefits of the proposed system of BLC

CBH has stated that the base load approach to capacity management will improve the operational efficiency of its port facilities. CBH submits that this will enable it to reduce costs to users. The ACCC considers that such gains in operational efficiency—or productive efficiency—is a matter to which it must have regard (s. 44ZZA(3)(aa)).

In particular, CBH has identified three ways in which it considers the arrangements will enable it to operate its facilities more efficiently. These are that:

- the base capacity will spread the export task over the year
- BLC provides flexibility for CBH to negotiate with customers to move capacity to avoid congestion and hence to improve efficiency
- narrowing of the base load laycan from 30 to 10 days will increase capacity.

The ACCC recognises that capacity management arrangements that spread demand at port and provide flexibility may contribute to improved operational efficiency, with benefits to the access provider that may be shared with users through lower prices and reduced congestion.

This is true whether congestion is due to capacity limitations at port or in the land based supply chain that moves grain to port. However, the ACCC has not been able to clearly identify the efficiencies that CBH anticipates will result from the proposed arrangements. In this regard, the ACCC notes that CBH has not provided material that assists the ACCC to form a view regarding the magnitude of the anticipated

efficiencies, such as by reference to past congestion experience and the potential for CBH to increase capacity throughput at its facilities or reduce costs.

The ACCC also recognises that capacity management arrangements similar to that proposed by CBH have been used by other port operators. These arrangements achieve efficiency in the operation of the port by spreading vessel loading evenly across the year and requiring customers to make their shipping arrangements in conformity with its port operation schedule. Further, these arrangements achieve most operationally efficient outcomes when all shipping through the port—by smaller volume as well as large volume shippers—is done in accordance with base load scheduling. Less than maximum efficiency benefits result from restricting access to BLC to only large volume shippers. The ACCC considers that, if maximising the benefits of spreading demand is the objective, then a base load scheduling system should be open to all shippers.

The ACCC also notes that other arrangements can be used to spread the shipping task. The current auction system of allocation uses price to spread the shipping across time and ports by access seekers acquiring capacity according to willingness to pay. Under auction arrangements, when capacity in preferred periods is gone, exporters who were not prepared to pay the premium for that period must move demand to periods when the premium is lower. In this respect, as noted above, auctions provide an efficient outcome as they spread demand by a price mechanism and hence achieve allocative, as well as operational efficiency.

On the second point relating to flexibility to avoid congestion, the ACCC notes that, while in principle a BLC system may achieve efficiencies in this respect, CBH has not provided information to enable the ACCC to form a view regarding the extent to which congestion that is amenable to such a resolution occurs at CBH ports in practice. Further, the PTR at Schedule 3 to the Proposed 2011 Undertaking do not provide scope for such a requirement to be placed on base load customers. As noted above, base load customers are required to provide a BLASS and to revise it at regular intervals. CBH has the ability to not accept a revision to a BLASS if it would have a detrimental impact on port operations but there is no provision for CBH to require, or even request, a base load customer to change a scheduled vessel loading to assist the port operator to resolve a congestion problem that emerges for any reason. Absent such provision in the PTR the ACCC is of the preliminary view that it is not evident that the anticipated flexibility, and consequent efficiencies, will actually eventuate.

Further, while recognising that reducing the base load laycan from 30 to 10 days, 21 days out may have some impact on the capacity that CBH is able to make available, CBH has not provided material that enables an assessment of how available capacity under the proposed base load arrangements can be increased relative to 15 day capacity slots under auctioned capacity.

In addition to the above factors impacting the efficient operation of CBH's port facilities, the ACCC notes that the lack of transferability of BLC increases the likelihood of capacity being lost. The ACCC recognises that non-transferability is consistent with the take-or-pay characteristics of the base load proposal but notes that, if eligible customers book more capacity than is required at peak times, this may result in lost capacity while non-eligible customers are unable to obtain needed capacity. Such an outcome raises efficiency concerns.

In summary, the ACCC recognises in-principle benefits of arrangements, such as BLC systems, that enable supply chain efficiencies to be achieved through changes to port terminal management, but it has not been able to form a clear view of the potential benefits of the particular two-tiered approach as proposed by CBH in its current form. Consequently, the ACCC has formed a preliminary view that it is uncertain that the BLC, as proposed, will materially improve the operational efficiency of CBH port terminal facilities as compared to the existing auction arrangements.

The implications of the proposed arrangements for access seekers depend on their status under the proposed base load eligibility criteria as discussed next.

Implications for access seekers eligible for BLC

The ACCC notes that, on the information provided by CBH, four exporters of bulk wheat will be eligible to acquire BLC of which CBH Grain is one.

Customers eligible for BLC, particularly those for whom the 800,000 tonne minimum is less than their total requirements, obtain significant advantage over customers that are not eligible. These customers are able to set forecast requirements for the purposes of acquiring BLC (as provided to CBH in the BLASS) above the eligibility minimum but below total requirements and thereby meet a significant proportion of required capacity at the lower base load price with minimal risk that lost capacity charges will be incurred under the take-or-pay base load arrangements. These customers are then well placed to top up their BLC through the auction system. This top-up demand is likely to be for the peak periods with these large customers well placed to out bid non-eligible customers for remaining peak period slots. As discussed above, peak period auction premia are likely to be higher than would have occurred in the absence of BLC.

For eligible customers whose requirements are close to the 800,000 minimum tonnage, there is less opportunity to leave a balance to be met through auction so as to reduce the risk of lost capacity under the take-or-pay arrangements. Entering into base load arrangements is therefore more risky for these customers than for the largest customers—such as CBH Grain—whose exports are well above the 800,000 tonne minimum. Further, the lost capacity fee is less of a risk for CBH Grain than for other port users as the lost capacity fee is simply transferred within the CBH group.

All base load customers have an advantage at the auction of highly valued slots and also have the advantage of capacity certainty before non-eligible customers. This gives them a competitive advantage in acquiring grain from producers and in making sales and limits competition in these upstream and downstream markets.

Implications for access seekers not eligible for BLC

The ACCC considers that, under s. 44ZZA(3)(e), the objectives of the WEMA are relevant when deciding whether to accept an access undertaking relating to port terminal services provided for the export of bulk wheat.³⁹ In particular, the ACCC notes that the WEMA access test is

³⁹ See Appendix 2 for a discussion of the legislative framework

... intended to ensure that accredited exporters that own, operate or control port terminal facilities provide fair and transparent access to their facilities to other accredited exporters. The test aims to avoid regional monopolies unfairly controlling infrastructure necessary to export wheat in bulk quantities, to the detriment of other accredited exporters.⁴⁰

Further, in the second reading speech the minister stated that ‘unless all exporters can obtain access to these critical facilities on fair and reasonable terms then one of the major objectives of the policy could be frustrated.’⁴¹ Accordingly, ‘fair and reasonable’ access is one factor the ACCC is taking into account under s. 44ZZA.

CBH has proposed introducing BLC under a two-tiered arrangement whereby eligibility to BLC is limited to a small number of customers that are large volume exporters. Those customers that are not eligible for BLC may be placed at a significant disadvantage compared to those that are eligible. This disadvantage arises because:

- these customers do not have access to all port terminal capacity on equal terms with the customers eligible for BLC, and consequently, are not able to obtain certainty regarding elevation capacity until significantly after base load customers; this places these customers at a competitive disadvantage in acquiring grain from growers and in making export sales
- during peak periods, the share of capacity available to these customers through auction is likely to be significantly constrained and the average price paid by these customers for capacity at peak times will be higher than the price to customers acquiring BLC or as compared to auction only arrangements
- CBH will assess eligibility with reference to historical performance of the exporter which may restrain new entry and growth of these exporters.

Based on these factors, the ACCC is of the preliminary view that the proposed arrangements in their current form will result in non-eligible customers having access to port terminal services on terms that are not fair and reasonable as a consequence of eligible customers—including CBH Grain—acquiring BLC.

The ACCC notes that all but one of the nine third party submissions received raised concerns that the proposed arrangements were discriminatory and disadvantaged exporters not eligible for BLC. Submissions are available on the ACCC website and a summary is provided at Appendix 4.

Further, the ACCC is of the preliminary view that, in light of these factors, the proposed arrangements create a significant market disadvantage for non eligible customers which is not in their interests and hence raises significant concerns in regard to the interests of access seekers (s. 44ZZA(3)(c)).

The ACCC has also considered whether the proposed arrangements amount to discrimination in the provision of access to these access seekers. If the proposed arrangements are discriminatory this means that they are inconsistent with the non-discrimination provision at clause 6.2 of the Proposed 2011 Undertaking.

⁴⁰ Explanatory Memorandum, *Wheat Export Marketing Bill 2008*, p. 31.

⁴¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 29 May 2008, 3860 (Tony Burke, Minister for Agriculture).

As noted above (5.2.4.1), the ACCC is of the preliminary view that the Proposed 2011 Undertaking establishes arrangements whereby some access seekers are provided port terminal services on less favourable terms. Further, those terms provide port terminal services on preferential terms to customers eligible for BLC, including CBH Grain and are therefore potentially discriminatory.

It is possible that a proposal could be designed that achieved efficiencies from BLC arrangements but avoided or limited the problems associated with restricting access to the BLC.

Implications for related markets and dynamic efficiency

Under s. 44ZZA(3)(b) of the Act the ACCC is required to have regard to the public interest, including the public interest in having competition in markets (whether or not in Australia). The capacity management proposal has the potential to impact competition in related markets in a number of ways as discussed below.

The ACCC recognises that in principle a BLC system may be capable of providing certainty for investment and hence promote competition along the supply chain. This could be a particular benefit that the ACCC would take into account in weighing up the factors in s. 44ZZA(3). However, the ACCC is not persuaded that the particular scheme proposed by CBH will actually provide the requisite degree of certainty. On the other hand, the restriction of eligibility to only the largest bulk wheat exporters has implications for competition in other markets. Importantly, Western Australian wheat growers will face limited competition between buyers, particularly early in the season before non-eligible bulk wheat exporters are able to obtain certainty regarding their ability to ship. For wheat growers this means that selling opportunities are more restricted and this may result in them receiving lower prices.

Competition in downstream markets for buyers of export wheat free on board is likely to be similarly limited by the eligibility restrictions on those shippers that are able to acquire BLC. The ACCC recognises that Australian wheat exports compete on a world market with competition from other wheat producing and exporting countries. However, competition to make international sales of Western Australian wheat is likely to be limited by the restricted access to BLC that confers an advantage in acquiring and shipping to those eligible for BLC.

The ACCC, therefore, is of the preliminary view that the proposed capacity management arrangements in their current form raise concerns under s. 44ZZA(3)(b) of the Act.

In addition to these immediate consequences, the restriction of eligibility for BLC to only the largest bulk wheat exporters has longer term implications. As noted above, the objectives of the WEMA legislation is relevant under s. 44ZZA(3)(e) which requires that the ACCC have regard to other matters it considers relevant in deciding whether to accept an undertaking. The objects of the WEMA include:

to promote the development of a bulk wheat export marketing industry that is efficient, competitive and responsive to the needs of wheat growers.⁴²

⁴² WEMA, s. 3.

The ACCC considers that the proposed capacity management arrangements will tend to inhibit entry into the bulk wheat export market and limit the growth of smaller and mid-sized exporters of bulk wheat from Western Australia relative to that which would occur without such restrictions. The ACCC considers that, by restricting the development of the market by imposing eligibility criteria for BLC, the proposed capacity management arrangements in their current form are likely to limit innovation and market improvements in response to the needs of Western Australian wheat growers.

The ACCC, therefore, is of the preliminary view that the proposed capacity management arrangements raise concerns under s. 44ZZA(3)(e) of the Act.

It may be possible that a BLC proposal could be designed that clearly achieved the sought benefits of the system while avoiding or limiting these problems.

Design of the proposed BLC allocation and management

In addition to the specific concerns discussed in this section, the ACCC has concerns that there is a lack of clarity and certainty with respect to the proposed arrangements for a two-tiered approach to capacity management in the Proposed 2011 Undertaking.

In particular, the ACCC notes that there is:

- no certainty as to how CBH can ensure that its arrangements with base load customers achieve the changes to shipping arrangements (such as changes to load port) necessary if the anticipated efficiency outcomes are to be realised
- no clarity as to what price will be charged for BLC and how that compares to the minimum auction price (excluding premia)
- no details of the timing of payments for BLC and how that compares to the timing of payments for auction capacity.

These are additional concerns that the ACCC considers must be addressed for the Proposed 2011 Undertaking to be appropriate having regard to the interests of access seekers to have certainty and clarity about the terms on which access is provided (s. 44ZZA(3)(c)).

5.2.4.4 Summary of assessment

In forming a preliminary view regarding whether it is appropriate to accept the Proposed 2011 Undertaking in light of the capacity management arrangements it contains, the ACCC has weighed the matters it is required to have regard to under s. 44ZZA(3).

The ACCC considers that BLC arrangements in principle may have operational efficiency benefits, may promote efficient investment in up-country supply chains and may also have positive effects on competition in upstream markets.

However, its preliminary view is that the proposed two-tiered arrangements, in their current form, are not appropriate.

As noted above the proposed arrangements raise concerns in regard to the interests of persons not eligible to acquire BLC who might want access to port terminal services provided by CBH (s. 44ZZA(3)(c)); the public interest in having competition in markets, including the market for wheat produced in Western Australia (s. 44ZZA(3)(b)); the objects of Part IIIA of the Act to promote economic efficiency (s. 44ZZA(3)(aa)); the objectives of the WEMA for the development of a competitive wheat export marketing industry and the intent of that legislation that wheat exporters have access to port terminal services operated by integrated regional monopolies on fair and reasonable terms (s. 44ZZA(3)(e)).

Against this, the ACCC recognises that the proposed BLC arrangements have potential to improve supply chain efficiencies and encourage competition in up-country storage and freight services. The proposal is also likely to be in the interests of those customers that are eligible for BLC and may give rise to operational efficiencies for CBH.

The ACCC has weighed the matters it is required to have regard to under s. 44ZZA(3) when deciding whether to accept an undertaking under Part IIIA and formed the preliminary view that the Proposed 2011 Undertaking is not acceptable with respect to the capacity management arrangements because it considers that the identified concerns outweigh any potential benefits likely to flow from the proposed arrangements.

The ACCC recognises that it is possible that a BLC proposal could be designed that clearly achieved the sought benefits in efficiency, investment and promotion of competition while minimising the problems with the current proposal. The ACCC is open to considering an alternative proposal in future that clearly achieves these goals, if CBH wished to propose an alternative design in consultation with industry. For present purposes though, the proposed two-tiered system in its current form is not an appropriate method of capacity allocation.

5.2.4.5 Revised Draft

CBH has not included the two-tiered approach to capacity allocation in the Revised Draft. Instead, CBH has reverted to the auction allocation arrangements in operation under the 2009 Undertaking and must seek approval from the ACCC for any significant amendment of the capacity allocation system.

As discussed in 5.2.3, the ACCC is of the view that port terminal capacity management arrangements based on auction and transferability are appropriate at this point in time having regard to matters in s. 44ZZA(3). The ACCC is therefore of the preliminary view that the reversion of the Proposed 2011 Undertaking to an auction allocation system appropriately addresses the concerns raised in regard to capacity management and is appropriate. The ACCC notes that submissions to the ACCC Issues Paper regarding the Proposed 2011 Undertaking supported the auction arrangements but did not give more detailed views; rather submissions addressed the two-tiered approach proposed. The ACCC invites comments on the current auction arrangements.

6 The Port Terminal Rules and Standard Access Terms

6.1 Variation of the Port Terminal Rules

6.1.1 CBH's Proposed 2011 Undertaking

Clause 10 of the Proposed 2011 Undertaking outlines the manner in which the PTRs are able to be varied. The Proposed 2011 Undertaking specifies that the PTRs are able to be varied by CBH without a formal variation of the undertaking in accordance with s. 44ZZBC(7) of the CCA. Before varying the PTRs, CBH must consult with industry participants and provide adequate notice of the variation.

The variation procedure in the Proposed 2011 Undertaking has been materially changed from the 2009 Undertaking. In summary, the PTR variation procedure in the Proposed 2011 Undertaking provides for three distinct processes for the variation of the PTRs, including:

- variations to fix 'typographical, formatting or grammatical errors (clause 10.3)
- variations to institute 'standard amendments' (clause 10.4). Under this provision, CBH is provided with the ability to amend the substance of variation notices without having to restart the variation process altogether
- variations under 'exceptional circumstances' (clause 10.5). 'Exceptional circumstances' is defined at clause 1.1. of the Proposed 2011 Undertaking to mean:

...circumstances in which urgent variation/s to the Port Terminal Rules are necessary to prevent or reduce systemic or technical deficiencies or errors in the process or rules for the conduct of capacity auctions.

Each of the above processes for variation of the PTRs imposes different obligations on CBH in terms of the required consultation and notice.

The inclusion of a new clause 10.6 of the Proposed 2011 Undertaking provides the ACCC with the right to issue an objection notice in relation to a variation proposed by CBH. Should the ACCC issue an objection notice, the provisions of clause 10.6 stipulate that CBH may:

- withdraw the proposed variation and commence a new variation process by placing a notice to that effect in a prominent place on the Port Operator's website and notifying the ACCC in writing
- withdraw the proposed variation and confirm the status of the existing Port Terminal Rules by publishing a notice in a prominent place on the Port Operator's website and notifying the ACCC in writing

- notify the ACCC that it disputes the ACCC's objection and refer the matter to arbitration.⁴³

6.1.2 CBH and third party submissions on the variation of the Port Terminal Rules

A summary of all CBH's public submissions and submissions received from interested third parties in relation to the variation of the PTRs is provided at Appendix 4 (section C).

6.1.3 ACCC view

The provisions for variation of the PTRs contained in the Proposed 2011 Undertaking are materially changed from those of the 2009 undertaking. In particular, the Proposed 2011 Undertaking includes new provisions to allow for variations under three distinct sets of circumstances (as above).

This section focuses on the following issues:

- the comprehensive nature of the PTRs
- the process for varying the PTRs
- the ACCC's role in the process for varying the PTRs (see Chapter 4.4)

In considering each of these issues, the ACCC has had regard to the factors listed in s. 44ZZA(3) of the CCA. In relation to the PTRs, of particular relevance are s. 44ZZA(3)(a) and CBH's legitimate business interests to have the port terminals operating efficiently, and s. 44ZZA(3)(c) and access seekers' interests in understanding the rules and processes affecting the export of their bulk wheat. The rules and processes must be clear and comprehensive so that both CBH and access seekers understand how access to the port terminal services is governed

As discussed in Chapter 3, a relevant factor under s. 44ZZA(3)(e) of the CCA in the assessment of the Proposed 2011 Undertaking is the performance of the 2009 Undertakings. Consideration of the 2009 Undertakings is relevant to encouraging a consistent regulatory approach under the objects of Part IIIA. Further, through the operation of the 2009 Undertakings, the ACCC has gained insight as to the effect of the Undertakings in practice. The ACCC considers that this experience is relevant to the assessment of CBH's Proposed 2011 Undertaking.

During the operation of the 2009 Undertakings, the PTRs of Viterra, GrainCorp and CBH have gone through the variation process set out in each of their respective undertakings. Different issues have arisen with the variation processes undertaken by each of the port operators to date.

CBH varied its PTRs in accordance with the provisions of the 2009 Undertaking twice in September 2010. No issues or concerns were directly raised by interested parties in relation to those variations.

⁴³ Clause 10.6(f)(i) to (iii) of the Proposed 2011 Undertaking.

The ACCC has also taken into consideration the experience of the previous variation processes under the 2009 undertakings in assessing the Proposed 2011 Undertaking given that the Proposed 2011 Undertaking in some instances mirrors provisions of the 2009 Undertaking.

6.1.3.1 The comprehensive nature of the PTRs

The ACCC considers that clause 10.1 of the Proposed 2011 Undertaking, which imposes an obligation on CBH to comply with the PTRs, requires the published PTRs to be comprehensive. This is because the PTRs provide the rules and processes for access to port terminal services and therefore, to provide an appropriate level of clarity and certainty for access seekers, should be located in the one comprehensive document (i.e. the PTRs).

The ACCC notes that the Revised Draft seeks to address this issue outlined with the inclusion of clause 10.1, which states that:

10.1 Compliance with Port Terminal Rules

- (a) The Port Terminal Rules must be, and continue to be, a comprehensive statement of the Port Operator's policies and procedures for managing demand for Port Terminal Services.

The ACCC is of the preliminary view that the inclusion of a new clause 10.1 in the Revised Draft adequately addresses the ACCC's concerns and is therefore appropriate.

6.1.3.2 Process for varying the PTRs

In 2009, the ACCC accepted a PTR variation mechanism based on an industry consultation process rather than a formal ACCC consultation process. In its Final Decision on CBH's 2009 Undertaking the ACCC stated that it would monitor the success of this variation model and take its findings into account in any future review of access undertakings.⁴⁴

The ACCC recognises that the model accepted for the variation of the PTRs carries some risks as the ACCC would likely not review all proposed amendments to determine their appropriateness. However, the ACCC notes that this risk is effectively mitigated by:

- the inclusion of a robust consultation mechanism (at clause 10.4)
- the inclusion of a provision that any variation to the PTRs must be made subject to the non-discrimination provision (at clause 6.2) and the no hindering provision (at clause 10.8) of the Proposed 2011 Undertaking.

In assessing the appropriateness of the variation process contained in the Proposed 2011 Undertaking, the ACCC has taken into account the experience of the port operators with 2009 Undertakings in making variations to their PTRs. The ACCC considers that there are a number of minimum standards that should apply to a variation process, to ensure a fair, meaningful and transparent consultation process.

⁴⁴ ACCC, *Cooperative Bulk Handling Limited Port Terminal Services Access Undertaking Further Draft Decision*, 23 December 2009, p. 223.

The ACCC notes that the industry wide approach it is taking with regard to the PTR variation process is consistent with s. 44AA(b), which promotes consistency in access regulation across the industry.

The minimum standards that the ACCC considers are necessary for a fair, meaningful and transparent variation process are:

- a draft variation and an explanation for the changes, circulated to interested parties and the ACCC
- a reasonable consultation timeframe, which allows for meaningful consultation between industry participants and the port operator
- an obligation on the port operator to consider submissions in good faith, with submissions to be made publicly available
- an ability for the port operator to amend the draft variation based on consultation, without having to withdraw the draft variation and start another process
- a reasonable period of time following publication of a finalised variation before the variation takes effect.

The ACCC considers that these standards should apply consistently across the industry as discussed above, while not necessarily resulting in identical variation processes. The ACCC has assessed the variation process in the Proposed 2011 Undertaking against these proposed minimum standards in the discussion that follows.

(i) *A draft variation and an explanation for the changes, circulated to interested parties and the ACCC*

Under clause 10.3, which outlines the process for typographical, formatting and grammatical amendments, no explanation of the relevant variation is circulated to interested parties and the ACCC. However, the ACCC takes the preliminary view that, in the case of typographical, formatting and grammatical amendments, this minimum standard is not necessary given that the purpose for such changes should be self-evident.

Under clause 10.4, which outlines the process for standard amendments, CBH is required to publish its reasons for the amendment (clause 10.4(a)(ii)) and to provide a copy of the draft variation to all users and the ACCC (clause 10.4(b)). The ACCC takes the preliminary view that clause 10.4(a)(ii) and 10.4(b) fulfil this minimum standard.

Under clause 10.5, which outlines the process for amendments under ‘exceptional circumstances’, CBH is required to follow the variation process provided at clause 10.4 for standard amendments (as above) *after* amending the relevant provision(s) under clause 10.5(a). The circumstances under which such amendments can occur are appropriately limited.

(ii) ***A reasonable consultation timeframe, which allows for meaningful consultation between industry participants and the port operator***

Under clause 10.3, which outlines the process for typographical, formatting and grammatical amendments, no consultation period is provided for. However, the ACCC takes the preliminary view that, in the case of typographical, formatting and grammatical amendments, this minimum standard is not necessary given that such amendments will unlikely be of a material nature.

Under clause 10.4, which outlines the process for standard amendments, CBH provides 10 business days for interested parties to make submissions (clause 10.4(a)(iii)). The ACCC is of the preliminary view that this fulfils the minimum standard.

Under clause 10.5, which outlines the process for amendments under ‘exceptional circumstances’, CBH is required to follow the consultation process provided at clause 10.4 for standard amendments (as above) *after* amending the relevant provision(s) under clause 10.5(a). The circumstances under which such amendments can occur are appropriately limited.

(iii) ***An obligation on the port operator to consider submissions in good faith, with submissions to be made publicly available***

Under clause 10.3, which outlines the process for typographical, formatting and grammatical amendments, CBH is not required to consider submissions. However, the ACCC takes the preliminary view that this minimum standard is not necessary for such amendments given that such amendments will unlikely be of a material nature.

Under clause 10.4, which outlines the process for standard amendments, CBH is required to consider submissions from interested parties in good faith (clause 10.4(e)). The ACCC is of the preliminary view that this fulfils the minimum standard.

Under clause 10.5, which outlines the process for amendments under ‘exceptional circumstances’, CBH is required to consider submissions from interested parties in good faith as provided under clause 10.4(e) for standard amendments (as above) *after* amending the relevant provision(s) under clause 10.5(a). The circumstances under which such amendments can occur are appropriately limited.

(iv) ***An ability for the port operator to amend the proposed variation based on consultation, without having to withdraw the current variation and start another process***

Under clause 10.3, which outlines the process for typographical, formatting and grammatical amendments, CBH does not have an ability to amend the proposed variation. However, the ACCC takes the preliminary view that, in the case of typographical, formatting and grammatical amendments, this minimum standard is not necessary given that there is no consultation process and any such proposed amendments are not likely to require further amendment.

Under clause 10.4, which outlines the process for standard amendments, CBH is able to amend a variation notice based on consultation without needing to restart the variation process (clause 10.4(f)(i)). The ACCC is of the preliminary view that this fulfils the minimum standard.

Under clause 10.5, which outlines the process for amendments under ‘exceptional circumstances’, CBH may amend a variation notice as provided under clause 10.4(f)(i) for standard amendments (as above) *after* amending the relevant provision(s) under clause 10.5(a). The circumstances under which such amendments can occur are appropriately limited.

- (v) *A reasonable period of time following publication of a finalised variation before the variation takes effect.*

Under clause 10.3, any typographical, formatting and grammatical amendments will take effect at the same time that the details of any such amendment are published. The ACCC takes the preliminary view that, in the case of typographical, formatting and grammatical amendments, this minimum standard is not necessary given that there is no consultation process and any such proposed amendments are likely not to be material.

Under clause 10.4, standard amendments will take effect no less than 20 days after the final PTR Variation Notice is published by CBH (clause 10.4(f)(ii)(E)). The ACCC is of the preliminary view that this fulfils the minimum standard.

Under clause 10.5, an amendment under ‘exceptional circumstances’ takes effect two days after CBH publishes a notice of the change (clause 10.5(a)). The ACCC is of the preliminary view that this is appropriate given that such amendments are only likely to occur under urgent circumstances and relate to the efficient operation of the ports. The circumstances under which such amendments can occur are therefore appropriately limited.

6.2 Substance of the Standard Access Terms

6.2.1 CBH’s Proposed 2011 Undertaking

Under clause 5.4(b)(ii) of the Proposed 2011 Undertaking, CBH is obliged to offer port terminal services to access seekers on the ‘Standard Access Terms’. The Standard Access Terms comprise:

- the published References Prices at which port terminal services are offered
- the published Standard Port Terminal Terms, which are set out at Schedule 2 of the Proposed 2011 Undertaking.

The Standard Access Terms provide a clear starting point for negotiations between access seekers, which is critical in ensuring access seekers can effectively negotiate with CBH. The inclusion of Standard Access Terms also assists in ensuring that the costs of negotiation and/or arbitration are not excessive.

The Standard Port Terminal Terms act as a default access agreement in the event that parties are unable to reach a negotiated agreement. The Standard Port Terminal Terms attached at Schedule 2 of the Proposed 2011 Undertaking has not been materially altered from the Standard Port Terminal Terms attached to the 2009 Undertaking. Minor changes include:

- the rolling over of dates to enable the provisions of the Standard Port Terminal Terms to apply to the 2011/12 year
- replacement of TPA with CCA to reflect the change in the law
- the removal of the definition of ‘ring-fencing’ under clause 2.

CBH has, however, made a material change to the provisions of the 2009 Undertaking by including a new clause 6.1(c) in the Proposed 2011 Undertaking. This clause 6.1(c) provides CBH with an ability to unilaterally vary the Standard Access Terms, without any obligation to provide notice or to consult with stakeholders.

6.2.2 CBH and third party submissions

A summary of all CBH’s public submissions and submissions received from interested third parties in relation to the Substance of the Standard Access Terms is provided at Appendix 4 (section D).

6.2.3 ACCC view

6.2.3.1 Ability to vary the Standard Access Terms

In its Final Decisions on the 2009 Undertakings, the ACCC took the view that certain aspects of the access agreement are commercial issues to be negotiated between parties. In the Final Decision on CBH’s 2009 Undertaking, the ACCC noted that:

... the Standard Terms provided under the September Indicative Access Agreement are intended to be the minimum terms and conditions of access to CBH’s port terminal services, and that access seekers will have the ability to negotiate (or arbitrate) non-Standard Access Terms that vary from any of those Standard Access Terms that they consider to be unacceptable, based on their own particular commercial considerations and circumstances. Accordingly, in this decision, the ACCC has not found it necessary to form views about whether the particular terms and conditions of the September Indicative Access Agreement would be acceptable to particular parties (given likely differences between the commercial considerations and circumstances of specific access seekers);⁴⁵

The ACCC considers that while all elements of the Standard Access Terms are subject to negotiation between CBH and access seekers, the Standard Access Terms represent an important starting point for those negotiations.

In its Final Decision on the 2009 Undertakings, the ACCC stated that it was necessary for the Standard Access Terms to ensure the following:

- any ability of CBH to unilaterally vary the terms of an executed indicative access agreement can only be exercised in appropriate circumstances
- the terms and conditions of the Indicate Access Agreement provide for sufficient certainty and clarity in their terms, effect and operation.⁴⁶

⁴⁵ ACCC, *Co-operative Bulk Handling Limited Port Terminal Services Access Undertaking Decision to Accept*, 29 September 2009, pp. 137-38. A similar position was reflected in the Final Decisions on GrainCorp and AusBulk’s (now Viterra) 2009 undertakings.

⁴⁶ ACCC, *Co-operative Bulk Handling Limited Port Terminal Services Access Undertaking Decision to Accept*, 29 September 2009, p.179

On this basis, the ACCC is of the preliminary view that the ability for CBH to vary its Standard Access Terms under clause 6.1(c) is not appropriate. This is because such ability would result in a significant reduction in the clarity and certainty provided to customers through the provision of Standard Access Terms in their negotiations with CBH for access to port terminal services.

The ACCC considers that an appropriate alternative mechanism should be drafted, which provides CBH with an ability to unilaterally vary the Reference Prices but requires it to obtain ACCC approval for proposed changes to the Standard Port Terminal Terms (as contained in the Port Terminal Service Agreement at Schedule 2 of the Proposed 2011 Undertaking).

In response to this issue, the Revised Draft provided by CBH proposes to amend subclauses 6.1(a), (c) and (d) to provide that:

6.1 Obligation to publish standard access terms

- (a) Subject to clause 6.1(b), by no later than 31 August of each year the Port Operator must publish on its website:
- (i) a single set of reference prices (Reference Prices); and
 - (ii) a set of standard terms and conditions for the supply of Port Terminal Services (Standard Port Terminal Terms),

which, subject to clause 6.1(c) and clause 6.1(d), will apply to access to the Port Terminal Services for the Season commencing in that year (together the Standard Access Terms).

- (b) For the first year of term of this Undertaking, the Port Operator must publish the Standard Access Terms on its website (and provide a copy to the ACCC) within three Business Days of the Commencement Date.
- (c) The Port Operator may vary the Standard Port Terminal Terms with approval from the ACCC in accordance with the procedure in Division 6 of Part IIIA of the CCA. The Port Operator must publish notice of any approved variation on its website within three Business Days of the ACCC's approval.
- (d) The Port Operator may vary the Reference Prices from time to time, provided that it publishes notice of such fact on its website and sends a copy of the revised Reference Prices to the ACCC within three Business Days of publication.
- (e) The Standard Access Terms and any variation of the Standard Access Terms must be consistent with clause 6.2 and the objectives set out in clause 2.
- (f) Schedule 2 sets out the initial Standard Port Terminal Terms applicable under this Undertaking.

The ACCC is of the preliminary view that the amended clause 6.1 as above is appropriate as it provides an enhanced level of clarity and certainty to access seekers in relation to the Standard Access Terms relating to the provision of port terminal services.

6.2.3.2 Liability

Gavilon indicated that CBH should be liable to exporters should it over-estimate available port capacity.⁴⁷ Submissions from AGEA and Louis Dreyfus expressed the view that CBH should be liable for despatch-demurrage costs incurred by exporters as a result of delays.⁴⁸ However, CBH does not accept liability to compensate customers under these circumstances, even where a loss results from an act or omission by CBH as port operator, unless caused by the ‘gross negligence’ of CBH.

The ACCC is cognisant of submissions calling for the inclusion of a despatch-demurrage obligation and other performance-base penalties on CBH. However, consistent with the ACCC’s approach in its Final Decision on the GrainCorp proposed 2011 undertaking and its ongoing assessment of the proposed 2011 undertakings of ABA and Viterra, the ACCC considers liability to be a commercial issue suited to negotiation between the parties to the agreement in accordance with the publish-negotiate-arbitrate model. If parties are unable to resolve these issues, the parties may seek arbitration. Accordingly, the ACCC has not formed a view on the appropriateness of the liability provisions proposed in its Standard Access Terms and whether particular clauses will be acceptable to all parties.

Rather, the ACCC reiterates that access terms different to those in the Standard Access Terms can be negotiated between CBH and access seekers. Where an access seeker believes that negotiation of an agreement does not occur in accordance with clause 7 of the Proposed 2011 Undertaking, the access seeker may make use of the dispute resolution provisions in clause 8 of the Proposed 2011 Undertaking. The dispute resolution regime provides for arbitration by the ACCC or a private arbitrator. Parties seeking to negotiate in relation to the liability provisions of the Standard Access Terms may avail themselves of these dispute resolution procedures.

For the reasons above, the ACCC is of the preliminary view that the limitation of liability provisions included in the Proposed 2011 Undertaking constitutes an appropriate starting point for negotiations between access seekers and CBH.

6.2.3.3 Remaining provisions of the Standard Access Terms

The ACCC emphasises that the Standard Access Terms are negotiable between CBH and access seekers. The Standard Access Terms are intended to be the minimum terms and conditions of access to CBH’s port terminal services, and that access seekers will have the ability to negotiate (or arbitrate) non-standard terms that vary from those Standard Access Terms that they consider to be unacceptable, based on their own particular commercial considerations and circumstances (in accordance with the publish-negotiate-arbitrate framework). Accordingly, with the exception of the provisions discussed above where the ACCC has explicitly noted that the Standard Access Terms proposed by CBH may not meet an appropriate minimum standard, the ACCC does not take a view on the appropriateness of the remaining provisions.

⁴⁷ Gavilon, *CBH Port Terminal Services Proposed Access Undertaking*, 19 May 2011, p.7

⁴⁸ AGEA, *Submission to the ACCC*, 20 May 2011, p.2; and Louis Dreyfus, *Submission to the ACCC’s Issues Paper*, 27 May 2011, p.2

7 Approach to pricing

7.1 CBH's Proposed 2011 Undertaking

The Proposed 2011 Undertaking submitted by CBH proposes to continue the 'publish-negotiate-arbitrate' approach contained in its 2009 undertaking, rather than, for example, adopting an ex ante pricing approach. Under the Proposed 2011 Undertaking, CBH is obliged to publish prices at a specified time under clause 6.1(a)(i). Access seekers that wish to obtain prices that differ from the offered Reference Prices can negotiate to do so. Should the access seeker and CBH not reach agreement on price through negotiation, they may submit to binding arbitration.

7.2 CBH and third-party submissions

A summary of all CBH's public submissions and submissions received from interested third parties in relation to CBH's approach to pricing is provided at Appendix 4 (section E).

7.3 ACCC view

The ACCC considers that the 2009 Undertakings are a relevant matter in the assessment of CBH's Proposed Undertaking, in accordance with s. 44ZZA(3)(e). Through the operation of the 2009 Undertakings, the ACCC has gained insight as to the effect of the Undertakings in practice. The ACCC considers that this experience is relevant to the assessment of CBH's Proposed 2011 Undertaking and the Proposed 2011 Undertakings of the other port terminal operators. Consideration of the 2009 Undertakings is also relevant to encouraging a consistent regulatory approach under the objects of Part IIIA.

As the Proposed 2011 Undertaking does not include ex ante prices, the ACCC is not, in this context, assessing the appropriateness of particular prices for port terminal services. However, the ACCC has considered the prices published under the 2009 Undertakings in order to determine whether the publish-negotiate-arbitrate approach to determining access prices has been effective, and whether it is appropriate that the Proposed 2011 Undertaking continue this approach. This is particularly relevant in the case of CBH due to the concerns raised in submissions regarding CBH's prices.

The ACCC has observed that the level and structure of published prices varies between port terminal operators. This is illustrated in Table 7.1 below, which compares various charges applied by each of the four port terminal operators during the 2010/11 season.

The ACCC notes that there are other charges applied by the other four port terminal operators not represented in Table 7.1, such as fees for stock transfer and blending. However, these charges generally relate to specific additional services and do not form part of the 'baseline' price for access to port terminal services. This 'baseline' price represents the minimum level of fees payable by any access seeker wishing to use port terminal services through any up-country supply chain. Due to the different pricing structures applied by the port terminal operator it is difficult to accurately compare a standard 'baseline' price across operators. However, the ACCC

understands that it would generally be comprised of the charges represented in Table 7.1.

Table 7.1: Comparison of port terminal pricing structures

Component	ABA ⁴⁹	GrainCorp ⁵⁰	Viterra ⁵¹	CBH ⁵²
Total export charge	N/A	N/A	N/A	\$17.10 ^a
Non-refundable booking fee	\$5.00	\$5.00	\$5.00	(\$10.00 ^b)
Receival by rail (road)	\$5.00 (\$5.50)	\$7.50 (\$9.25)	\$2.20 (\$3.40)	N/A
Additional charge for third party storage receivals	\$0.50	\$1.54	\$2.50 ^c	N/A
Storage fee	\$1.00 per week	\$1.10 per week	\$0.70+ per month ^d	N/A
Ship loading fee	\$5.50	\$2.70	\$10.00 ^e	N/A

^a Sum of Export fee and Marketer fee. Exporters must also pay an annual registration fee to access CBH's port terminal services.

^b Non-refundable component of total fee; sum of Marketer fee and Lost-capacity charge.

^c This differential applies to third party storage facilities approved by Viterra; a differential of approximately \$11.10 is applied to receivals from non-approved sites.

^d Charge varies throughout the year, up to \$3.00 per month in September.

^e Charge varies between ports.

Based on the prices published for the 2010/11 season under the 2009 Undertakings, the ACCC makes the following general observations regarding CBH's prices compared with those of the other port terminal operators:

- port terminal service pricing is provided in Western Australia on an aggregated basis, whereby CBH offers a fixed price amount covering a suite of services at port; in comparison, the other port terminal operators apply a series of itemised prices for various specific services
- while a direct comparison across operators is problematic, the overall level of port terminal prices charged by CBH does not appear to be high relative to the charges of other port operators in Australia.

Submissions by interested parties have raised concerns with the approach to pricing by CBH. In particular, interested parties have submitted that they are not able to

⁴⁹ ABA, 'Schedule A - 2010/11 Charges', in *Storage and Handling Agreement 2010/11*, December 2010, pp. 24-26. ABA does not currently have an accepted access undertaking; these prices are published voluntarily.

⁵⁰ GrainCorp, 'Annexure A: Bulk Wheat Port Terminal Services Fee Schedule 2010/11', in *GrainCorp 2010/2011 Bulk Wheat Port Terminal Services Agreement*, 30 August 2010.

⁵¹ Viterra, *Wheat Reference Prices – Port Terminal Services 2010/11*, 24 August 2010.

⁵² CBH, *Port Terminal Services Charge Schedule 2010/11*, September 2010.

determine the reasonableness of prices charged in the absence of a cost analysis and breakdown of those charges, and that this impacts on their level of clarity and certainty. Submissions expressed that there is currently no basis for assessing whether CBH's charges represent the cost of providing port terminal services,⁵³ and that CBH should properly cost individual services in order to allow comparison across services and providers.⁵⁴ However, it was also noted by Emerald that overall CBH's fees compare favourably with the other port terminal operators.⁵⁵

The concern was also raised that CBH could be engaging in cross-subsidisation of its up-country storage and transport network with its port terminal prices.⁵⁶

In assessing whether CBH's approach to pricing for port terminal services under the publish-negotiate-arbitrate framework is reasonable, the ACCC must have regard to the legislative criteria outlined in Appendix 2. This includes s. 44ZZA(3)(b), which requires the ACCC to have regard to the public interest, including the public interest in having competition in markets.

The promotion of competition in markets is also relevant given the regulatory context established by the WEMA. The ACCC considers that the WEMA, and the rationale for the inclusion of the access test in the statute are, under s. 44ZZA(3)(e), matters relevant to the current decision. In particular, the ACCC acknowledges that the intention of Parliament to promote competition in the export of bulk wheat has various dimensions, including:

- the promotion of competition between marketers for the acquisition of bulk wheat from growers
- the promotion of competition between exporters for the export of wheat from Australia
- the concomitant promotion of competition for associated products and services, such as supply chain services and grower services.⁵⁷

The ACCC further acknowledges Parliament's recognition that the promotion of competition in the form described may potentially be limited by anti-competitive conduct associated with port terminal facilities, and that the inclusion of the access test demonstrates a clear intention to legislate measures to mitigate the possibility of such conduct undermining the broader intent of the legislation.⁵⁸

⁵³ AGEA, *Submission to the ACCC Issues Paper*, 20 May 2011, p 3; Louis Dreyfus, *Response to ACCC Issues Paper*, 27 May 2011, p.1; PGA, *CBH Port Access Undertaking*, 27 May 2011, p.3-4; QRNF, *CBH proposed port terminal services undertaking*, 27 May 2011, p. 3; Wheat Exports Australia, *Public submission on ACCC Issues Paper*, 20 May 2011, p. 1

⁵⁴ Emerald, *Submission to the ACCC*, 27 May 2011, p 1; PGA, *CBH Port Access Undertaking*, 27 May 2011, p5; Wheat Exports Australia, *Public submission on ACCC Issues Paper*, 20 May 2011, p. 1

⁵⁵ Emerald, *Submission to the ACCC*, 27 May 2011, p.1

⁵⁶ QRNF, *CBH proposed port terminal services undertaking*, 27 May 2011, p.3; PGA, *CBH Port Access Undertaking*, 27 May 2011, p. 4.

⁵⁷ Explanatory Memorandum, *Wheat Export Marketing Bill 2008* (Cth)

⁵⁸ Explanatory Memorandum, *Wheat Export Marketing Bill 2008* (Cth)

The PC considered that in the ACCC's assessment of the Proposed 2011 Undertakings:

The ACCC could be more proactive in ensuring up-front that port fees and charges were based only on expenses related to port operations (as distinct from up-country transport and storage elements of the supply chain).⁵⁹

The ACCC notes that, while competition for up-country storage has emerged on the east coast, and to a lesser extent in South Australia, this is not the case in Western Australia. In addition, there are indications that problems are arising under the current access arrangements applying to CBH. Specifically, while competition for up-country storage has emerged since deregulation on the east coast, and to a lesser extent in South Australia, this is not the case in Western Australia. In addition, access seekers have not yet used the direct to port delivery method for wheat in Western Australia. Due to its vertically integrated position, CBH has the incentive to use its monopoly position at the port terminals to advantage its up-country storage and handling and transport services (i.e. CBH Grain).

However, the ACCC has not been provided with any evidence that CBH has cross subsidised its up-country services with charges for port terminal services or vice versa. In order to establish that cross subsidisation had occurred, it would need to be established that CBH had priced its up-country services below the long-run incremental cost of those services.

CBH has submitted that its port terminal charges do not cross subsidise its up-country storages or CBH Grain, and that if it did so it would be in breach of its non-discrimination obligations.⁶⁰ As previously noted, the overall level of CBH's port prices does not appear to be particularly high compared to the other port terminal operators.

The ACCC has considered several potential solutions to the concerns around CBH's approach to pricing, including an ex ante pricing regime, ring-fencing arrangements, and increased transparency measures. These potential approaches are discussed in the sections below.

7.3.1 Ex ante pricing regime

An ex ante pricing regime, as implemented in other industries such as the Hunter Valley rail network, would represent the most effective guard against monopoly pricing by CBH for port terminal services and cross subsidisation of CBH's vertically integrated up-country system. However, as discussed at section 7.3.3, while the approach that CBH has taken to its pricing under the existing undertaking has differed from the other BHCs in that it has been more aggregated, the overall level of prices does not appear to be high relative to charges of other port terminal operators in Australia.

The PC, in its inquiry report, stated that it:

⁵⁹ Productivity Commission, 2010, *Wheat Export Marketing Arrangements, Report no. 51*, Canberra, p. 192.

⁶⁰ CBH, *Submission to the ACCC*, 14 June 2011, p.11

is not attracted to heavy handed regulation for port terminals, particularly because of the potentially large costs involved.⁶¹

The ACCC agrees that requiring CBH to adopt an ex ante pricing approach in its Proposed 2011 Undertaking would impose significant regulatory costs on CBH which do not appear to be warranted at this time. In arriving at this view, the ACCC has taken into account the transitional state of the industry and the potential for further regulatory change.

7.3.2 Ring-fencing arrangements

Ring-fencing arrangements separating port terminal and up-country operations would limit CBH's ability to cross-subsidise between port terminal services and up-country services. However, it would also impose substantial regulatory costs on CBH. In addition, the ACCC notes that vertical integration has the potential to create legitimate efficiency gains, such as through shared administrative costs, and that ring-fencing arrangements may therefore reduce the efficiency of CBH's operations and increase its costs.

In the absence of evidence that CBH has engaged in cross-subsidisation, the ACCC does not consider that it is appropriate to require ring-fencing arrangements in order to prevent the possibility of cross-subsidisation. In addition, the ACCC notes that ring fencing would not address stakeholders' concerns regarding the need for increased transparency of prices.

The ACCC's view on the need for ring-fencing arrangements is discussed in Chapter 4.3.

7.3.3 Increased transparency measures

In the absence of more prescriptive pricing regulation or ring-fencing arrangements, the ACCC has considered options for strengthening the publish-negotiate-arbitrate framework proposed by CBH. Currently, the approach is supported by non-discrimination and no-hindering access clauses as discussed in Chapter 3.

In order for the publish-negotiate-arbitrate approach to be effective, access seekers must have sufficient information to negotiate prices which are mutually acceptable. As the access provider, CBH has an information advantage regarding the relative costs of providing various services.

Under the publish-negotiate-arbitrate approach, any party that is not satisfied with the Reference Prices may seek to negotiate alternative prices. The limited number of negotiations on fees and limited use of direct to port delivery under the 2009 Undertaking may indicate that CBH's terms are acceptable and that access seekers prefer to use CBH's up-country services. However, as previously mentioned, CBH has an information advantage in these negotiations, and therefore it may alternatively indicate that access seekers are not in a position to effectively negotiate different arrangements.

The ACCC considers that there are aspects of the publish-negotiate-arbitrate framework which could be strengthened in order to provide more transparency around

⁶¹ Productivity Commission, *Wheat Export Marketing Arrangements – inquiry report no.51*, June 30, 2010, p. 203

CBH's operations and thereby facilitate effective negotiation by access seekers. While additional transparency will not prevent cross-subsidisation, it will reduce the current uncertainty facing access seekers wishing to use alternative supply chains. Therefore, the ACCC considers it appropriate that the transparency of CBH's port pricing be improved.

The ACCC considers that the purpose of requiring publication of Reference Prices under the publish-negotiate-arbitrate approach is so that all access seekers are aware of the price of access to port terminal services irrespective of supply chain and grain origin. The ACCC notes that other port terminal operators currently provide more information around the variable costs incurred from different supply chains through their itemised prices as illustrated in Table 7.1. This establishes a baseline for negotiation around particular aspects and services.

Submissions indicate that there is uncertainty for users wishing to bring their grain direct to port without using CBH's up-country storage and transport services with respect to what services are required and how much those services will cost.⁶²

The ACCC notes that CBH's aggregated pricing has been developed in the current market context, in which 100 percent of bulk export grain passes through CBH's up-country storage, handling and transport services. Aggregated charges are more transparent only insofar as they apply to all access seekers; including those using different up-country supply chains. It is not clear what additional charges, if any, would apply should grain be delivered direct to port from a third party storage facility and third party freight. Such information represents the baseline for negotiations and is currently not clear. Access seekers are therefore at an informational disadvantage when it comes to negotiating for direct to port access.

The ACCC considers that the Proposed 2011 Undertaking as currently drafted is not appropriate, having regard to the interests of access seekers under s. 44ZZA(3)(c), as it does not require CBH to provide a sufficiently transparent baseline for negotiation of access prices. The ACCC considers that it would be appropriate for CBH to provide itemised prices in order to provide sufficient transparency for access seekers wishing to use alternative supply chains. Such itemised prices would encourage efficient use of the port terminal and should be broadly cost reflective.

However, the ACCC recognises that under the current market structure all grain is passed through CBH's up-country system. Pricing differentials based on increased costs of receiving grain from alternative supply chains would therefore be hypothetical, as they would depend on a number of variables which may currently be unknown in. In accordance with s. 44ZZA(3)(a), the ACCC also has regard to CBH's submission that developing itemised prices would require 'detailed cost analysis' which would impose significant costs on CBH.⁶³

- While the ACCC appreciates that not every potential eventuality can be accounted for, currently the information on pricing that is provided by CBH is insufficient, as access seekers wishing to use third-party supply chains do not have certainty

⁶² Emerald, *Submission to the ACCC*, 27 May 2011, p.1; Louis Dreyfus, *Response to ACCC Issues Paper*, 27 May 2011, p.1; Wheat Exports Australia, *Public submission on ACCC Issues Paper*, 20 May 2011, p.1.

⁶³ CBH, *Public submission to the ACCC*, 31 March 2011, pp. 9-10.

about whether differential charges would be applied and on what basis they would be developed.

An alternative to providing itemised prices would be for CBH to provide greater transparency around the characteristics of the services covered by the current prices. This would give greater certainty to access seekers wishing to use alternative supply chains, as they would be able to determine whether the alternative supply chain would impose any additional costs not included in the current prices, and thereby assess the reasonableness of any differentials CBH may wish to apply.

Accordingly, the ACCC considers that it would be appropriate for CBH to provide additional detail around the scenarios which are covered by the Reference Prices. In order to facilitate this, the ACCC considers it would be appropriate for CBH to include a requirement to that effect in the Proposed 2011 Undertaking.

In response to this issue, CBH has included a new clause 12.5 to the Revised Draft, which imposes an obligation on CBH to provide increased transparency in relation to its pricing for port terminal services. Clause 12.5 states that:

12.5 Reference Services

- (a) The Port Operator must, throughout the term of this Undertaking, publish in a prominent place on its website (in the same location as the shipping stem) details in relation to:
- the specific services covered by the charges set out in the Reference Prices including, where appropriate, the duration of those services; and
 - the criteria (if any) which must be satisfied in order to qualify for any charges set out in the Reference Prices.
- (b) For clarity:
- (i) an eligible Applicant may negotiate with the Port Operator in relation to the Reference Prices and the application of, or Port Terminal Services underpinning, those Reference Prices in accordance with clause 7.6. Any Dispute in relation to such negotiations may be resolved in accordance with clause 8; and
 - (j) the criteria referred to in clause 12.5(a)(ii) may include criteria for approved third party storage and/or transport.

The ACCC is of the preliminary view that the new clause 12.5 above adequately addresses the ACCC's concerns and is therefore appropriate.

7.3.4 Conclusion

The ACCC considers that CBH's approach to pricing under the Proposed 2011 Undertaking is not appropriate as it does not provide a sufficiently transparent baseline for effective negotiation with access seekers. However, following consideration of various approaches to address this concern, the ACCC is of the view that it is appropriate to maintain a relatively 'light-handed' approach to pricing in CBH's Proposed 2011 Undertaking and not require more prescriptive ex ante prices or ring fencing.

The inclusion of clause 12.5 in the Revised Draft, which requires CBH to provide additional information around the range of services covered by the Reference Prices and the criteria required to qualify for those prices, will provide enhanced transparency around the baseline prices and thereby provide a greater level of clarity and certainty for access seekers in negotiations. In particular, this enhanced transparency will assist access seekers that wish to use alternative up-country supply chains, as they will be in a better position to determine the reasonableness of any differentials CBH may wish to apply above the standard aggregated charge reflected in the current Reference Prices. The ACCC considers that this would be appropriate having regard to the interests of access seekers in accordance with s. 44ZZA(3)(c).

The ACCC also considers that increased transparency will reduce the uncertainty currently faced by access seekers wishing to use alternative supply chains in Western Australia, which is appropriate having regard to the public interest, including the public interest in having competition in markets in accordance with s. 44ZZA(3)(b).

Appendix 1: Industry Overview

Co-operative Bulk Handling Limited

CBH is a bulk handling company that was founded in 1933 as a grower owned cooperative. It currently has approximately 4650 shareholders that are grain growers in Western Australia.

CBH is vertically integrated across the grain industry. As well as its significant grain storage and logistics arm, it has a significant presence in grain trading through its subsidiary, CBH Grain Pty Ltd (**CBH Grain**). In Western Australia, CBH is the dominant supplier of grain storage and logistics services with an up-country storage network of 193 receival sites and storage capacity of around 20 million tonnes. CBH's effective storage capacity is greater than the largest recorded Western Australian grain harvest.

Recently, CBH has expanded into grain processing through investments in South East Asian flour mills. In addition, CBH owns and operates Esperance, Geraldton, Albany and Kwinana grain ports in Western Australia.

As set out in its memorandum of association, CBH's main objectives are to:

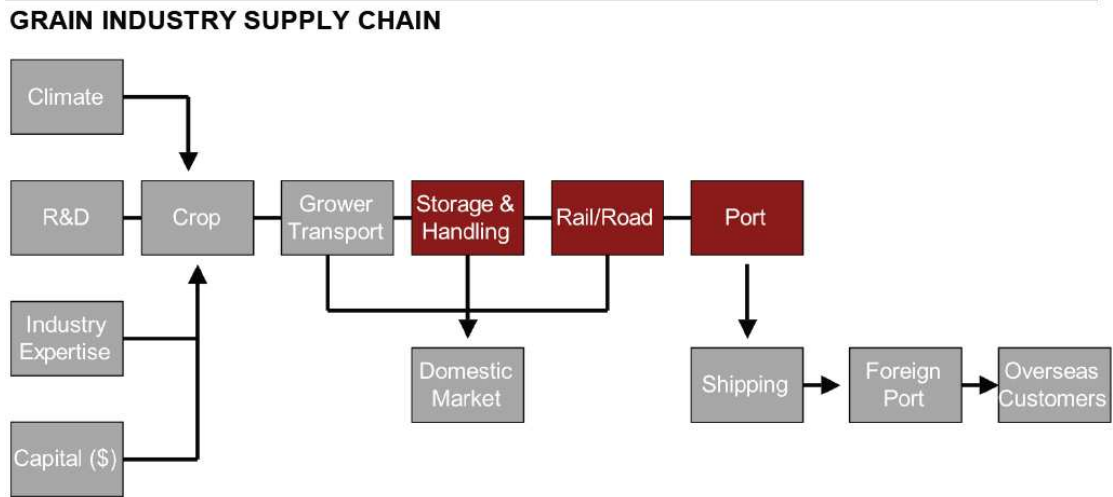
- establish, maintain and conduct any schemes or systems for handling wheat and/or other grain in bulk or otherwise
- receive, handle, transport, grade, classify and store wheat and or/other grain
- carry on either in conjunction with or separately from the above objectives, any business or businesses that may be conveniently carried on by CBH or may promote, assist or be conducive to the objectives of CBH.⁵²

Background information on the grain industry in Western Australia is presented below.

The wheat industry in Western Australia

Figure 1 sets out the grain supply chain for Western Australia and includes primary inputs (climate, research and development, industry expertise and capital), grain production, transportation (road, rail and ship), storage and handling and the domestic and foreign markets.

Figure 1: the grain supply chain for Western Australia

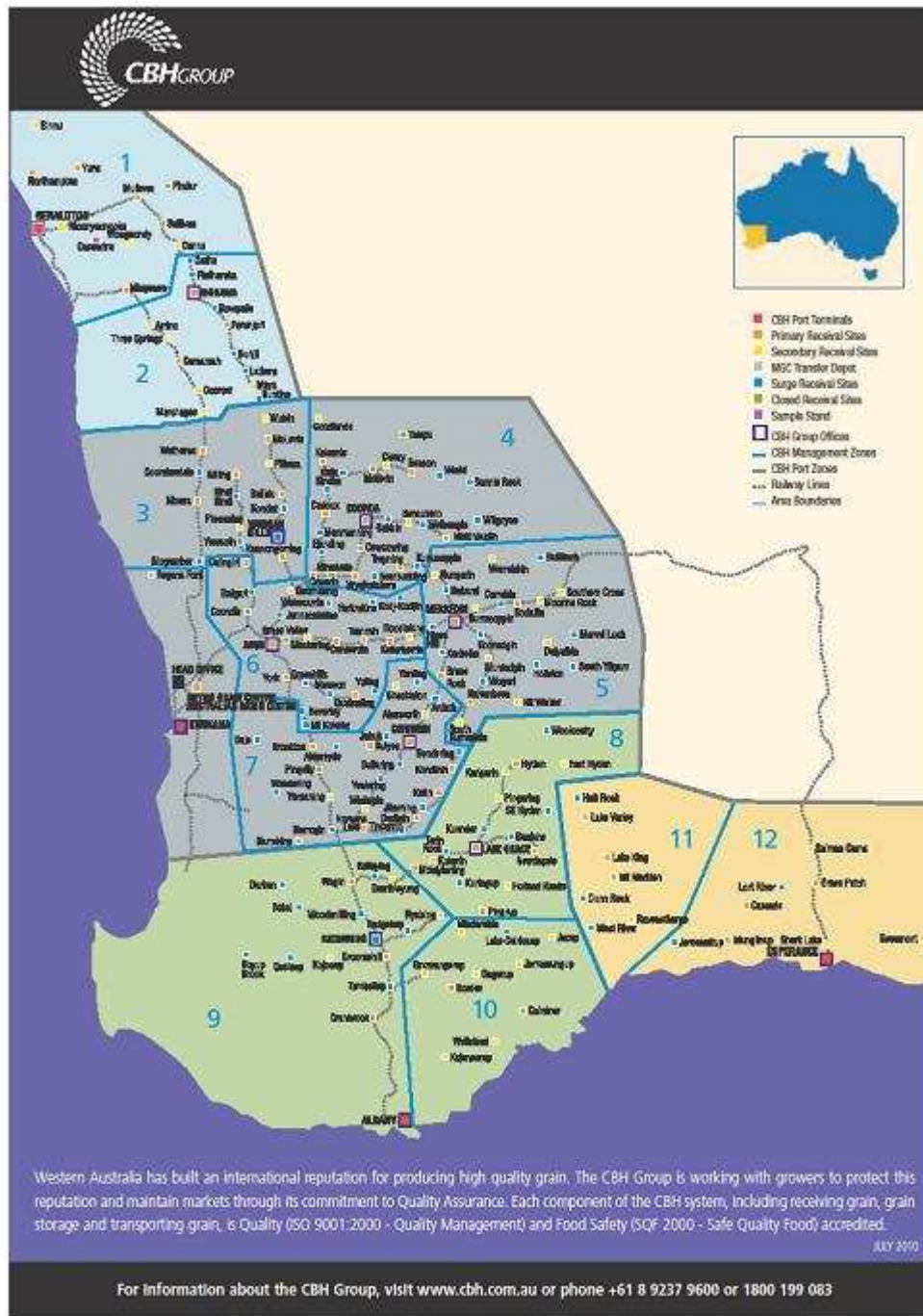


Source: Ernst & Young (2008)

Source: Ernst & Young, in Allen (2008)

Figure 2 provides an overview of CBH's storage, handling and port elevator network in Western Australia.

Figure 2: CBH's storage, handling and port elevator network in Western Australia



The Australian Bureau of Agricultural and Resource Economics and Sciences (ABARES) forecast that winter crop production in Western Australia for 2010/11 would reach an estimated total of 7.4mt, with wheat representing 4.7mt.⁶⁴

⁶⁴ ABARES (2011), *Australian Crop Report no.157*, 15 February 2011, pp.6 and 17

Grain production in Western Australia

Western Australia is typically Australia's largest grain producing state and has previously supplied over 50 per cent of all bulk wheat exported. However, Western Australia is forecast to account for a significantly lower proportion of export bulk wheat in 2010/11⁶⁵, primarily due to the prevailing poor harvest conditions.

The area planted to wheat in Western Australia in 2009/10 is estimated to have decreased slightly to 4.9 million hectares. Total wheat production was estimated at 8.1mt in 2009/10, which is around 0.1mt less than what was produced in the 2009/10 season. Wheat production for the 2010/11 season is forecast at 4.7mt, which represents a significant reduction (of around 3.4mt) on previous seasons.

Grain production in Western Australia is widely distributed and reliant on well coordinated storage, handling and transport links at harvest. The storage, handling and transport links are also integrated with port facilities.

Up-country storage and handling in Western Australia

In Western Australia, up-country receival sites are served by road, narrow gauge rail, and/or standard gauge rail. Of the 193 up-country receival sites throughout Western Australia, 42 are serviced exclusively by road. There are 28 'road to rail' sites, where ARG contracts road carriers to handle the first leg of the journey to port.⁶⁶ However, the Western Australian grain storage and handling system and the location of grain receival sites are built around the rail network.

Approximately 95 per cent of the Western Australian grain crop is exported through CBH's port facilities.⁶⁷ Grain receival, storage and handling infrastructure that is not controlled by CBH is made up of small locally based private operators and on-farm storage.

CBH's country grain receival points vary in size, capacity and capability, from:

- remote, small capacity 'satellite and secondary site' receival points served by road and narrow gauge rail
- larger 'primary sites' closer to ports and served by road, dual or standard gauge rail
- Metro Grain Centre, a unique purpose-built receival point and container loading facility, served by road and rail.

Transportation in Western Australia

The market for grain transport services involves competition between two modes of transport, road and rail. The average haul distance for Western Australian grain on rail is 290km, almost double the average haul from road sites. Of the total farm to port (and domestic consumer) task, rail currently accounts for approximately 70 per cent of all net tonne kilometres. However, road has been increasing its share of the overall

⁶⁵ ABARES (2011), Australian Crop Report no.157, 15 February 2011, pp.6 and 17

⁶⁶ CBH, Notification N93439, *Supporting Submission*, 2008, p. 23

⁶⁷ IBIS World Industry Report, *Grain Storage in Australia: I6701*, 18 October 2007, p. 19

Western Australian grain transport task over the past ten years and this is predicted to continue in the medium term.⁶⁸

Each of the four port zones has a different arrangement with regard to the transport infrastructure that exists:

- Kwinana port is served almost exclusively by rail. A dual gauge rail line operates from Northam to Kwinana.
- A single narrow gauge line running from Hyden serves the Albany port, which is also served by road access. However, the Albany terminal is placed on a narrow site that creates some restrictions on concurrent access by road and rail.
- Geraldton port is served by two main narrow gauge rail lines as well as main roads from Mullewa, Morawa and Mingenew. A high proportion of deliveries to the CBH storage facilities co-located with Geraldton port (approximately 20 per cent) are direct grower deliveries.
- Esperance is predominantly served by road with growers delivering 40 per cent of total production direct to storage facilities co-located with the port . Only 14 per cent of grain harvested in this zone is delivered to port by rail. Rail links are on standard gauge track mainly used for non-grain haulage purposes. There are two sites served by rail in this zone.

Rail

Rail transports 65 per cent of the export grain task in Western Australia.⁶⁹ The percentage of rail's share differs between the four grain growing 'zones'.

In December 2010, CBH announced plans to acquire its own rail assets in competition with ARG which, until now, has owned 100 percent of the, the above-rail (rolling-stock) components of the rail network in Western Australia . The below-rail components (standard and narrow gauge track) are controlled by Westnet Rail through a 49 year lease.

The Western Australia Grain Freight Network comprises about 2800 route kilometres of track in the south-west of Western Australia—consisting of about 500 km of standard gauge mainline and 2300 km of narrow gauge grain branch and main lines.⁷⁰

A 2008 review of Western Australia's grain freight network highlighted that grain movements on the standard gauge rail are highly efficient, benefiting from good terrain, heavy rail and direct route to port. Alternatively, the narrow gauge network requires lighter axle loads, has poorer gradients and is less direct to port.⁷²

⁶⁸ CBH, Notification N93439, *Supporting Submission*, 2008, p. 63

⁶⁹ Single Vision Grains Australia, *Transport Infrastructure Issues Paper Two*, January 2007, p. 8.

⁷⁰ Department of Planning and Infrastructure WA, *Submission to the NTC Rail Productivity Review Issues Paper (August 2008)*, October 2008, p. 7

Road

Approximately 35 per cent of export grain in Western Australia is transported by road.⁷¹ In addition to the rail network outlined above, the Western Australian grain freight network consists of a local government provided road feeder network and a state government provided feeder and parallel road network.⁷² As with rail, the percentage of road's share of the grain haulage task differs between grain growing regions of Western Australia. In general, the closer the growing region is to the port, the more likely it will be transported by road.

Port terminals

There are four export grain terminals in Western Australia—namely Kwinana, Geraldton, Albany and Esperance.

The Kwinana Grain Terminal is Western Australia's primary grain export facility, shipping more than half of the Western Australia's export grain. The terminal receives grain from nearly 120 country receival points. It can receive grain at 4000 tonnes per hour (tph) and has a current storage capacity of more than 1 mt. Ships can be loaded at 5000 tph.⁷³

Grain is delivered to the Geraldton Grain Terminal by road and rail from 23 receival points. The Terminal currently has a grain storage capacity of 295 000 tonnes and a ship loading speed of 2000 tonnes per hour.

Grain is received at the Albany Grain Terminal by road and rail from the 42 receival points in the Albany zone. The terminal can receive grain from road at 2000 tph and from rail at 800 tph. Ships can be loaded at 1600 tph.

Grain is mainly received at the Esperance Grain Terminal by road from CBH's 15 receival points in the Esperance zone. Only two receival points, Grass Patch and Salmon Gums, are connected by rail to the terminal.

⁷¹ Single Vision Grains Australia, *Transport Infrastructure Issues Paper Two*, January 2007, p. 8

⁷² Department of Planning and Infrastructure WA, *Submission to the NTC Rail Productivity Review Issues Paper (August 2008)*, October 2008, p. 7

⁷³ All the following statistical data on WA ports is derived from the CBH Group's website at <http://www.cbhoperations.com.au/grainopsindex.html>

Notified conduct

The ACCC notes that on 29 June 2011, it revoked the notification provided to CBH in 2008 in relation to elements of its grain storage, handling and transportation arrangements between its up-country receival sites and its ports, effective 1 May 2012.. CBH has sought a review of that decision by the Australian Competition Tribunal (**Tribunal**). CBH is able to continue to engage in the notified conduct while the application for review is considered but will not be able to engage in the conduct after 1 May 2012 if the Tribunal affirms the ACCC's decision to revoke the notification.

Industry structure – CBH submissions

Co-operative Bulk Handling Limited 2009 submission

CBH provided submissions on a range of issues and responses to a range of questions posed by the ACCC during the 2009 assessment process. Their submissions and responses included the following main points:

- According to CBH, the wheat export supply chain in Western Australia is characterised by:
 - a large number of growers, who determine what crops and crop varieties they will grow and the persons to whom they will sell those crops
 - an incumbent storage and handling supplier (CBH) that is owned in a cooperative formed by those growers
 - a number of competing logistics services providers
 - a large number of grain marketers, many of whom are substantial vertically integrated multi-national corporations which compete for sales of wheat at a global level and own flour milling businesses.⁷⁴

The ACCC's Issues Paper and information request to CBH included questions on industry structure. CBH's responses to some of these questions are set out below.

- CBH considers that there is limited ability for bulk wheat Exporters to switch between WA ports. There is even less ability to switch between any WA port and ports in South Australia, Victoria and New South Wales. CBH does not comment in relation to switching between ports on the Eastern seaboard.
- Once grain has been acquired, it is likely that the port of departure for export has already been determined. However, for the reasons outlined above, this fact does not mean that there is no substitution or competitive tension between the services offered by different port terminal operators. The locus of this aspect of competition is at the point of acquisition of grain.

⁷⁴ CBH, *Submission to the ACCC*, 14 April 2009, para 4, p. 20

- CBH does not apply different treatment, terms or conditions in relation to grain based solely on its place of origin. Different States may have different crop results in any given year, so if exporters seek a particular grade of wheat, that grade may be more available or cheaper in one State than another. So, to the ability of Exporters to respond to higher port terminal costs in a port area by acquiring grain in another area may be limited by the cost and availability of grain in that area.
- in Western Australia it is possible to construct additional infrastructure outside the port terminal including non-port terminal services, which will have a constraining effect on port terminals. These developments, such as intermodal links and storage facilities to directly alleviate the creation of “bottlenecks” in the storage and transport elements of the supply chain, indirectly alleviate the “bottlenecks” at port terminal facilities. For example, the Western Australian government is considering the development of a new intermodal freight terminal in Kwinana which will include an increased capacity for containerised export grain in addition to the existing intermodal terminal at Forrestfield.
- It is possible for Exporters to consider access to or investment in these intermodal terminals as a means of enhancing their ability to maximise efficiency in their own supply chains upstream of the port terminal facilities themselves.
- There is some degree of substitutability at the Albany, Bunbury and Geraldton ports where facilities exist for the export of woodchips.⁷⁵

CBH also makes the following points about the differences between the grain industry in WA and in other states:

CBH’s Access Undertaking is offered in a substantially different operational and legal context from what exists in other States. The main differences are:

- CBH is required to comply with provisions of the Bulk Handling Act 1967 (WA) (Bulk Handling Act), which require CBH to perform certain functions and establish a grain entitlement framework which defines CBH’s obligation to Outturn grain on the request of warrant holders;
- CBH deals with a higher proportion of export grain and a lower proportion of domestic grain;
- CBH owns a higher proportion of the country storage facilities in Western Australia;

⁷⁵ CBH, *Further submission to the ACCC*, 29 June 2009, pp. 35-37

- in part as a consequence of the above factors, CBH successfully introduced a fully integrated supply chain solution, Grain Express and notified the relevant conduct to the ACCC; and
- the ACCC did not reject the notification and recognised the efficiencies generated by Grain Express.

Because of these factors, the interaction between the Port Terminal Service offered under the Undertaking and the Grain Express Service requires particular focus. For the reasons stated in this part of the submission, CBH considers that the substantial efficiencies generated in the Grain Express project can and should be preserved following the introduction of the Undertaking.⁷⁶

CBH goes on to make the following submissions:

The WA export grain supply chain

The Western Australian supply chain for export grain comprises the following functions:

- production – Growers produce grain on medium and large scale farms in the Western Australian grain belt;
- transport from farm gate to silo – Growers arrange for road transport between the farm gate and CBH’s country Receival Points;
- sale/acquisition of grain to Exporter – Growers choose from a range of options in selling their grain. Exporters acquire grain at the Receival Point;
- trading and accumulation – grain, like most other commodities, is traded and accumulated in a secondary market, as traders seek to derive value or manage risk by acquiring, accumulating and trading grain;
- storage and handling – grain is unloaded at Receival Points, sampled, analysed, weighed, graded, stored and fumigated then loaded for transport;
- bulk freight – Exporters and CBH contract with rail and road providers to transport grain from the Receival Point to the port, the container loading facilities (such as those at the Metro Grain Centre (MGC)) or the domestic market, as instructed by traders or domestic end users;
- port storage and handling – bulk grain is accumulated for export at four major port terminals in Western Australia (Kwinana, Geraldton, Albany and Esperance) and loaded onto ships;
- container loading & handling – grain may be loaded into containers for export or shipment to domestic suppliers;

⁷⁶ CBH, *Further submission to the ACCC*, 29 June 2009, p. 4

- export marketing – Exporters contract with overseas grain buyers and arrange for shipping of bulk or container grain to the required foreign ports.

CBH as a bulk handler serving Growers located across a large and largely remote area has developed its receival and storage infrastructure network on the basis that receival and storage of grain is maintained at sites local to producers in up-country locations. As grain is required for export, it is transported from the up-country sites and accumulated for loading onto ships at the port terminals.

Storage of grain (except for the purposes of transitory accumulation of cargoes of grain for loading onto ships) is maintained at up-country Receival Points, rather than port terminals, as land acquisition, and storage and receival infrastructure construction and maintenance costs are in general terms significantly lower at the numerous up-country sites rather than the limited availability premium location port sites.

The Western Australian grain belt is roughly divided into four port zones, each served by the Geraldton port, the Kwinana port, the Albany port and the Esperance port.

The grain supply chain is largely geared toward grain exports, and the structure of storage and handling, transport and marketing arrangements reflects this.

Under the current arrangements, the flow of information, instructions and documents is complex, and varies according to the type of grain, and the identity and approach of Exporters.⁷⁷

CBH makes the following submissions about grain entitlement and custody:

CBH offers grain receival services for particular grains at particular sites. Not all sites may be geared to receive all grains or grades of grain at all times during the harvest. CBH configures its sites ahead of harvest, using a combination of the crop estimate information provided by Growers, close consultation with Grower elected bin representatives and the information provided by export Customers (including forward shipping plans). For example, a particular area may be projected to yield predominantly barley and canola at one stage of the harvest, and then yield wheat at a later stage. The site serving that area may therefore be set up to initially receive barley and canola, and then wheat – but that site may not offer a service to receive lupins. Growers in that area who have harvested lupins will be told in advance the location of the nearest site offering to receive lupins.

A truckload of grain, once delivered to storage, is inevitably commingled with other loads of similar grade grain already received into storage. In this way, grain has some similarity to gas or fluids. It is

⁷⁷ CBH, *Further submission to the ACCC*, 29 June 2009, pp. 5-6.

neither efficient, nor possible, for a warrant holder to insist that CBH deliver the same grain to the warrant holder at port as was delivered by the Grower at the country Receiving Point. The Bulk Handling Act and Bulk Handling Regulations recognise this in two ways:

- an Exporter is not entitled to delivery of the same grain that was delivered to CBH by a Grower. Instead, as section 44 provides, the warrant holder is entitled to “receive an equivalent weight of grain of the type corresponding with, and of a grade at least equal to, that in respect of which the warrant was issued”.
- Regulation 20 provides that before 1 March in any year, CBH shall deliver grain to the point nominated by the warrant holder. It also states that CBH “is not obliged to deliver grain from the particular point of receipt as shown on the warrant”.

Any requirement for separation creates the inherent potential for lost capacity and inefficiency. This is due to the space required between parcels in horizontal or bulkhead storage, and the lost capacity of silo storage. This lost capacity in CBH’s storage facilities is referred to as “loss by division”. It represents a substantial potential inefficiency (or potentially an inability to cope with the entire harvest) for CBH if its infrastructure is under-utilised due to unnecessary division. As is discussed below in relation to transport, any ability of exporters to require the movement of particular parcels of grain to occur in an ad-hoc or uncoordinated fashion increases the incidence of capacity waste, particularly in country sites. This cost is ultimately borne by Growers.⁷⁸

CBH submits that many market participants fundamentally confuse or misstate the true nature of their rights to grain in the possession of CBH. For example, the AGEA Submission states, at 3.24:

“BHCs’ storage and handling agreements allow BHCs to move AWEs’ grain between sites without permission while requiring that AWEs bear the costs\ and delay associated with the unauthorised movement. An example where this has occurred is referred to in one of AGEA’s Confidential Submissions.”

Leaving aside the inherent unfairness of making such an allegation in public but concealing the purported detail and evidence from the person against whom it is made, this statement is based on a false premise. When an Exporter acquires grain from a Grower and that grain is in CBH’s custody, the grain is commingled with other grain of an equivalent grade. At that point, it is impossible to assert control over the movement of any specific grain. Rather, an Exporter may assert the right to have grain of an equivalent grade and quantity returned at the nominated destination site upon request. Commingled stacks of grain are self-evidently essential to the efficiency of the supply chain because,

⁷⁸CBH, *Further submission to the ACCC*, 29 June 2009, pp. 5-6

during harvest, CBH is receiving a constant flow of grain deliveries from Growers and each Grower may delay making a decision in relation to the marketing of the grain delivered until they are ready to, or required to, sell it. Segregating the grain according to the identity of the exporter at up-country sites would render harvest operations unworkable and create substantial reduction in storage capacity, or “loss by division” because multiple stacks take substantially greater storage capacity than a single stack. The same efficiency considerations apply to the use of transport infrastructure in moving grain to port. If Exporters are able to require grain movements to occur in terms of their claims to ownership of specific grain parcels, what results is ad hoc, uncoordinated movement of small volumes of differentiated grain. As the Synergies Economic Consulting Report in support of the Grain Express notification concludes, efficiencies from unit train (i.e. homogenous cargo) grain movements are substantial and valuable.

Finally, the ability to move grain toward port at its discretion during harvest enables CBH to keep country sites “open”. If CBH had to wait for instructions from warrant holders to move grain, country sites would fill up earlier in the harvest and deliveries to those sites would be refused. This would add cost and inconvenience for Growers who would have to drive further to an “open” site to deliver grain and it reduces the efficiency of the entire supply chain. These efficiency issues were compounded when the WEMA deregulated export bulk wheat exporting. Faced with the largest export task and geographically dispersed infrastructure, CBH had to find a way to coordinate grain movements efficiently.⁷⁹

The following diagrams summarise the ownership, movement and custody of grain in Grain Express.

⁷⁹ CBH, *Further submission to the ACCC*, 29 June 2009, pp. 9-10

Figure 1. - Ownership, custody and movement in Grain Express: Example 1 –
 Grower chooses price at Destination Site

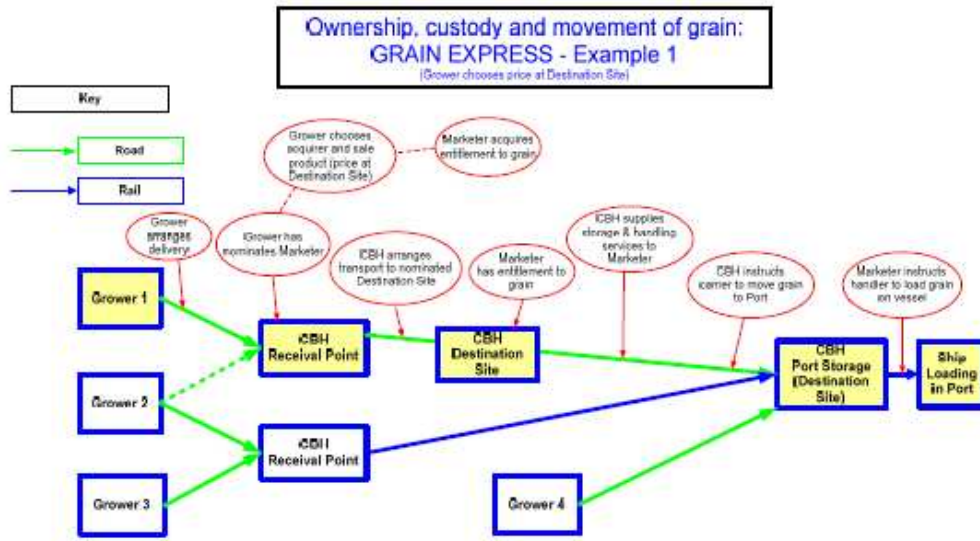
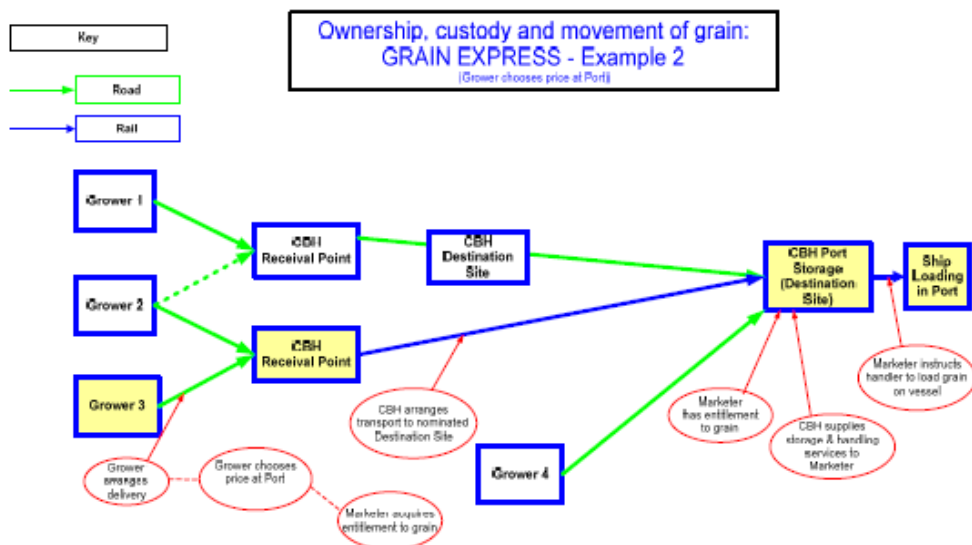


Figure 2. - Ownership, custody and movement in Grain Express: Example 2 –
 Grower chooses price at Port



Co-operative Bulk Handling 2011 submission

CBH refers to the content of its submissions in 2009 and has made no further submissions in relation to the Western Australian grain industry.

Regulatory regimes

In addition to its obligations under the Memorandum, the Articles and the Cooperative Act, CBH submits that it has a number of obligations under the *Bulk Handling Act 1967 (WA)* (Bulk Handling Act) and *Bulk Handling Act Regulations 1967 (WA)* (Bulk Handling Regulations). These obligations, as highlighted in CBH’s Port Terminal Services Access Undertaking, are duplicated below:

- CBH must receive all grain tendered to it that meets the requisite standards: Bulk Handling Act, section 42, and Bulk Handling Regulations, regulation 13
- CBH must determine the grade of the grain tendered to it and inform the person tendering the grain of CBH's determination: Bulk Handling Act, sections 6A and 43(2)
- on receipt of the grain tendered to it, CBH must cause the grain to be weighed and issue a weighbridge ticket for the grain to the person tendering the grain: Bulk Handling Act, section 36(1)
- CBH must issue a warrant for the grain tendered to it: Bulk Handling Act, section 37(1)
- CBH must deliver the grain to the receipt point or port in the State as required by the person who is entitled to the grain under the warrant: Bulk Handling Regulations, regulation 20
- The holder of the warrant issued under Bulk Handling Act section 37(1) must take delivery of the grain by 30 September next following the receipt of the grain by CBH: Bulk Handling Act, section 45(1)
- If the holder of the warrant issued under Bulk Handling Act section 37(1) does not take delivery of the grain by 30 September next, CBH can sell the grain, deduct its costs from the funds realised from the sale and pay the net proceeds from the sale to the warrant holder: Bulk Handling Act, section 45(2), and Bulk Handling Regulations, regulation 26
- CBH must insure all grain in its custody or under its control: Bulk Handling Act, section 11.⁸⁰

Sections 35A(a)-(d) of the *Bulk Handling Act 1967 (WA)* also place restrictions on the manner in which CBH can use its income or property. These sections provide that:

- (b) all income and property of the Company [that is, CBH] shall be applied, subject to this Act, towards the objects of the Company as set out in clause 2 of its memorandum of association and not otherwise.
- (c) the directors of the Company may set aside out of the profits of the Company such sums as they think fit as reserves for application, in the discretion of those directors, in meeting contingencies or in achieving any other purpose that is, under the memorandum or articles of association of the Company but subject to this Act, a proper purpose for the application of profits of the Company;
- (d) where any reserves set aside pursuant to paragraph (c) are not immediately required for application in accordance with that paragraph, they may, in the discretion of the directors of the Company, be applied in the business of the

⁸⁰ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, pp. 7-8.

Company or in furthering, subject to this Act, the objects of the Company as set out in clause 2 of its memorandum of association, paying off or reducing some or all of its debentures for the time being outstanding, or liquidating any other indebtedness of the Company or they may be invested in such investments as those directors think fit.

CBH submits that Section 19 of the Bulk Handling Act is especially relevant in relation to port access. This section provides that:

Subject to this Act and the regulations, the Company shall allow a person, on payment of the prescribed charges, the use of any bulk handling facilities and equipment controlled by it at ports in the State.

The Productivity Commission inquiry

The Productivity Commission (PC) conducted an inquiry into wheat export marketing arrangements, publishing its final report on 1 July 2010. In its final report, the PC stated that access to port terminal facilities represented the most significant issue in its inquiry, and that the ability of wheat exporters to access port terminal facilities is critical to the success of the deregulated market.⁸¹

The PC identified several characteristics particular to the wheat export industry in Western Australia:

- *Almost all wheat is exported in bulk.* However, the bulk supply chain competes to some extent with exports in containers.⁸² CBH is the dominant provider of bulk storage services and faces little or not competition from independent storage providers.⁸³
- *Bulk wheat storage may face competition from on-farm storage.* Although on-farm storage comprises a relatively small proportion of total storage capacity in Western Australia (i.e. CBH's storage capacity is approximately 20 mt and on-farm storage is 2.6 mt) competition may occur between CBH's storage system and on-farm storage.⁸⁴ The trend toward on-farm storage began prior to deregulation, but it is likely that a deregulated environment gives increased incentives for growers to use on-farm storage.⁸⁵ Since deregulation, uneconomic bulk storage facilities have been closed down due to the increase in site-based costing.⁸⁶
- *There is no competition in the provision of port services.* The bulk grain export terminals operated by CBH in Western Australia are not in close proximity to another other alternative grain ports.⁸⁷
- *The share of wheat transported by road has increased relative to rail transport.* Prior to deregulation, 65-70 per cent of export wheat was transported by rail in

⁸¹ Productivity Commission (2010) *Wheat Export Marketing Arrangements*, Report no. 51, p. 173.

⁸² Productivity Commission (2010) *Wheat Export Marketing Arrangements*, Report no. 51, p. 68.

⁸³ Productivity Commission (2010) *Wheat Export Marketing Arrangements*, Report no. 51, p. 67-68.

⁸⁴ Productivity Commission (2010) *Wheat Export Marketing Arrangements*, Report no. 51, p. 69.

⁸⁵ Productivity Commission (2010) *Wheat Export Marketing Arrangements*, Report no. 51, p. 259.

⁸⁶ Productivity Commission (2010) *Wheat Export Marketing Arrangements*, Report no. 51, pp. 261-2.

⁸⁷ Productivity Commission (2010) *Wheat Export Marketing Arrangements*, Report no. 51, p. 68.

Western Australia, excluding road transport from farm to bulk receival sites. Since then it is likely that the share of grain transported by road has risen.⁸⁸ This is partly a result of the privatisation of rail and deregulation of the wheat export industry, as:

- the cost efficiency of road compared with rail transport has improved due to investment in road infrastructure and increased capacity of heavy vehicles.
- competition in the wheat export market puts increased pressure on peak periods, resulting in increased use of trucks in conjunction with rail transport.
- more cost reflective freight rates are being set across the different segments of the network. This has meant that in some areas road transport is now more cost effective.⁸⁹
- *Investment in transport infrastructure is likely to be required in the future.* The Productivity Commission suggested that a thorough cost-benefit analysis, taking into account the economic and social costs and benefits of road and rail use, is required.⁹⁰

⁸⁸ Productivity Commission (2010) *Wheat Export Marketing Arrangements*, Report no. 51, p. 257.

⁸⁹ Productivity Commission (2010) *Wheat Export Marketing Arrangements*, Report no. 51, pp. 263-5.

⁹⁰ Productivity Commission (2010) *Wheat Export Marketing Arrangements*, Report no. 51, p. 251.

Appendix 2: Legislative Framework

Access test

The *Wheat Export Marketing Act 2008* (Cth) (**WEMA**) came into effect on 1 July 2008. The WEMA and associated transitional legislation replaced the Export Wheat Commission with a new statutory body, Wheat Exports Australia (**WEA**), which 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.⁹¹

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

Part of the ‘access test’ is linked to Part IIIA of the *Competition and Consumer Act 2010* (Cth) (**Act**), (previously the *Trade Practices Act 1974* (Cth)). 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 Act, and that undertaking relates to the provision to accredited wheat exporters of access to the port terminal service for purposes relating to the export of wheat; or
- there is in force a decision 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 the export of wheat.

Under the ‘access test’ providers of port terminal services must also comply with ‘continuous disclosure rules’ set out in s. 24(4) of the WEMA. 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 (i.e. the PTRs); and
- a statement, updated each business day, 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).⁹²

⁹¹ The relevant transitional legislation is the *Wheat Export Marketing (Repeal and Consequential Amendments) Act 2008* (Cth).

⁹² See subsection 24(4) of the WEMA for detail about the continuous disclosure rules.

CBH has submitted its Proposed 2011 Undertaking to the ACCC pursuant to Part IIIA of the CCA for the purpose of satisfying the access test.

Productivity Commission inquiry

The Productivity Commission (PC) completed an inquiry into the wheat export marketing arrangements following the deregulation of the industry. The PC 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 CCA supported by mandatory disclosure and a voluntary code of conduct.

The full report is available on the PC website at:

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

As at the date of release of this Draft Decision, the Government has not yet responded to the PC's report.

Legal test for accepting an access undertaking under Part IIIA

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 s. 44V);
- access undertakings and access codes (under ss. 44ZZA and 44ZZAA respectively); and
- decision that a State or Territory access regime is effective (under s. 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 s. 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 s. 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 s. 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, s. 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
- 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.

The objects of Part IIIA and the public interest

The ACCC considers it appropriate, in having regard to the matters in s. 44ZZA(3)(aa) and (b) of Part IIIA, to have some regard to the competitive environment in which the services the subject of the undertaking are provided. That is, s. 44ZZA(3)(aa), by referring to the objects of Part IIIA, recognises the promotion of the economically efficient operation of, use of and investment in infrastructure, thereby promoting competition in upstream and downstream markets, while s. 44ZZA(3)(b) refers to the public interest, including the public interest in having competition in markets (whether or not in Australia).

The ACCC considers that economic efficiency has three components.

- Productive efficiency refers to the efficient use of resources within each firm such that all goods and services are produced using the least cost combination of inputs.
- Allocative efficiency refers to the efficient allocation of resources across the economy such that the goods and services that are produced in the economy are the ones most valued by consumers. It also refers to the distribution of production costs amongst firms within an industry to minimise industry-wide costs.
- Dynamic efficiency refers to the efficient deployment of resources between present and future uses such that the welfare of society is maximised over time. Dynamic efficiency incorporates efficiencies flowing from innovation leading to the development of new services, or improvements in production techniques.

Other matters

The ACCC considers that the regulatory scheme established by the WEMA, and the rationale for the inclusion of the access test in the statute are, under s. 44ZZA(3)(e), matters relevant to the current decision.

In particular, the ACCC acknowledges Parliament's intention in introducing the access test, which was to ensure that accredited exporters provide fair and transparent access to their facilities to other accredited exporters. As the Explanatory Memorandum states, the WEMA access test is:

...intended to ensure that accredited exporters that own or operate port terminal facilities provide fair and transparent access to their facilities to other accredited exporters. The test aims to avoid regional monopolies unfairly controlling

infrastructure necessary to export wheat in bulk quantities, to the detriment of other accredited exporters.⁹³

Further, in the second reading speech, the minister stated that ‘unless all exporters can obtain access to these critical facilities on fair and reasonable terms then one of the major objectives of the policy could be frustrated.’⁹⁴

The ACCC also acknowledges that Parliament’s intention to promote competition in the export of bulk wheat has various dimensions, including:

- the promotion of competition between marketers for the acquisition of bulk wheat from growers
- the promotion of competition between exporters for the export of wheat from Australia
- the concomitant promotion of competition for associated products and services, such as supply chain services and grower services.

The ACCC further acknowledges Parliament’s recognition that the promotion of competition in the form described may potentially be limited by anti-competitive conduct associated with port terminal facilities, and that the inclusion of the access test demonstrates a clear intention to legislate measures to mitigate the possibility of such conduct undermining the broader intent of the legislation.

The ACCC considers that the 2009 Undertakings are a relevant matter in the assessment of CBH’s Proposed Undertaking, per s. 44ZZA(3)(e). Through the operation of the 2009 Undertakings, the ACCC has gained insight as to the effect of the Undertakings in practice. The ACCC considers that this experience is relevant to the assessment of CBH’s Proposed 2011 Undertaking and the Proposed 2011 Undertakings of the other port terminal operators. Further, consideration of the 2009 Undertakings is relevant to encouraging a consistent regulatory approach under the objects of Part IIIA.

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 CCA, including to the procedures set out in Part IIIA for the assessment of access undertakings.

Timeframes for ACCC decisions and stopping the clock

Subsection 44ZZBC(1) of the CCA now provides that the ACCC must make a decision on an access undertaking application within the period of 180 days starting at the start of 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 s. 44ZZBE of the CCA within the expected period, it is taken, immediately after the end of the expected period, to have:

⁹³ Explanatory Memorandum, *Wheat Export Marketing Bill 2008*, p. 31.

⁹⁴ Parliamentary Debates, *Wheat Export Marketing Bill 2008*, 29 May 2008, p 3860.

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

The changes to the CCA also introduce provisions for ‘stopping the clock’ that mean certain time periods are not taken into account when determining the expected period (see s. 44ZZBC(2)). In particular, the ACCC may disregard a period:

- by written agreement between the ACCC and the access provider, and such agreement must be published: s. 44ZZBC(4) & (5)
- if the ACCC gives a notice under s. 44ZZBCA(1) requesting information in relation to the application
- if a notice is published under s. 44ZZBD(1) inviting public submissions in relation to the application
- a decision is published under s. 44ZZCB(4) deferring consideration of whether to accept the access undertaking, in whole or in part, while the ACCC arbitrates an access dispute.

Amendment notices

Subsection 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
- the ACCC’s reasons for the proposed amendment or amendments
- 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 s. 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 s. 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: subsection 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:
s. 44ZZAAA(6).

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

Other changes

Information requests

Subsection 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.

Fixed principles

Section 44ZZAAB of the CCA now provides that an access undertaking given to the ACCC under s. 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: s. 44ZZAAB(3).

Appendix 3: Key features of each regional wheat market

Up-country supply chains

The key up-country supply chain characteristics (and differences) that exist in each of the three regions is summarised in Table 1 below:

Table 1: Up-country supply chain characteristics by region

Region	Characteristics
East Coast	<p>GrainCorp holds significant market share in the provision of wheat storage and handling services in New South Wales, Victoria and QLD.</p> <p>Alternative options to storage and handling services provided by the two BHCs are:</p> <ul style="list-style-type: none"> ▪ on-farm storage (which makes up a relatively greater proportion of total storage capacity than in other regions)⁹⁵; ▪ a wider choice of independent storage and transport providers compared to other regions ▪ limited overlap of GrainCorp's and Viterra's up-country storage networks.
South Australia	<p>Viterra holds a significant market share in the provision of wheat storage and handling services in south Australia with some alternative options provided by:</p> <ul style="list-style-type: none"> ▪ on-farm storage ▪ independent bulk handlers.
Western Australia	<p>The provision of bulk wheat storage and handling services is dominated by CBH.</p> <p>There is some on-farm storage, a significant proportion of which is for on-farm use, but no competition from independent bulk handlers.</p>

Source: Productivity Commission Inquiry Report No. 51: Wheat Export Marketing Arrangements, 1 July 2010, pp. 67-68.

As Table 1 illustrates, there appears to be greater use of alternatives to the up-country grain storage and handling services provided on the East Coast as compared to both South Australia and Western Australia.

Domestic and export wheat

The proportion of wheat that is supplied into the Australian domestic market relative to the proportion that is exported overseas varies significantly between the three regions, as illustrated in Table 2 below:

⁹⁵ The PC Report observed that the larger stock of on-farm storage in the East Coast may be attributable to the relative importance of the domestic market and longer history of choice in domestic marketing: Productivity Commission *Inquiry Report No. 51: Wheat Export Marketing Arrangements*, 1 July 2010, p. 68.

Table 2: Domestic and export wheat supply characteristics by region

Region	Characteristics
East Coast	<p>While a substantial volume of wheat is exported from the East Coast, a significant proportion of wheat is also consumed domestically. The domestic market is therefore a significant alternative to bulk wheat export market for grain growers on the east coast.</p> <p>Also, containerised export wheat volumes on the East Coast have expanded in recent years. In particular, the Essential Services Commission (ESC) noted that containerised wheat exports in Victoria and southern New South Wales expanded to represent a significant proportion of total exports from those areas.⁹⁶ Containerised grain exports are therefore an alternative to bulk exports on the east coast.</p>
South Australia	<p>Almost all wheat in South Australia is exported, with only a relatively small proportion supplied into the domestic market. The domestic market is therefore a less significant alternative to the export market for SA growers than is the case for growers on the east coast.</p> <p>Almost all wheat in South Australia is exported in bulk with limited export of wheat in containers and bags.</p>
Western Australia	<p>Almost all wheat in Western Australia is exported in bulk (90 per cent), with only a relatively small proportion supplied into the domestic market (5 per cent) and the balance exported in containers.</p>

Source: Source: Productivity Commission *Inquiry Report No. 51: Wheat Export Marketing Arrangements*, 1 July 2010, pp. 56 and 68.

As Table 2 illustrates, there is greater use of alternatives to the bulk wheat supply chain by growers on the East Coast region, as compared to both South Australia and Western Australia

Port terminal facilities

The relative proximity of port terminals operated by different bulk handlers in particular regions is a key determinant of the extent to which those ports terminals compete with nearby ports for the through put of wheat. Table 3 below provides an overview the proximity of grain elevation ports.

Table 3: competition between port terminals by region

Region	Characteristics
East Coast	<p>Some port terminals in New South Wales, Victoria and the easternmost parts of South Australia operated by GrainCorp, ABA and Viterra are in relatively close proximity and may provide alternatives for some wheat throughput.</p> <p>The Essential Services Commission, in its review of grain handling and storage arrangements in Victoria, also noted that there is a “significant degree of competitive substitutability” between the ports terminals operated by ABA and GrainCorp.⁹⁷</p>
South Australia	<p>Viterra operates all wheat port terminals in South Australia (the Eyre Peninsula) with no feasible alternatives, with the possible exception of Port of Portland in far west Victoria.</p>

⁹⁶ Essential Services Commission, *Review of Victorian Grain Handling and Storage Access Regime Final Report*, May 2009, pp. 39-40: The ESC noted that, on average, over the period from 2001/02 to 2007/08, containerised grain exports represented approximately one quarter of all grain exports in Victoria and southern NSW.

⁹⁷ Essential Services Commission, *Review of Victorian Grain Handling and Storage Access Regime, Final Report*, May 2009, p. 48.

Region	Characteristics
Western Australia	CBH operates all wheat port terminals in Western Australia and the ACCC is unaware of any immediate alternative port terminal facility for use by grain exporters.

Source: Productivity Commission Inquiry Report No. 51: Wheat Export Marketing Arrangements, 1 July 2010, pg 68.

Appendix 4: Summary of CBH and third party submissions

A summary of the submissions received from CBH and other interested third parties in relation to CBH's Proposed 2011 Undertaking is provided below.

A. The Publish-Negotiate-Arbitrate framework

A.1 CBH's submissions on the publish-negotiate-arbitrate framework

CBH's submission accompanying the Proposed 2011 Undertaking – 31 March 2011

CBH submits that it has retained the publish-negotiate-arbitrate structure of the 2009 Undertaking in the Proposed 2011 Undertaking because:

- the case for adopting a heavier handed approach is weak given that the benefits of even the existing lighter-handed level of regulation are likely to be outweighed by the costs in the longer-term;
- there is no evidence of access seekers being denied access to services provided by the use of CBH's port facilities. Although there have been some minor complaints in relation to operational performance, there have been no pricing disputes and relatively few negotiations. Customers are large, well resourced, experienced grain marketing companies that operate worldwide and would 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 the opportunity to derive monopoly rents or to preferentially self-deal due to the combined effect of factors including published reference prices, the requirement to publish the shipping stem, CBH's non-profit cooperative structure and CBH's existing ring-fencing arrangements.

CBH submits that the framework for access negotiations remains substantially unchanged in the Proposed 2011 Undertaking, except for amendments made to improve clarity.

CBH notes that the Proposed 2011 Undertaking required it to publish the Standard Access terms (which includes Reference Prices) and enables access seekers to obtain access on those terms unless otherwise agreed. CBH argues that this provides certainty for access seekers while preserving the flexibility to negotiate different outcomes if they so choose.

CBH notes that it is required to negotiate in good faith with access seekers under the Proposed 2011 Undertaking.

Section 44ZZBCA request for information: CBH – 13 May 2011

The ACCC issued an information request to CBH on 6 May 2011. CBH provided its response on 13 May 2011.

CBH submits that it is not aware of any impediments to the secondary market and 'is concerned that port terminal capacity is allocated in the most efficient manner possible in

order to most effectively use the port'.⁹⁸ CBH further notes that it has not provided its approval for a transfer on the secondary market.

CBH's supplementary submission – 18 May 2011

In response to the ACCC's Issues Paper, CBH provided a submission dated 18 May 2011.

Under the publish-negotiate-arbitrate model, CBH submits that:

- Access seekers were able to obtain access to CBH's port terminal services on acceptable terms during the 2009/10 and 2010/11 seasons with no formal disputes or substantial complaints or breaches of the 2009 Undertaking or PTRs;
- CBH port terminals have operated efficiently in the 2009/10 and 2010/11 seasons without recurrence of the congestion issues experienced in 2009.

CBH submits that the publish-negotiate-arbitrate model of the Proposed Undertaking is not materially different from the 2009 Undertaking. CBH notes that under the 2009 Undertaking:

- There is no evidence that access seekers have been denied access to CBH's port terminal services;
- There were no formal disputes (and relatively few negotiations) or substantial complaints or breaches of the 2009 Undertaking;
- There is no evidence that CBH has favoured its related marketing entity, CBH Grain;
- The combined effect of the requirement to publish reference prices, to publish the shipping stem, and CBH's non-profit cooperative structure mean that CBH has neither the incentive nor opportunity to derived monopoly rents or preferentially self-deal.

CBH's response to the ACCC's Issues Paper and third party submissions received – 14 June 2011

In response to the ACCC's Issues Paper and submissions received from third parties, CBH provided a detailed submission dated 14 June 2011.

CBH notes that there has been little comment on this aspect of the Proposed 2011 Undertaking.

CBH addresses AGEA's submission that there is need for more measurable performance benchmarks by noting that this comment is inconsistent with AGEA's submission that the publish-negotiate-arbitrate structure has worked well. CBH further submits that this is also inconsistent with CBH's history of no access disputes and the evidence put forward by other exporters such as Emerald and Plum Grove. CBH also notes that Louis Dreyfus supports the publish-negotiate-arbitrate structure.

⁹⁸ CBH, *Response to ACCC information request*, 13 May 2011, p.9

A.2 Third party submissions on the publish-negotiate-arbitrate framework

Australian Grain Exporter's Association

The Australian Grain Exporter's Association (AGEA) believes that the publish-negotiate-arbitrate model has worked in relation to port terminal services. However, AGEA notes that there is no counterfactual against which to compare whether access seekers have assisted access seekers.

AGEA argues that more measurable performance benchmarks are needed against which CBH can be held accountable. Currently, AGEA notes that it is difficult to initiate arbitration under the Proposed 2011 Undertaking since benchmarks are not clear and measurable.⁹⁹

Emerald

Emerald submits that the publish-negotiate-arbitrate approach has not been tested to its full potential given its recent introduction, but also that:

The threat of arbitration has encouraged CBH to act in a reasonable manner in its negotiations with access seekers.¹⁰⁰

Emerald submits that CBH has:

not abused its position as a monopoly provider under the 2009 Undertaking and...that its fees compare favourably to other exporting states' bulk handlers.¹⁰¹

Louis Dreyfus

Louis Dreyfus submits that the publish-negotiate-arbitrate approach is appropriate. However, Louis Dreyfus also notes that it is not clear whether the publish-negotiate-arbitrate has assisted access seekers since there is no counterfactual situation to judge it against.

Plum Grove

Plum Grove submits that it was able to access CBH Port Terminal services on acceptable terms and with no apparent disadvantage to other exporters.

B. The capacity allocation model

B.1 CBH's submissions on capacity allocation issues

CBH's submission accompanying the Proposed 2011 Undertaking – 31 March 2011

CBH submits that it has varied its PTRs in line with two of the recommendations made by the PC, namely:

- the PTRs were varied in September 2010 to provide that capacity is to be nominated to a supply chain no later than 30 days prior to the first day of the Shipping Window; and

⁹⁹ AGEA, *Submission to the ACCC's Issues Paper*, 20 May 2011, p.3

¹⁰⁰ Emerald, *Submission to the ACCC*, 26 May 2011, p.1

¹⁰¹ Emerald, *Submission to the ACCC*, 26 May 2011, p.1

- the Standard Access Terms were varied in September 2010 to provide for simple flat fees for capacity transfers on the secondary market, rather than tonnage based-fees. CBH notes that other port operators do not permit the transfer of capacity.

CBH, however, did not accept the PC’s finding that there is a link between Grain Express and the port capacity auction system that precludes customers opting for an alternative supply chain.

CBH notes the PC’s suggestion that port capacity should be determined without reference to the land-based supply chain. This approach is inefficient and unrealistic as it may result in users paying for port capacity that the supply chain cannot deliver. CBH notes that it already offers more capacity than could be used. However, CBH recognises that it should not offer port capacity to Grain Express customers that is not equally available to other customers.

CBH notes that its port capacity allocation system operates equally regardless of the supply chain that brought it to port – all capacity is available to users.

CBH rejects the assertion that surge capacity discriminates in favour of Grain Express customers not using Grain Express may still access surge capacity and will not be charged surge fees if they do not use the CBH supply chain – the contractual nexus to charge for surge capacity would not be present if the CBH supply chain is not used.

The proposed two-tiered capacity allocation system

CBH submits that it has proposed the two-tiered capacity allocation system for a range of reasons, including that there are some difficulties associated with use of the auction system, because:

- (i) auctions incur substantial costs;
- (ii) demand can fluctuate markedly from year to year as a result of crop size and global market conditions;
- (iii) in low-demand years, auctions are regarded by participants as unnecessary;
- (iv) participants are unable to acquire certainty of capacity until the auctions are held, which inhibits longer term planning for both marketers and CBH;
- (v) the auction system has resulted in maximum accumulation periods that are shorter than would be possible with a more flexible system; and
- (vi) reliance on the auction system has reduced flexibility in port capacity management, because users have been confined to “hard” shipping windows, with limited ability to manage risk.¹⁰²

CBH expressed concern that the difficulties associated with the auction system ‘may be causing marketers to prefer to do business in other States over Western Australia’.¹⁰³

Additionally, CBH submits that a high proportion of port terminal capacity:

has been used by a relatively small number of exporters, each of which use capacity year-round and have the ability to generate substantial efficiencies from longer-term cargo accumulation and shipping planning;¹⁰⁴

¹⁰² CBH, *Public submission to the ACCC: Port Terminal Service Undertaking*, 31 March 2011, p.13

¹⁰³ CBH, *Public submission to the ACCC: Port Terminal Service Undertaking*, 31 March 2011, p.14

CBH states that there are short-comings with first-come first-served systems, as evidenced by the harvest in New South Wales, Victoria and South Australia. In this regard, CBH agrees with the PC Report, which stated that:

...auctions should be the preferred method of allocating port terminal slots in situations where there is likely to be shifting peak load issues (that is, periods of excess demand given capacity constraints).¹⁰⁵

However, while CBH seeks to preserve the auction system in relation to non-BLC, it submits that the proposed two-tiered system is intended to address the alleged problems with the auction system and to allow large volume exporters to acquire long-term capacity to provide an enhanced level of certainty in planning for such customers, for whom auctions 'represent a late, uncertain process for planning annual shipping'.¹⁰⁶ CBH further submits that the proportion of total capacity that is to be offered as auction capacity (at least 40 per cent) would be sufficient to meet the demand of the smaller exporters. On this basis, CBH submits that the two-tiered system balances the interests of large exporters and smaller exporters and meets the objective set out in sections 44AAZ(3)(a) and (c) of the CCA.¹⁰⁷

Additionally, CBH submits that:

...certainty of BLC will allow CBH to ensure that costs and shipping are spread out over the year to retain the lowest cost supply chain for participants in the Western Australian Grain Supply Chain.¹⁰⁸

CBH further submits that the two-tiered system will have 'eligibility' criteria that will ensure that BLC is only available to exporters 'capable of using that capacity reliably and efficiently'.¹⁰⁹ CBH considers that only large volume exporters that are able to plan vessel arrivals over the full year and have a high degree of assurance of using substantial amounts of capacity should be able to access BLC. On this basis, CBH has proposed that to be eligible for BLC, an access seeker must have a forecast shipment schedule in excess of eight hundred thousand (800,000) metric tonnes in the next shipping year.¹¹⁰

CBH submits that, contrary to larger volume customers, annual planning is unnecessary for smaller exporters, which are unable to flexibly deploy large grain stocks between cargoes or flexibly deploy vessels to use capacity. CBH submits, therefore, that smaller volume customers do not need to access BLC and will have access to capacity sufficient to meet their respective demands through auction capacity.¹¹¹

Under the proposed two-tiered system, BLC will be made available to eligible exporters prior to the commencement of auctions for non-BLC. For example, the Rule 3.4(g) of the PTRs states that negotiations for BLC must be concluded before 14 September of each year, which is prior to the 28 September date set for auctions to commence in the 2010/11 year.

CBH submits that the price for BLC will be set at the starting price of auction capacity. CBH further submits that the two-tiered system will not discriminate in favour of large volume exporters, mainly since:

¹⁰⁴ CBH, *Public submission to the ACCC: Port Terminal Service Undertaking*, 31 March 2011, p.13

¹⁰⁵ Productivity Commission, *Wheat Export Marketing Arrangements – inquiry report no.51*, 1 July 2010, p.220

¹⁰⁶ CBH, *Public submission to the ACCC*, 31 March 2011, p.14

¹⁰⁷ *Ibid.*, p.18

¹⁰⁸ *Ibid.*, p.14

¹⁰⁹ *Ibid.*, p.14

¹¹⁰ *Ibid.*, p.14

¹¹¹ *Ibid.*, p.14

- The take-or-pay basis of BLC introduces a risk that acquirers of auction capacity do not assume given they are able to transfer capacity on the secondary market, which BLC exporters cannot.
- Due to the operation of the auction premium rebate system, exporters that acquire auction capacity are rebated a sum that results in them paying little or no net premium, which approximates the outcome for the use of BLC.
- The ‘lost capacity fee’ charged in relation to BLC will be \$10 compared to \$7 for auction capacity.

CBH submits that the proposed two-tiered system will include safeguards to prevent exporters with BLC from ‘blocking out’ any given month and that capacity remains available on a non-discriminatory basis; this will also ensure that the two-tiered system will also not raise barriers to entry or expansion. CBH notes that the take-or-pay basis of BLC will also serve as a disincentive to over-booking of the shipping stem.

CBH submits that port terminal services (including BLC) would not be supplied on the condition that exporters also acquire other services from CBH. Rather than having a single agreement covering all services, CBH will allow the acquisition of both auction and BLC to be governed under the PTRs and Standard Access Terms.

Section 44ZZBCA request for information: CBH – 13 May 2011

The ACCC issued an information request to CBH on 6 May 2011. CBH provided its response on 13 May 2011.

CBH submits that its references in submissions made to the ACCC to:

- ‘Supply Chain Agreement’ in the definitions and at clause 3.4(b) of the PTRs, and
- ‘PTSA’ in clause 4.2 of the PTRs

are typographical errors and should instead refer to ‘an agreement for the supply of Port Terminal Services’.

CBH submits that access seekers will not be required to acquire other services from CBH in order to access BLC. Further in this regard, CBH states that:

...any agreement for BLC *will not* be offered on the condition that exporters will not, or will not except to a limited extent, acquire supply chain services (including grain transportation services), in whole or in part, from an alternative supplier.¹¹²

CBH submits that BLC will be provided on the terms set out in the PTRs and will be governed by the rules contained therein.

CBH states that, where an eligible customer does not use BLC, it will be liable for the lost capacity fee (\$10). The unused capacity will then be ‘sterilised’ by CBH and cannot be transferred to another exporter. In limited circumstances, such as where the exporter ceases to trade, CBH may seek to make the lost capacity available to other exporters.

CBH submits that the 800,000mt forecast shipment schedule criterion for eligibility for BLC will be determined on the basis of information provided by the access seeker and historical data.

¹¹² CBH, *Public response to ACCC information request*, 13 May 2011, p. 3.

CBH distinguishes between BLC and auction capacity as different products with different terms designed to serve different segments of the market (i.e. a different class of customer). CBH submits that, rather than being discriminatory in favour of large volume exporters, the two-tiered system represents:

...two distinct products, each of which have different terms and conditions and are tailored to different classes of access seekers.¹¹³

CBH submits that all port capacity is on a take-or-pay basis given that auction capacity has an estimated lost capacity fee of \$7/tonne, while BLC has an estimated lost capacity fee of \$10/tonne. CBH notes that:

The higher take or pay charge for BLC introduces discipline into the system by ensuring that large users who acquire BLC only acquire the capacity that they need.¹¹⁴

CBH submits that allowing the trading of BLC would remove the discipline imposed by the higher lost capacity fee. Additionally, since BLC is acquired prior to auction capacity, CBH submits that:

- there may be an incentive for a user to acquire excess capacity (since they would be able to trade away any excess capacity) to the detriment of the auction process (and therefore smaller users); and
- there may be an incentive to strategically acquire excess capacity in order to 'lock out' smaller users and drive up the price of capacity in the secondary market.¹¹⁵

CBH notes that this issue may not arise where there is sufficient capacity at port. CBH notes, however, that should the ACCC revoke the Grain Express notified conduct, capacity at CBH's ports is likely to diminish.

CBH submits that it is open to considering a

...limited process to allow BLC to be reallocated if enough notice is given. The notice period would have to be reasonable in order to prevent the potential gaming.¹¹⁶

CBH notes that there may be some systemic difficulties in reallocating between BLC and auction capacity, such as a lack of alignment on shipping windows between the two types of capacity.

CBH submits that eligible customers will not have an incentive to hoard BLC since it is made available on a take-or-pay basis, which imposes a pricing discipline on access seekers. Additionally, CBH notes that since eligibility for BLC is based on volumes shipped, customers are unlikely to hoard capacity that they are not intending to use given that they may not be deemed eligible in the next year.

CBH submits that it has no interest in restricting access to CBH's ports – CBH's cooperative structure means that it exists to provide services to its members (who are also growers and therefore users of port terminal services). Additionally, CBH notes that 'a port relies on throughput to survive and restricting access 'would make no economic sense'.¹¹⁷

¹¹³ CBH, *Public response to ACCC information request*, 13 May 2011, p.7

¹¹⁴ *Ibid.*, p.5

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*, p.6

CBH's supplementary submission – 18 May 2011

In response to the ACCC's Issues Paper, CBH provided a submission dated 18 May 2011.

Definition of available capacity

CBH notes that clause 1.1 of the PTRs define 'capacity' as:

the tonnage of grain capable of being exported through the Port Operator's 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 year.

CBH submits that it defines port capacity by reference to the supply chain that is able to bring grain to port. CBH states that

It is unrealistic and misleading to offer to the market capacity that CBH knows cannot be used because the supply chain will be unable to transport it to the port (whether through Grain Express or otherwise).¹¹⁸

CBH notes that, to date, its approach to capacity management has not resulted in any shortage of available capacity.

CBH's response to the ACCC's Issues Paper and third party submissions received – 14 June 2011

In response to the ACCC's Issues Paper and submissions received from third parties, CBH provided a detailed submission dated 14 June 2011.

The BLC System

CBH submits that the submissions received by the ACCC to date indicate that the majority of grain exporters either support the two-tiered system or are not opposed. CBH notes that objections were only raised by exporters that ship less than 10 per cent of total grain moving through CBH's ports. CBH states that the proposed two-tiered system is 'consistent with the interests of the overwhelming majority of exporters'.¹¹⁹ Additionally, the proposed two-tiered system is consistent with the legitimate business interests of CBH, which is relevant to the ACCC's consideration under 44ZZA(3)(a) of the CCA.

CBH submits that it is conscious of concerns from smaller exporters and that the two-tiered system has 'safeguards to ensure that small or prospective users are protected and retain an ability to export wheat through the port terminals'.¹²⁰

CBH submits that it is not in its interest to reduce throughput at its ports. Rather, CBH states that the two-tiered system 'provides increased flexibility for CBH and will allow it to increase efficiencies and port throughput'.¹²¹

CBH submits that the concerns expressed in third party submissions are based on 'misconceptions' around the two-tiered system – these are addressed below.

¹¹⁸ CBH, *Public submission to the ACCC*, 18 May 2011 submission, p.4

¹¹⁹ CBH, *Public submission in response to third party submissions*, 14 June 2011, p.3

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

The two-tiered system disadvantages smaller traders

CBH referred to third party submissions [WEA, Gaviion, QR, Louis Dreyfus] that indicated the view that the two-tiered system is to the detriment of smaller exporters. CBH submits that it has designed the two-tiered system ‘to ensure that smaller access seekers are not disadvantaged’ and that it:

Provides for significant efficiencies which enable CBH to keep its port prices low and capacity maximised for the benefit of all users.¹²²

CBH submits that auction capacity is not an inferior product relative to BLC and that third party submissions alleging that BLC customers will obtain ‘premium slots’ are false. Auction capacity is simply a different product which is suitable for smaller exporters. Although BLC is allocated first, it is capped at 60% of capacity (with a 20% cap for an individual customer and 10% cap on usage of entitlement per month).

CBH submits that, since its ports will be less constrained (due to the operation of the two-tiered system), smaller exporters are less likely to be locked out.

There are some aspects of BLC that are less favourable than auction capacity, namely:

- auction capacity is allocated later in the year when harvest tonnages are better known – there is less seasonal risk associated with the acquisition of auction capacity;
- the lost capacity allocation charge for BLC with higher at \$10/tonne compared to \$7/tonne for auction capacity;
- the restrictions on shipment size that apply to BLC customers.

Leveraging BLC to affect auction capacity

CBH referred to third party submissions [AGEA] suggesting that large exporters can purchase the full 60% entitlement for BLC (such that no capacity is rolled into auction capacity) and then bid up the 40% auction capacity ‘knowing that they can spread the auction premium over the total of their tonnes’.¹²³ CBH submits that this scenario relies on two false assumptions, as below:

- CBH’s port capacity has not been constrained under the 2009 Undertakings and is not likely to become so, subject to the potential revocation of the Grain Express notified conduct, which will ‘almost certainly shrink port capacity in the short term’¹²⁴; and
- exporters are unlikely to purchase a significant volume of BLC on a take-or-pay basis (with a higher \$10/tonne lost capacity fee) together with auction capacity (with auction premiums attached) that they do not intend to use, given that the potential benefits of engaging in such conduct would be outweighed by the costs.

CBH referred to third party submissions [Louis Dreyfus] suggesting that eligible customers would effectively be able to ‘block out’ port capacity during particular periods. CBH submitted that BLC is restricted on a monthly basis and that

¹²² CBH, *Public submission in response to third party submissions*, 14 June 2011, p.4

¹²³ AGEA, *Submission to the ACCC Issues Paper*, 20 May 2011, p.4

¹²⁴ CBH, *Submission in response to third party submissions*, 14 June 2011, p.4

The BLC 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.¹²⁵

Cost of not using capacity

CBH referred to third party submissions [Plum Grove] that the base load lost capacity fees should be rebated to the auction system. CBH submits that this would assist BLC customers to hoard capacity, since the hoarded BLC would be replaced by auction capacity subsidised by the lost capacity fee.

CBH referred to third party submissions [AGEA, Louis Dreyfus] that any lost capacity fee payable by CBH Grain should be rebated to port users and not CBH. CBH submits that this is a 'very onerous disincentive against providing capacity to CBH Grain' and would:

- force CBH to subsidise its competitors every time it did not use capacity; and
- incentivise CBH to be more conservative when acquiring capacity than it should be, thereby decreasing competition and penalising growers.

CBH notes that when CBH Grain is obliged to pay the lost capacity fee, it reduces the capital available to CBH Grain to purchase grain. Additionally, CBH states that:

If CBH were merely to 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.¹²⁶

CBH further submits that the proposals raised by third parties (as above):

...penalises CBH for being vertically integrated by depriving it of income, requiring its subsidiary to subsidise its subsidiary's competitors and reduce the revenue of CBH's subsidiary.¹²⁷

Transfer of BLC

CBH referred to third party submissions [Gavilon and QR] that indicated that BLC should be transferrable. However, CBH noted that this view was not universal and that some other exporters [Emerald and AGEA] support the restriction on trading BLC in recognition of the potential abuses. CBH has provided detailed reasons for why it considers BLC should not be tradeable in its submission dated 18 May 2011.

CBH states that it is 'agreeable' to a 'limited process to allow BLC to be reallocated if enough notice is given'.¹²⁸

Efficiency

CBH referred to third party submissions [Gavilon] that suggested that the two-tiered system may result in less efficient large exporters being allocated capacity. CBH submits that there is no evidence that larger exporters are less efficient. Additionally, the two-tiered system is intended to introduce efficiency to the port and not to individual exporters. Rather than

¹²⁵ CBH, *Submission in response to third party submissions*, 14 June 2011, p.5

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ Ibid., p.6

reducing efficiency, the two-tiered system ‘allows CBH to better plan the port, smooth delivery schedules and therefore increase port efficiency – something which is recognised by some third parties making submissions.

Eligibility for BLC

CBH makes reference to a number of third party submissions and provides its comments in relation to each, as below:

- Emerald supports the two-tiered system and believes the eligibility requirements are appropriate;
- Plum Grove’s objection to the two-tiered system appears to be based on its view that the eligibility requirement of 800,000 tonnes is too high and should be reduced to 240,000 tonnes. It appears likely to support a two-tiered system if the eligibility requirement is reduced;
- AGEA states that the eligibility requirements are ‘subjective’. CBH submits that this is not the case and the criteria are ‘clear and objective’ (i.e. an exporter must have a forecast schedule of 800,000 tonnes).
- AGEA and Louis Dreyfus state that CBH has ‘sole discretion’ over what exporters are eligible. CBH submits this is misleading as it will determine eligibility on the basis of the criteria in the PTRs – any disputes as to the application of the criteria may be disputed under the PTRs.
- AGEA queries how a new or emerging exporter would get access to BLC. CBH submits that the new or emerging exporter would simply need a credible forecast schedule of 800,000 tonnes.
- CBH does not consider that the information provided by WEA in relation to the likely number of eligible exporters is accurate.
- CBH submits that it would not discriminate between customers who have previously been and remain eligible, and customers who are eligible but have not previously acquired BLC (i.e. both would be eligible).
- Louis Dreyfus states that the two-tiered system is discriminatory and contrary to the objectives of the undertaking. CBH refutes this assertion, noting that the same terms are offered to all base load customers, in the same way that the same terms are offered to all base load customers. CBH notes that ‘The objective in the Undertaking is non-discrimination as between *customers* not as between *services*’.¹²⁹

CBH’s legitimate interests

CBH referred to submissions from third parties [Gavilon] that the two-tiered system is not in the legitimate interests of CBH. CBH submits that it is in the best position to determine its own legitimate interests.

¹²⁹ CBH, *Submission in response to third party submissions*, 14 June 2011, p.7

CBH referred to submissions from third parties [Gavilon] that the two-tiered system will not give CBH certainty over its up-country logistics. CBH submits that the two-tiered system is defined to increase efficiencies at the port and not up-country services.

Notice of the two-tiered system

CBH referred to submissions from third parties [Gavilon] that the two-tiered system should have been subject to industry consultation. CBH notes that the process for approving the Proposed 2011 Undertaking provides ample time and opportunity for Gavilon to make submissions on the system.

Definition of available capacity

Although CBH notes the submissions made by Gavilon, Louis Dreyfus PGA and Emerald, which all took issue with the definition of ‘available capacity’, it also notes that none of those submissions address the reasons why CBH defines capacity as it does. CBH states that it is ‘unrealistic and misleading’ to offer capacity to the market that it knows cannot be used due to inability of the supply chain to deliver grain to port.

CBH notes that if it defined capacity based on port capacity alone, customers would acquire capacity that cannot be fulfilled. CBH submits that planned capacity management is needed to avoid the delays experienced in early 2009. CBH further notes that it has offered in over 1.5 million tonnes of capacity in excess of the highest previous annual exports.

CBH considers that its method of defining capacity is ‘appropriate and transparent as it is in line with the principles set out in clause 3.2 of the PTRs. Further, CBH submits that it ‘would not artificially restrict capacity as it would reduce port throughput and harm growers (who are also CBH members)’ – CBH’s track record shows that capacity offered has always exceeded supply¹³⁰

CBH states that the submissions from AGEA and Louis Dreyfus, which suggest that capacity based on CBH logistics supply, are erroneous. CBH states that it determines capacity by estimating what *any* supply chain can bring to port; this approach has not resulted in any shortage of capacity.

CBH refers to submissions from Louis Dreyfus that CBH artificially constrain port capacity and forcing parties wishing to use direct to port access arrangements to pay excessive charges in the form of auction premiums. CBH submits that there is no basis nor evidence for that CBH has ever engaged in such conduct. CBH reiterates that it offered more port capacity than have ever been exported from Western Australia in a season. CBH further notes that it receives no financial benefit from auction premiums, which may be perceived as a reduced return to CBH’s members (i.e. growers).

CBH notes that Emerald supports CBH’s determination of capacity, although it also argues that CBH should provide a monthly update on performance and changes to assumptions to the capacity model. CBH queries whether this monthly update is necessary given that CBH indicates the spare capacity available following auction and notified parties when it becomes available.

¹³⁰ CBH, *Submission in response to third party submissions*, 14 June 2011, p.8

CBH refers to a submission from Gavilon that CBH does not have the requisite oversight of the harvest or transport task across the whole supply chain to determine capacity. CBH notes that, as storage operator, it has access to historical data relating to shipping, forecast of crop yields, harvest deliveries, carryover stock, transport capacity and all parties' forecast shipments. CBH notes that no party other than CBH Grain has provided CBH with its forecast annual shipments despite this being a requirement under the PTRs.

Under the two-tiered system, CBH submits that it 'will be able to better plan port operations than at any time in its history'¹³¹ and will allow enable CBH to increase port capacity.

CBH submits that to require the ACCC to approve the capacity set by CBH is 'unnecessary and administratively unworkable'.¹³²

CBH refers to Gavilon's submissions that CBH should provide a rebate to all customers in the event that it overestimates capacity. CBH notes that such a requirement would provide an incentive for CBH to define capacity conservatively.

CBH rejects PGA's submissions that the mechanism to define capacity is intended to 'protect marketers from bad decisions'. CBH submits that the mechanism 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'.¹³³

CBH notes that it has historically provided information on the quantity of Annual Capacity it will make available during the auctions phase.

CBH refers to submissions from QRNF, which suggest that the PTRs link the port to CBH's logistics supply chain. CBH notes that this is incorrect and reiterates that it determines capacity with reference to the entire supply chain, not just CBH's logistics.

CBH explains that the PTRs differentiate between CBH supply chain agreements (GSA) and other forms of supply chain agreement, since CBH will have the relevant information relating to grain that moves through CBH's system.

CBH refers to QRNF's submissions that the requirement to nominate whether capacity is to be serviced under a GSA potentially limits the effectiveness of the secondary market. CBH notes that it is difficult to process the transfer of grain without knowledge of the supply chain that will deliver it.

CBH's response to the issues raised at meetings between the ACCC and CBH – 18 July 2011

BLC – the rationale

CBH submit that the auction system set out in its 31 March 2011 submission (paragraphs 5.7 and 5.8) was impeding the efficient operation of the port and did not provide enough flexibility for larger exporters. Therefore CBH designed a hybrid system using the auction system while providing a BLC system.

BLC – the benefits

CBH states that the BLC system provides benefits such as:

- Smoother allocation of larger exporter's shipments across the year.

¹³¹ CBH, *Submission in response to third party submissions*, 14 June 2011, p. 9.

¹³² *Ibid.*, p. 9

¹³³ *Ibid.*, p. 9.

- Narrower shipping windows for BLC customers.
- The ability to allocate a shipping window to another port with less demand by agreement.
- Better forward planning by CBH.
- Additional flexibility when large exporters are to due to narrow windows.
- Large users will get increased flexibility from greater certainty of capacity allocation across the year.
- Small exporters will get greater capacity during peak times as larger exporters smooth their exports across the year.

BLC – how determined

CBH submits that a maximum of 60 per cent of capacity is to be allocated as BLC to the largest shippers. A minimum of 40 per cent is to be allocated as auction capacity to smaller shippers and larger shipper overflow. BLC not acquired before 14 September must be allocated by auction.

Key features of BLC vs. Auction Capacity

CBH submits that the BLC system is designed to sit alongside the auction system and offer a different product for larger exporters.

CBH provides the following key features compared to the auction system:

Feature	BLC	Auction capacity
Eligibility	800 000 tonnes per year (approx. 4 exporters)	No minimum criteria
Allocation	10% of customer's entitlement in a single month allocated prior to 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)
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 size
Shipment plan	Annual shipment plan. Revised quarterly.	No annual plan
Shipping window	10 days	15 days

Protection for smaller exporters

CBH states that it was careful to ensure that the auction system, which they consider has worked well under the existing undertaking for smaller exporters, remained in the Undertaking and was not rendered ineffective by the BLC system.

CBH considers that it will ensure this by:

- Auction capacity is more than the historical amount smaller shippers' ship.
- BLC is take or pay and requires large shippers to smooth out deliveries across the year. Base load customers will be incentivised to book less auction capacity during peak times as they have paid for capacity across the year.
- BLC is acquired prior to auction capacity but these customers cannot allocate more than 10% of their BLC into a given month prior to the completion of auctions.
- BLC is not transferrable; therefore these customers are likely to acquire their capacity conservatively to avoid the take or pay risk.

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

CBH provides the following reasons:

- Flexibility is something which only the largest exporters can provide. For example large exporters may have stock at each port which would allow CBH to negotiate the transfer of the shipping window to another port.
- Under the BLC system exporters are incentivised to use capacity (or else they lose it) and therefore incentivised to negotiate with CBH to provide flexibility while the auction system does not have this feature.
- The auction is also available to all exporters. However, the flexibility which CBH is seeking may only be provided by the larger exporters. Without a separate system CBH would be discriminating against larger exporters.

Section 44ZZA(3) of the CCA

CBH state that BLC is consistent with the objectives of section 44ZZA(3) of the CCA because it is:

- consistent with the objectives of Part IIIA
- in the legitimate business interests of CBH as a storage and handling provider
- in the public interest as it provides for greater efficiencies to growers and exporters and has wide industry support
- in the interests of persons who might want access to the service.

Definition of Capacity

CBH state that they have neither commercial nor operational incentives to restrict the supply of port capacity because:

- CBH would not profit from limiting capacity, CBH does not retain the auction premium, and encouraging scarcity would lead to pressure to prematurely expand terminal capacity.
- CBH is constrained by the threat of new entry; restriction would encourage competitors to build competitive facilities.
- CBH has a commercial incentive to attract volume through its ports

CBH contend that the ability of a Port Terminal to achieve its theoretical capability is inherently uncertain due to a number of reasons such as:

- Harvest size and characteristics varying between years and between zones
- Port Terminal Facilities are connected to supply chains which bring grain to port
- Depending on the harvest, and other factors that are difficult to predict and control, 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.

CBH state that it publishes full details of the capacity it offers at www.portcapacity.com.

Lost capacity fees

CBH state that it considers it inappropriate to penalise CBH for its vertical integration where it engages in non-discriminatory conduct. CBH state that the CBH group as a whole does not benefit from foregone capacity as no new revenue flows into the CBH group.

CBH also submits that CBH Grain will retain a significant exposure to the auction system in order to acquire additional capacity to meet its requirements.

B.2 Third party submissions on capacity allocation issues

AGEA

Capacity allocation system

The Australian Grain Exporter's Association (**AGEA**) supports the existing auction capacity allocation system:

AGEA believes that the auction system...can be an effective mechanism for allocating capacity and, in fact, the auction system may be the most effective mechanism where demand for capacity exceeds supply.¹³⁴

AGEA further notes that '[w]here demand for capacity exceeds supply, price should be the only determinant of the quantity of capacity allocated to each applicant'¹³⁵.

AGEA submits that non-performance fees incurred by exporters should result in forfeiture to the bulk handler, while non-performance fees incurred by the bulk handler should be forfeited to a fund that is redistributed to all parties that ship in that period.

AGEA does not consider the proposed two-tiered system to be appropriate and that:

A port terminal operator can offer more than one program with accompanying terms, but all programs and related standard terms and conditions should be available to all access seekers.¹³⁶

Furthermore, AGEA submits that the two-tiered system would place CBH in a position of operating in a discriminatory manner. In this regard, AGEA states that:

CBH...should not set eligibility criteria that are subjective and they should not be the judge of which access seeker is successful or eligible for a specific program and set of terms.

AGEA points to a number of issues with the two-tiered system, as below:

- Exporters not eligible for BLC will be placed at a competitive disadvantage. For example:

If BLC eligible participants have 60% and they know its going to be a large export task, then they can afford to bud up the auction premium for the remaining 40% knowing that they will be able to spread that auction premium over the total of their tonnes.

This has the potential to provide substantial leverage to the base load participants during peak periods.

- New or emerging exporters would find it difficult to access BLC given CBH has sole discretion over who is eligible and applies eligibility criteria that look at the past three years shipping volumes.
- Where BLC is not used, it should be not be transferrable but put back on the shipping stem and allocated to other shippers via a transparent process.

¹³⁴ AGEA, *Submission to the ACCC Issues Paper*, 20 May 2011, p.4

¹³⁵ *Ibid.*, p.2

¹³⁶ *Ibid.*, p.4

AGEA notes that the above issues with the two-tiered system are mitigated by the restriction on the transfer of BLC, the requirement to use that capacity over 12 months and the higher lost capacity charge. However, the proposal remains ‘anti-competitive and will result in inefficiencies’.¹³⁷

Definition of available capacity

AGEA submits that CBH’s defined capacity and offered auction capacity are not the same since:

CBH defines capacity in the Port Terminal Rules as the tonnage capacity to put grain on a vessel in a period, however, the actual capacity offered is based on CBH’s logistics capacity.¹³⁸

AGEA states that CBH should state the total port terminal capacity and that this figure should not be subject to crop size. AGEA states that CBH should further state the volume of bundled logistics service that they offer in each period, which will vary according to crop size and logistics arrangements.

AGEA states that, for exporters who commit to purchase fobbing capacity, CBH receives compensation in the form of lost capacity charges, which are 100% of the cost CBH charges to deliver the service.

AGEA submits that, after the initial auction, CBH may determine the available capacity from time to time, having regard to its internal and external arrangements.

AGEA argues that CBH has:

total discretion as to what capacity it offers and their view of the size of the grain export task and the logistical capacity related to that task as defined by CBH is what determines this.¹³⁹

AGEA submits that the above mechanism effectively sets the auction premium and that this can artificially drive prices up.

AGEA submits that exporters can be deterred by the fact that CBH logistics determines capacity and not the total supply chain or port terminal capacity.

Transferability of port capacity

AGEA states that:

A number of AGEA members have used the secondary market for the trading of port terminal capacity and found it effective.¹⁴⁰

AGEA believes that the transferability of port capacity is critical across port, time, grain and owner.

¹³⁷ AGEA, *Submission to the ACCC Issues Paper*, 20 May 2011, p. 5.

¹³⁸ *Ibid.*, p. 4.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*, p. 5.

AGEA states, however, that eligible customers for ‘BLC’ should not be able to transfer that capacity – but that any unused base should be declared as ‘lost capacity’ and made available on the shipping stem to other exporters.

Emerald

Emerald submits that there are issues with the existing auction system:

[Emerald] have not always been able to secure shipping slots that we have needed to satisfy our customer’ requirements, thus forcing us to sell accumulated grain in the track market, sometimes at a loss.¹⁴¹

Emerald states that the two-tiered system will ‘encourage competition in the accumulation market by providing much needed certainty to higher volume exporters’¹⁴²; this certainty would enable higher volume exporters to plan their sales program, sell forward and make long-term commitments to accumulation in Western Australia.

Emerald submits that, although it may be argued that the two-tiered system is discriminatory, ‘[d]iscrimination is often justified when it aids efficiency’¹⁴³. The two-tiered system will aid efficiency and promote competition by:

- encouraging and rewarding commitment to the market by high volume traders; and
- sharing the risk with CBH of seasonal volatility.

Emerald submits that the take-or-pay arrangements for BLC are likely to result in conservatism on the part of large volume exporters – and that there is likely to be in excess of 40 per cent of capacity available for smaller volume exporters via the auction mechanism. Emerald supports the take-or-pay structure as it

allows CBH the certainty to invest in efficient supply chain infrastructure by alleviating the seasonal risk and sharing that risk with exporters.¹⁴⁴

Emerald considers that the eligibility criteria for BLC are appropriate.

Emerald does not consider it unreasonable that BLC customers may be required to enter into a supply chain agreement which is not regulated (e.g. includes elements of the up-country supply chain).

Emerald submits that BLC customers should be able to transfer a proportion of their allocation as the take-or-pay arrangements are ‘financially onerous’¹⁴⁵. This should be balanced against the ‘potential for aggressive traders to block out capacity for opportunistic gain’.¹⁴⁶

Emerald submits that it as used the secondary market for trading port capacity and has experienced no problems. Emerald believes that the secondary market will continue to be effective notwithstanding the two-tiered system.

¹⁴¹ Emerald, *Submission to the ACCC*, 26 May 2011, p.2

¹⁴² Ibid., p.2

¹⁴³ Ibid., p.2

¹⁴⁴ Ibid., p.2

¹⁴⁵ Ibid., p.3

¹⁴⁶ Ibid., p.3

Definition of available capacity

Emerald ‘accepts that capacity is a dynamic concept influenced by many factors along the supply chain’ and considers CBH’s approach of considering up-country issues and freight capacity as reasonable so long as CBH regularly reports changes to available capacity¹⁴⁷. As a minimum, Emerald suggests a monthly update highlighting performance and changes to assumptions to the capacity model.

Gavilon

Gavilon supports the existing auction capacity allocation system:

The auction system represents the most efficient, equitable and transparent use of the infrastructure as all customers may participate and capacity will be allocated to those who want it most.¹⁴⁸

Gavilon submits that the proposed two-tiered capacity allocation system is not appropriate with regard to the factors listed in section 44ZZA(3) of the CCA. In particular, Gavilon submits that:

- The two-tiered system does not promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided. Gavilon submits that, due to the inability to transfer BLC, there is the risk that capacity will go unused and that:

where there is demand for this capacity from other customers, the efficiency of the port and the overall supply chain will be reduced.¹⁴⁹

Additionally, the restriction of BLC to large customers results in the risk that 60% of port capacity may be allocated to less efficient exporters.

- The two-tiered system does not provide an incentive for CBH to improve productivity. Gavilon submits that:

There is the risk that by providing CBH with the certainty of guaranteed return, the BLC allocation system will not incentivise CBH to improve port throughput.¹⁵⁰

- The two-tiered system is not in the legitimate interests of CBH. Gavilon submits that is arguable that the two-tiered system will provide it with certainty over its logistics task given customers booking capacity will not be bound to use CBH’s up-country services.
- The two-tiered system does not appropriately take into account the interests of persons who might want access to the service. The reasons for this include that:
 - the eligibility criteria unreasonably discriminate in favour of large customers by preventing customers with shipping forecasts of 800,000mt or more from accessing BLC. Both new entrants and incumbents that are smaller customers would be discriminated against as they will be unlikely to meet the eligibility criteria – accordingly, the eligibility criteria should be removed.

¹⁴⁷ Emerald, *Submission to the ACCC*, 26 May 2011, p.2

¹⁴⁸ Gavilon, *CBH: Port Terminal Services Proposed Access Undertaking*, 20 May 2011, p.4

¹⁴⁹ *Ibid.*, p.2

¹⁵⁰ *Ibid.*, p.2

- the two-tiered system does not appropriately take into account the interests of access seekers since: it only allocates 40% of available capacity to the auction process; it prevents the transfer of BLC; and it does not contain any provisions for the resumption and re-allocation of underutilised or hoarded capacity. Small customers may be prevented from accessing additional capacity when needed.
- access seekers have not been given sufficient notice of the proposed two-tiered system, which represents a major change to the allocation of port capacity and one which, if implemented, will require grain exporters to undertake significant internal analysis about its potential consequences on the amount of grain they may be able to export and their investment decisions.¹⁵¹
- The two-tiered system is not in the public interest since it does not provide a ‘level playing field’ for all customers and arguably lessens competition in the grain export market.

For the reasons outlined above, Gavilon submits that the proposed two-tiered system should be removed and the existing auction system retained for all port capacity. The reasons for this include that:

- the auction system represents the most efficient, equitable and transparent use of the infrastructure as all customers may participate and capacity will be allocated to those that want it most;
- the Western Australian grains industry has experienced unusual seasonal conditions in recent years and the auction system has proved to be an effective capacity allocation method in dealing with those conditions. If those conditions continue, the auction system has proven itself to be effective. If, as is hoped, conditions return to more usual patterns, the effectiveness of the auction system will be enhanced further. Gavilon believes that as industry participants become more familiar with the auction system over time, the full benefits of the system will be more fully realised if the system is retained for all capacity; and
- unlike the BLC allocation system, the auction system does allow for transfers of capacity.¹⁵²

Gavilon submits that the auction system should be subject to ongoing assessment, and proposes that CBH conduct an industry-wide review of the auction system one year prior to the expiration of the Proposed 2011 Undertaking to give grain exporters time to make any necessary adjustments should a different capacity allocation model be warranted.

Definition of available capacity

Gavilon states that:

CBH’s proposal for determining available Capacity will not promote the economically efficient operation, use of and investment in the relevant ports. Nor is the proposal in the interests of access seekers.¹⁵³

Gavilon submits that the definition of ‘Annual Capacity’ and Rule 3.2 of the PTRs indicate that ‘CBH will determine at its discretion what Capacity is made available to customers’.¹⁵⁴

¹⁵¹ Gavilon, *CBH: Port Terminal Services Proposed Access Undertaking*, 20 May 2011, p.4

¹⁵² *Ibid.*, p.5

¹⁵³ *Ibid.*, p.5

In defining capacity, Gavilon notes that CBH takes into account factors unrelated to port operations.

Gavilon submits that it is not appropriate for CBH to define capacity in this way. Gavilon also submits that

CBH as a port operator does not have the requisite oversight of the upcoming harvest or transport task across the whole supply chain to appropriately determine Capacity in the manner proposed.¹⁵⁵

Gavilon submits that:

- CBH's estimate of available capacity should be subject to ACCC approval. The ACCC's information gathering powers will assist in obtaining the necessary data;
- customers should be required to provide CBH with a forecast of their export requirements including the details listed in Rule 4.3 of the PTRs in order to enable CBH to accurately estimate the size and characteristics of the upcoming harvest; and
- to provide an incentive for CBH to estimate capacity accurately, the PTRs should be amended to require CBH to pay a rebate to customers where it overestimates available capacity. Performance should be measured against key performance indicators.

Transferability of port terminal capacity

Gavilon submits that shipping slots should be transferrable and that the proposal for BLC not be transferable is not in the interests of access seekers that wish to have this flexibility.

Louis Dreyfus

Louis Dreyfus supports the existing auction capacity allocation system. However, Louis Dreyfus indicated that the auction system may be improved if auction premiums and lost capacity fees from all shippers were put into a trust account to put CBH and exporters on an equal cash-flow basis – with monies from the account to be rebated to customers who execute shipping slots in the same way as the auction premium.

Louis Dreyfus does not consider the proposed two-tiered system to be appropriate, having regard to a number of factors, as below:

- The two-tiered system is inconsistent with the requirement that access should be fair and not discriminate in favour of CBH's own trading activity. The key points included that:
 - the terms and conditions of BLC should not confer an advantage or benefit to CBH Grain that is not available to other customers who cannot access BLC;
 - the price of BLC will lower than the price of auction capacity. Also, the upfront marketer's fee will not apply to customers of BLC – which confers a price advantage over customers that acquire auction capacity (which also includes an auction premium component);

¹⁵⁴ Gavilon, *CBH: Port Terminal Services Proposed Access Undertaking*, 20 May 2011, p.5

¹⁵⁵ *Ibid.*, 20 May 2011, p.5

- it is not possible to perform a comprehensive cost/benefit analysis of whether BLC will be more advantageous overall; and
 - new entrant and growing medium-sized exporters will face the significant potential impediment created by the BLC eligibility criteria and the uncertainty around how they will be applied by CBH.
- The two-tiered system is inconsistent with the Objectives outlined in the CBH Proposed 2011 Undertaking. The key points included that:
 - Since BLC customers are also able to bid for auction capacity, they are able to acquire all the capacity in a particular month by ‘bidding up’ the auction premium. Given that base load customer is able to spread the cost of the auction premium over a larger volume grain task, such customers will have a lower incremental cost of business compared to customers that cannot access BLC; and
 - there are no restrictions on BLC on a per port or per month basis. The two-tiered system would therefore allow BLC customers to completely book out capacity at specific port zones, leaving no available capacity for auction capacity customers.
 - The two-tiered system is inconsistent with the common principles Louis Dreyfus believes should underpin all the Port Terminal Access Undertakings. The key points included that:
 - the standard port terminal services offering should by CBH should be made under the same terms and conditions for all customers;
 - where demand for port terminal services exceeds supply in any given period, price should be the determinant of capacity allocation under both the auction system and proposed two-tiered allocation system; and
 - it is not appropriate that CBH discriminate between customers via the eligibility criteria for BLC. BLC should be made available to all customers on the same terms and conditions.

Definition of available capacity

Louis Dreyfus does not consider the method by which CBH defines ‘capacity’ to be appropriate – noting that CBH appears to have multiple definitions, the application of which is not sufficiently clear with some definitions appearing contradictory.

Louis Dreyfus believes that the appropriate definition of capacity is under the PTRs, which defines it as ‘the capacity of a Port Terminal Facility to put grain on board a vessel at a Port Terminal Facility during a defined period, measured in tonnes’.

However, CBH also:

- separately defines Annual Capacity in the PTRs to be ‘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 year’;

- defines Core Capacity in the PTRs as ‘the Capacity of each Port Terminal Facility calculated in accordance with the process set out in Rule 4.2(a)’.

In relation to the proposed two-tiered system, Louis Dreyfus further submits that:

- CBH does not propose to publish the quantity of Annual Capacity it will make available – customers will need to infer this from the amount of BLC.
- The timing of the auctions for Harvest Shipping Period and Annual Shipping Period are not defined – CBH proposes to publish a schedule of capacity on offer at auction five business days prior to the auction. It appears that customers will have to infer what quantity of BLC has been acquired.
- Harvest Capacity, BLC and Core Capacity should equal Annual Capacity but this is not confirmed by CBH – it is possible therefore for CBH to vary the PTRs to reduce the amount of auction capacity available.
- The term ‘available’ is not defined at Rule 3.2 of the PTRs. The criteria specified under Rule 3.2 heavily qualify capacity and reduce the capacity that CBH allocates to a quantity that is less than the actual capacity of the port terminals.
- Many of the criteria specified under Rule 3.2 are subjective, which is not appropriate in determining the quantity of capacity that CBH is willing to offer.

Louis Dreyfus also submits that:

...given that CBH proposes only to make its Port Terminal Facility capacity available by means of the Port Terminal Rules, and that the price paid by users is to be determined in part by the Auction Premium paid, and/or the undetermined cost of surge capacity, it is inappropriate that CBH IS able to artificially reduce the quantity of capacity in this manner.¹⁵⁶

Transferability of port terminal capacity

Louis Dreyfus considers that there has been an effective secondary market for the trading of port terminal capacity in Western Australia. Louis Dreyfus further states that:

...transferability of slots between users, ports, time period and grains is important and necessary to allow exporters to execute shipping programs, and to ensure that exporters who initially choose not to participate in the capacity allocation methods prescribed may still have an opportunity to access capacity when there is no spare capacity available.¹⁵⁷

Louis Dreyfus believes that BLC should be transferable between users, ports, time periods and grains. Louis Dreyfus further notes that it is not necessarily a disadvantage for eligible customers to be unable to trade that capacity given that they can acquire transferrable shipping slots at auction.

¹⁵⁶ Louis Dreyfus, *Response to ACCC Issues Paper*, 27 May 2011, p.7

¹⁵⁷ *Ibid.*, p.7

Pastoralist's and Grazier's Association of Western Australia

The Pastoralist's and Grazier's Association of Western Australia (**PGA**) supports the auction system as being 'workable'¹⁵⁸.

The PGA regards CBH's proposed two-tiered capacity allocation system to be 'self-evidently self interested' and that it will 'further stifle competition in [Western Australia], as it favours the incumbent monopoly operator, CBH'.¹⁵⁹

The PGA states that it:

Endorse[s] the Productivity Commission's view that port capacity should be offered without regard to what CBH believes the existing land-based supply chain may be (in)capable of delivering.¹⁶⁰

The PGA submits that the auction system is not to blame for exporters preferring to do business in other states. It notes anecdotal evidence that exporters are frustrated by CBH's business rules and pricing, which discourage competition in Western Australia.

The PGA submits that the eligibility rules for BLC 'consolidate power to CBH rather than making the system more open and transparent'.¹⁶¹ Accordingly, the two-tiered system should not proceed.

Plum Grove

Plum Grove supports the existing auction system:

Plum Grove supports the auction system in its current form as we believe it creates a transparent and equal process for the allocation of port capacity for all exporters.¹⁶²

Additionally, Plum Grove argues that Western Australia remains a preferred source of grain based on the more transparent port allocation system in place (i.e. auction).¹⁶³ Plum Grove submits that there is no evidence that the auction system is a disincentive to participate in the Western Australian grain market.

Plum Grove submits that it has 'significant reservations' regarding the two-tiered system, primarily as it will 'discriminate in favour of exporters with large established volumes of bulk wheat for export'.¹⁶⁴ This will result in there being a small number of larger operators and a reduction in competition.

Plum Grove considers that the 800,000mt eligibility criterion is excessive. However, Plum Grove agrees with CBH's argument that up front vessel plans that are evenly spread over the year would provide them with 'logistical efficiencies'. Accordingly, the minimum forecast criteria should be 240,000mt a year rather than 800,000mt. This will increase the number of potential BLC customers from 3-4 to ten.

¹⁵⁸ PGA, *CBH Port Access Undertaking*, 27 May 2011, p.6

¹⁵⁹ *Ibid.*, p.6

¹⁶⁰ *Ibid.*, p.6

¹⁶¹ *Ibid.*, p.6

¹⁶² Plum Grove, *Submission to the ACCC*, 20 May 2011, p.1

¹⁶³ *Ibid.*, p.1

¹⁶⁴ *Ibid.*, p.1

Plum Grove notes that smaller exporters like itself are able to provide a full 12 month shipping program to CBH to assist it in having certainty and effective planning over port operations. The assertion that smaller exporters are all spot or opportunistic traders that do not require planning is 'incorrect, naïve and frankly offensive'.¹⁶⁵

Plum Grove submits that it is opposed to the increased penalties for lost capacity as such fees would allow CBH to restrict competition with their trading arm by simply moving funds within the business. Any additional fees or penalties should be returned to the auction system.

Plum Grove notes that there is limited provision for transparency in relation to the allocation of BLC.

Queensland Rail Freight National

Queensland Rail Freight National (**QRNF**) expressed concern that:

The BLC concept potentially discriminates against smaller exporters by providing large exporters with the ability to access premium shipping slots first.¹⁶⁶

Additionally, QRNF notes that the take-or-pay obligation and inability to trade BLC results in a real cost to entities other than CBH. A potential outcome may be that exporters other than CBH are required to enter into a supply chain services agreement with CBH in order to access their desired shipping slots or reduce take-or-pay exposure.

QRNF submits that the two-tiered system has the risk of reducing competition in both the wheat export market and the transport market.

Transferability of port terminal capacity

QRNF states that:

The efficient utilisation of infrastructure, both port and transport, is dependent on the ability to flexibly manage variation. To that end, an effective secondary trading market promotes the efficiency of the supply chain.¹⁶⁷

QRNF submits that the prohibition on the trading or repositioning of BLC 'imposes an inefficient cost base on users of the supply chain'.¹⁶⁸ QRNF further states that the requirement to nominate whether capacity is serviced by CBH under a GSA potentially limits the effectiveness of the secondary market where traded capacity must retain the supply chain option nominated.

Wheat Exports Australia

Wheat Exports Australia (**WEA**) 'is supportive of the current CBH auction system as a fair and transparent allocation method'.¹⁶⁹ WEA quotes the PC's comments in relation to the CBH auction system:

...although the Commission considers aspects of the system can be improved upon, it supports its continuation (subject to modifications) and thinks that other port operators

¹⁶⁵ Plum Grove, *Submission to the ACCC*, 20 May 2011, p.2

¹⁶⁶ Queensland Rail National, *CBH proposed port terminal services undertaking*, 27 May 2011, p.2

¹⁶⁷ Ibid., p.3

¹⁶⁸ Ibid., p.3

¹⁶⁹ Wheat Exports Australia, *Public submission on ACCC Issues Paper*, 20 May 2011, p.3

might also consider adopting a similar system where there is a likelihood of excess demand for port capacity at certain points in time.¹⁷⁰

WEA submits that the two-tiered system:

...could be anti-competitive and unreasonably discriminate in favour of the largest bulk wheat exporters, including CBH Grain Pty Ltd, to the detriment of all other bulk wheat exporters.¹⁷¹

WEA notes that for the 2009/10 marketing year, due to the operation of the 800,000mt forecast minimum criteria, only two exporters would have been eligible for BLC – including CBH Grain. Accordingly, 11 of the 13 exporters operating in the Western Australian grain market would have been disadvantaged – approximately 3,500,000 tonnes of wheat would have been allocated prior to exporter's being able to acquire auction capacity.

WEA submits that the requirement for CBH to ensure efficiency in the port system should be through an 'unbiased approach and not to the exclusion of smaller exporters'.¹⁷² WEA is of the view that the two-tiered system could effectively block exporters' access to port terminal facilities.

WEA argues that the two-tiered system will allow the largest two exporters to book the most sought after shipping slots and to thereby force other exporters to buy FOB from CBH during those peak periods, given that they will not be able to acquire their preferred shipping slots.

WEA considers that the two-tiered system will effectively provide CBH Grain (and the other eligible customers) first access to shipping slots to the disadvantage of smaller exporters. BLC customers will also not face the risk and exposure associated with the auction system.

WEA submits that, even if the 800,000mt forecast minimum criteria were lowered, there would still always be exporters that are excluded from participating.

WEA argues that the two-tiered system is contrary to clause 6.2(a), which provides that:

The Port Operator must not discriminate between different Applicants or Users (including its own Trading Business) in favour of its own Trading Business including discrimination based on the location or identity of the storage custodian, handler or transporter of the Applicant' or User's Bulk Wheat.

WEA states that the two-tiered system:

Is not in the best interests of competition nor would it provide equitable access for all exporters to WA's bulk wheat export terminals.

¹⁷⁰ Wheat Exports Australia, *Public submission on ACCC Issues Paper*, 20 May 2011, p.2: quoting Productivity Report p.205

¹⁷¹ WEA, *Public Submission to the ACCC*, 20 May 2011, p.2

¹⁷² *Ibid.*, p.2

Definition of available capacity

WEA notes CBH's reference in to its ability to provide 'surge capacity'. WEA considers that all bulk handlers should be encouraged to adopt a 'standardised template outlining availability of port loading capacities. Currently, WEA is of the view that port in-load and out-load capacity are not made available to access seekers.

WEA notes that:

- surge capacity was made available by CBH at additional charge in 2008/09;
- CBH offers surge capacity on request in the Albany and Esperance port zones in 2010/11, despite this season being a drought year with only 30% of the harvest in 2008/09.
- Although shipping capacity has not been an issue in 2010/11, CBH continues to levy surge fees. WEA notes the perception that this created that CBH kept capacity low and surge capacity surcharges imposed on exporters.

WEA notes that it is difficult for exporters to plan shipments where there is no fixed in-load capacity and vessel loading capacity 'is determined by the number of shifts the BHC decides to work'.¹⁷³

C. Variation of the Port Terminal Rules

C.1 CBH submissions on the variation of the Port Terminal Rules

CBH's submission accompanying undertaking – 31 March 2011

CBH submits that the changes it has proposed to the PTR variation provisions at clause 10 of the Proposed 2011 Undertaking represent a 'new, simpler and clearer process for amending the PTRs', in line with ACCC suggestions that a simpler process should be employed.¹⁷⁴

Standard amendments

Under the standard amendment process, CBH must do the following:

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

¹⁷³ WEA, *Public Submission to the ACCC*, 20 May 2011, p.2

¹⁷⁴ CBH, *Public submission to the ACCC: Port Terminal Service Undertaking*, 31 March 2011, p.20

CBH submits that this process is a simpler and clearer process and provides ample opportunity for consultation.

CBH observes that it made several variations to the PTRs based on access seeker requests. CBH submits that the new process represents ‘an appropriate balance between certainty and flexibility’ and addresses the ACCC’s concerns with the variation process under the 2009 Undertaking.¹⁷⁵

Variations under exceptional circumstances

Under the process for variations in exceptional circumstances, CBH must give 2 days notice and publish the variation notice on its website. In particular, CBH will need to publish the facts and matters that give rise to the ‘exceptional circumstances’. CBH notes that, once it has made a variation under exceptional circumstances it must then commence the standard amendment procedure under clause 10.4 of the Proposed 2011 Undertaking (which allows interested parties to make submissions on the variation).

Typographical, grammatical and formatting amendments

CBH submits that the typographical, grammatical and formatting amendments process allows CBH to make variations without having to conduct the consultation process. Inconsequential amendments made by CBH must be published with a list of the amended paragraphs and a marked up copy of the PTRs showing the amendments.

Other comments

CBH notes that it has reviewed the ACCC’s Draft Decision in relation to GrainCorp and noted the ACCC’s concerns in relation to the PTR amendment process; the proposed changes are aimed at addressing those concern, such as the inclusion of the ‘objection notice’ provision at clause 10.6.

CBH submits that the proposed changes to the PTR variation process will ‘alleviate the difficulties CBH experienced in amending the PTR in 2010’.¹⁷⁶ Further, the proposed changes preserve the right for interested parties to consult with CBH on proposed variations and will allow CBH the flexibility to address concerns from interested parties without the delays associated with re-commencing the variation process. CBH further states that:

The changes will assist CBH to efficiently and effectively discuss proposed PTR amendments with interested parties, and will provide greater certainty and transparency to both CBH and interested parties in relation to the amendment procedure.

Section 44ZZBCA request for information: CBH – 13 May 2011

CBH submits that the exceptional circumstances amendment process is a ‘fast track mechanism’ for the variation of the PTRs.

CBH submits that the definition of ‘exceptional circumstances’ (see above) is:

...narrow and covers a specific circumstance, namely the urgent need to correct any deficiencies or errors in the conduct of the capacity auctions. Put another way, it is to

¹⁷⁵ CBH, *Public submission to the ACCC: Port Terminal Service Undertaking*, 31 May 2011, p.20

¹⁷⁶ CBH, *Public submission to the ACCC: Port Terminal Service Undertaking*, 31 March 2011, p.21

ensure that the auctions are run fairly and in accordance with the intended process in the Proposed Undertaking¹⁷⁷

CBH notes that it is not possible to provide an exhaustive definition of ‘exceptional circumstances’ as this would defeat the purpose of the process to provide CBH with the flexibility to urgently correct an error in the process rather than being forced to run the capacity auction with the error due to the time delay inherent to the amendment process.

CBH further notes that it is not aware of every possible circumstance that could give rise to systemic or technical errors or deficiencies; to provide an exhaustive definition would remove the flexibility of the exceptional circumstances mechanism.

CBH notes that it must follow the standard amendment process once the exceptional circumstances amendment, which would prevent CBH from unfairly amending the PTRs or otherwise bypassing the amendment process.

CBH’s supplementary submission – 18 May 2011

CBH notes that it has modelled the ‘ACCC objection notice’ in the Proposed 2011 Undertaking after the same provision in the GrainCorp undertaking. CBH submits that, where there is a dispute between CBH and the ACCC relating to a proposed variation, the matter should be resolved by an arbitrator who has specialist knowledge of the operation of the port.

CBH’s response to the ACCC’s Issues Paper and third party submissions received – 14 June 2011

CBH submits that Proposed 2011 Undertaking does not prevent the ACCC from issuing an objection notice in relation to a proposed variation to the PTRs by CBH under ‘exceptional circumstances’, given that the ten business day timeframe for the ACCC to issue an objection notice must be read in the context of clause 10.4.

CBH rejects submissions by AGEA that it did not consult effectively or in good faith in relation to previous variations to the PTRs. CBH notes Emerald’s submission that CBH’s consultation on variations to the PTRS were reasonable and were directed at ‘improving the efficiency or fairness of the system’.¹⁷⁸

CBH notes that AGEA did not make a submission in relation to the PTR variation conducted by CBH in 2010. Rather, CBH noted that it was required to ‘proactively solicit’ customer submissions. CBH further states that the variations made were in direct response to customer feedback and made the rules more flexible – the changes did not benefit CBH. CBH concludes therefore that there is no evidence to indicate that it did not consult effectively when seeking to vary the PTRs.

C.2 Third party submissions on variation of the Port Terminal Rules

AGEA

AGEA submits that access seekers were not satisfied with the consultation process undertaken by CBH prior to the variation of its PTRs in 2010. While AGEA recognises the difficulties faced by CBH, the consultation must be effective. AGEA argues that CBH has not consulted effectively and:

¹⁷⁷ CBH, *Response to ACCC information request*, 13 May 2011, p.9

¹⁷⁸ CBH, *Public submission to the ACCC*, 14 June 2011, p.13

does not demonstrably endeavour in good faith to take into consideration the view of accredited exporters with whom it discusses the terms and conditions of service provision.¹⁷⁹

Emerald

Emerald submits that, as long as there is industry consultation and access seekers' views are taken into account, CBH should be permitted the flexibility to vary the PTRs without ACCC approval. Emerald notes 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.¹⁸⁰

Gavilon

Gavilon states that it is unclear how the ACCC's power to issue an objection notice 10 days prior to the date on which a variation is to come into effect will work when CBH is permitted to vary the PTRs under 'exceptional circumstances' with two business days notice under clause 10(a) of the Proposed 2011 Undertaking. To this end, Gavilon suggests that clause 10.6(b) of the Proposed 2011 Undertaking be amended so that the ACCC may issue an objection notice up to ten business days after the variation under exceptional circumstances becomes effective.

D. Substance of the Standard Access Terms

D.1 CBH's submissions on the substance of the Standard Access Terms

CBH submits that the Proposed 2011 Undertaking requires the publication of the Standard Access Terms and enables eligible access seekers to gain access on those terms unless the parties agree otherwise. CBH argues that this provides certainty for access seekers while preserving the flexibility for the parties to negotiate different terms.

Section 44ZZBCA request for information: CBH – 13 May 2011

Variation to the Standard Access Terms

CBH submits that its existing process under the 2009 Undertaking allows it to unilaterally amend the Standard Access Terms. It notes that the proposed changes in the Proposed 2011 Undertaking provide for greater clarity around that power.

CBH notes that any variation to the Standard Access Terms must be consistent with the objective of the Proposed 2011 Undertaking set out in the non-discrimination at clauses 2 and 6.2. CBH further notes that access seekers are able to seek a non-standard access agreement under the Proposed 2011 Undertaking.

CBH argues that to provide for an alternative process for the variation of the Standard Access Terms:

would increase the level of regulatory intervention associated with the Proposed Undertaking for no real benefit and additional substantial costs and delays to amend.¹⁸¹

¹⁷⁹ AGEA, *Submission to the ACCC Issues Paper*, 20 May 2011, p.5

¹⁸⁰ Emerald, *Submission to the ACCC*, 27 May 2011, p.3

CBH also submits that removing the ability to unilaterally amend the Standard Access Terms would decrease its ability to respond to market changes.

CBH's supplementary submission – 18 May 2011-07-01

[no submissions]

CBH's response to the ACCC's Issues Paper and third party submissions received – 14 June 2011

Variation to the Standard Access Terms

CBH submits that its ability to vary the Standard Access Terms is an existing power that has not been subject to any complaints and is subject to the non-discrimination provisions of the Proposed 2011 Undertaking. CBH notes that the PTRs contain a substantial amount of the terms and conditions of access can only be varied in line with clause 10 of the Proposed 2011 Undertaking, which involves an ACCC role. CBH argues that these factors should address any concerns raised.

CBH submits that the broad auditing powers of the ACCC will ensure CBH's compliance with the non-discrimination provisions.

CBH notes that independent reviews of CBH's conduct regarding non-discrimination have been positive. CBH submits that it has complied with its non-discrimination obligations and that there is no need for further regulation.

CBH's response to the issues raised at meetings between the ACCC and CBH – 18 July 2011

CBH states that it 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)
- (ii) \$100 000 for a single event and \$250 000 for the term of the agreement

CBH contend that limitations of liability are usual for the industry and that there are two main risks for exporters:

- They cannot access the wheat at port – CBH will compensate the exporter
- Demurrage (delays in shipping) – CBH has limited liability

CBH is not aware of any port terminal services agreement which does not cap liability (in both instances).

CBH states that its limitations also compare favourably with the approved GrainCorp undertaking, and 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 gross negligence and wilful default of Viterra's employees and the up to a maximum of \$250 000 per event or series of events.

¹⁸¹ CBH, *Response to ACCC information request*, 13 May 2011, p.10

D.2 Third party submissions on the substance of the Standard Access Terms

AGEA

Limitation of liability

AGEA submits that the bulk handler should be liable for performance, particularly where a bundled service is offered. AGEA argues that the capacity of the bundled and third party components should be nominated by the bulk handler. Additionally, AGEA states that bundled service capacity should have commercially realistic load rates and that the bulk handler should be liable for demurrage/despatch.

Emerald

Emerald submits that the standard access agreement is a 'good starting point for negotiations'.¹⁸² Emerald argues that the 'more contentious' provisions of the standard CBH access agreement will be tested, such as the limitation of liability provisions.

Variation to the Standard Access Terms

Emerald submits that any significant variations to the standard terms be approved by the ACCC – the ACCC's interest in ensuring a fair, non-discriminatory and well-informed market is a 'valuable counterpoint' to CBH's negotiating position.

Louis Dreyfus

Louis Dreyfus notes that it did not elect to enter into specific negotiations with CBH and that it has a standard access agreement.

Variation to the Standard Access Terms

Louis Dreyfus submits that CBH should not have an ability to unilaterally vary its Standard Access Terms and states that:

At a minimum the circumstances under which CBH may seek to vary the Standard Terms, and the extent of any variation, such as which clauses may be subject to variation, should be defined.¹⁸³

Limitation of liability

Louis Dreyfus submits that, where a bulk handler offers a bundled service, it should be required to offer 'commercially acceptable vessel load rate and demurrage and despatch payments' at the relevant market rates¹⁸⁴.

¹⁸² Emerald, *Submission to the ACCC*, 27 May 2011, p.2

¹⁸³ Louis Dreyfus, *Response to ACCC Issues Paper*, 27 May 2011, p.3

¹⁸⁴ Louis Dreyfus, *Response to ACCC Issues Paper*, 27 May 2011, p.6

Gavilon

Variation to the Standard Access Terms

Gavilon notes that the unilateral right for CBH to vary its Standard Access Terms is not subject to a 'reasonableness' requirement.

Gavilon submits that it is practically difficult to monitor CBH's compliance with the relevant non-discrimination provisions at 6.1(d).

Gavilon states that, in the absence of any justification, the right to unilaterally vary the Standard Access Terms does not appropriately balance the legitimate interests of access seekers and CBH.

E. Approach to pricing

E.1 CBH submissions on CBH's approach to pricing

CBH's submission accompanying undertaking – 31 March 2011

CBH does not consider it necessary for the Proposed 2011 Undertaking to contain more prescriptive price regulation.

CBH notes that the ACCC must have regard to the pricing principles in section 44ZZCA of the CCA when assessing whether to accept an undertaking. CBH states that the purpose of the pricing principles:

is to create appropriate incentive for investment and innovation, and to ensure that access providers earn a reasonable rate of return on their infrastructure investments.¹⁸⁵

CBH sets out the pricing principles contained in section 44ZZCA of the CCA.

In favour of its submission that more prescriptive price regulation should not be imposed, CBH submits that:

- the non-discrimination provisions, combined with the dispute resolution process, ensures that CBH provides access at prices consistent with section 44ZZCA of the CCA.
- it will publish a single set of reference prices each year, and that any revisions to those prices must be published within two business days of the revision.
- it is prohibited from discriminating between applicants in favour of its own trading division, including discrimination based on the location or identity of the storage custodian, handler or transporter of the applicant's grain – the only exception being where the cost of providing access to an applicant is higher than to other applicants.
- any party that is not satisfied with CBH's pricing may negotiate and failing that, submit to the binding dispute resolution process.

¹⁸⁵ CBH, *Public submission to the ACCC*, 31 March 2011, p.8

- the ACCC can audit CBH’s compliance with its non-discrimination obligations.
- CBH’s pricing methodology provides for pricing certainty. It is unnecessary import pricing principles to the Proposed 2011 Undertaking as there is no evidence that lack of pricing certainty is an issue, nor have there been any submissions from interested parties in this regard. There have also been no complaints from users to CBH on pricing.
- the PC ‘was not attracted to heavy handed regulation for port terminals, particularly because of the large costs involved’¹⁸⁶. CBH notes that the cost of port terminal access regulation over the last 18 months was over \$1.5 million.
- prior to the WEMA, there was no evidence that CBH refused access or engaged in any market leveraging strategy to lessen competition.

CBH states that, for the reasons above, a ‘lighter’ approach to price setting at port terminals should be maintained. The negotiate-arbitrate regime will allow dissatisfied customers recourse to arbitration.

CBH notes that “[t]here has been limited interest in negotiating alternative fees and charges by Customers and no recourse to arbitration”.¹⁸⁷

CBH’s internal analysis indicates that the cost of exporting grain from Western Australia is still the lowest in Australia. CBH considers that this is largely due to the significant capital investment by CBH in its infrastructure.

Regarding itemised pricing, CBH submits that its ‘pricing has not been strictly and directly cost-reflective on an item by item basis, primarily because, as a cooperative, CBH has not needed to derive commercial rates of return on particular functions but has instead approached revenue, cost and capital expenditure on a consolidated basis’. CBH states that itemised pricing would require ‘detailed cost analysis’ which would, in the absence of dispute over access prices, ‘impose substantial costs without sufficient basis’.¹⁸⁸

Section 44ZZBCA request for information: CBH – 13 May 2011

[no submissions]

CBH’s supplementary submission – 18 May 2011

[no submissions]

CBH’s response to the ACCC’s Issues Paper and third party submissions received – 14 June 2011

CBH notes that pricing has been raised as an issue by a number of interested parties, including AGEA, Emerald, Louis Dreyfus, PGA and QRNF.

CBH refers to AGEA’s submission 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 notes its

¹⁸⁶ CBH, *Public submission to the ACCC*, 31 March 2011, p.9

¹⁸⁷ *Ibid.*, p.9

¹⁸⁸ *Ibid.*, pp. 9-10.

previous submission that ‘the cost of individual pricing would far exceed any alleged benefit’ particularly given that itemised pricing was only raised by PGA and an issue.

CBH notes that it has recently analysed its pricing and notes that Western Australia is still the lowest cost location to export wheat in Australia, which is consistent with customer submissions. CBH quotes Emerald’s submission that:

In respect of pricing issues, our observation is that CBH has not abused its position as monopoly provider under the 2009 undertaking regime and we note that its fees compare favourably to other exporting states’ bulk handlers.¹⁸⁹

CBH refers to Louis Dreyfus’ submissions that prices are transparent, although Louis Dreyfus also queried a number of charges. CBH’s responses to each price item query are as below:

- Up-front marketer’s fee: CBH states that this fee contributes to the costs of running CBH’s processes and to fund customer checks to ensure they are bona fide. CBH submits that this fee does not cross-subsidise other parts of its business.
- Lost capacity fee: CBH states that this fee contributes to its fixed costs and lost opportunity to earn revenue. CBH submits that this fee does not cross-subsidise other parts of its business.
- Remedial fumigation services fee: CBH states that this is a matter more appropriately dealt with under the relevant logistics contract. In any event, CBH notes that it does not charge for remedial fumigation services where the grain has come from CBH’s Grain Express service.

CBH refers to QRNF’s assertion that ‘there is no transparency regarding whether there is any cross subsidisation between ports or between the ports and the logistics supply chain’.¹⁹⁰ CBH notes that its prices must be consistent with the principles in the Proposed 2011 Undertaking and in section 44ZZCA of the CCA.

CBH submits that there is no justification for further price regulation or separation of accounts. CBH notes that QRNF has not addressed any of the issues put forward by CBH in its public submissions on why more rigorous price regulation is not warranted.

CBH submits that there is no evidence that cross subsidisation is occurring between port and up-country – and that CBH does not cross subsidise its up-country storages or CBH Grain; this would be a breach of CBH’s non-discrimination obligations. Further, CBH notes that it would be challengeable by arbitration should it engage in cross subsidisation.

CBH states that PGA’s submission 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’.¹⁹¹ CBH notes that the extracts relied on by PGA from the McColl Royal Commission in 1988 and a report commissioned by GrainCorp criticising the AWB single desk arrangements do not apply to the grain industry in 2011.

CBH further rejects PGA’s comparison of Australian bulk handling companies with those in the United States. CBH states that ports in the United States have numerous distinguishing

¹⁸⁹ Emerald, *Submission to the ACCC*, 27 May 2011, p.1

¹⁹⁰ Queensland Rail National, *CBH proposed port terminal services undertaking*, 27 May 2011, p.3

¹⁹¹ CBH, *Submission in response to third party submissions*, 14 June 2011, p.11

features, including that they will export an average of 20 times their storage capacity. CBH notes that Australian ports, however, only export an average of four times their storage capacity, which means that the capital component of the relevant charges are higher.

CBH notes that the Novorossiysk Grain Terminal in Russia charges a price roughly equivalent to CBH – and had its pricing determination upheld upon challenge of that price.

CBH submits that the PGA has made unsubstantiated allegations that CBH's ports are not being used efficiently. CBH further notes that there have been no marketer complaints about slow ship loading, as claimed by PGA.

CBH submits that the ACCC should place no weight on PGA's 'unsupported allegations'.

CBH's response to the issues raised at meetings between the ACCC and CBH – 18 July 2011

CBH provides a single fee for standard "port terminal services" which include:

- Unloading and receipt by CBH at the port
- Sampling
- Weighing
- Storage at the port
- Accumulating and assembling the wheat for the purpose of loading the cargo
- Administration and logistics services
- Access to inspectors
- Loading bulk wheat

CBH does not itemise the cost of each service and states that they cannot be realistically split. Also CBH states that an exporter requires all the services to export bulk wheat and as such does not consider further itemisation is required or justified.

For services not strictly required for the export of bulk wheat, the Port Terminal Services Agreement has separate fees listed.

CBH state that its pricing does not cross subsidise other parts of CBH's business (such as CBH Grain). Further, doing so would leave CBH open to allegations of breaching the non discrimination provisions of the Undertaking.

CBH states that its own research 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). CBH submits that this is inconsistent with CBH cross subsidising its upcountry network.

CBH considers there is no basis for an amendment in the Undertaking which provided that CBH would not cross subsidise its upcountry network.

CBH states that:

- Cross subsidising CBH Grain would be a breach of CBH's non discrimination obligations under section 44ZZCA of the Act
- CBH has no incentive to cross subsidise its up country network, as the same people are ultimately paying the charges

- CBH has been transparent with its pricing for port terminal services and has been praised for the low costs of the service. CBH is not aware of allegations that it subsidises its up country storage network save two submissions (QR National Freight and PGA). CBH responds to these submissions in its response to the ACCC's Issues Paper and third party submissions received-14 June 2011.

E.2 Third party submissions in relation to CBH's approach to pricing

AGEA

AGEA states that the approach to pricing 'has largely been that CBH has published [prices] and then exporters have chosen whether to accept or not.

AGEA submits that charges are transparent insofar as CBH publishes them, but that:

'exporters have no guide as to whether or not [the prices] are reasonable in terms of the cost of providing the service i.e. there is no basis for assessing whether the charges appropriately represent the true cost of providing the service',

AGEA considers that the distribution of the auction rebate to exporters that shipped is an appropriate mechanism for rebate.

Emerald

In respect to pricing, Emerald submits that CBH has:

not abused its position as a monopoly provider under the 2009 Undertaking and...that its fees compare favourably to other exporting states' bulk handlers.¹⁹²

However, Emerald argues that the port operators, such as CBH, need to properly cost their individual services to allow exporters to choose the services that they need and can compare alternative service offerings where available.¹⁹³

Emerald concedes, however, that bundled service offerings can add efficiency to export supply chain where there are scarce resources.

Emerald supports the auction premium rebate system and notes that exporters should not be penalised by the arbitrage activities of opportunistic traders and hedge fund operators.

Louis Dreyfus

Louis Dreyfus notes that it did not enter into specific pricing negotiations with CBH.

Louis Dreyfus states that CBH's pricing is transparent, however the 'basis for the existence and level of the charges is not always sufficiently clear'.¹⁹⁴

Louis Dreyfus outlines specific fees from Schedule 1 of the Proposed 2011 Undertaking.

Louis Dreyfus further notes that:

¹⁹² Emerald, *Submission to the ACCC*, 27 May 2011, p.1

¹⁹³ Emerald, *Submission to the ACCC*, 27 May 2011, p.1

¹⁹⁴ Louis Dreyfus, *Response to ACCC Issues Paper*, 27 May 2011, p.1

- It is unclear what service is provided for the Upfront Marketer Fee paid. There is no explanation of the actual cost incurred by CBH in providing this ‘undefined’ service.
- Any move by CBH to alter the reference prices should be scrutinised by the ACCC.
- There is no explanation from CBH as to the actual cost incurred when capacity is not used (i.e. Lost Capacity). It is therefore impossible to determine whether the Lost Capacity fee is appropriate.
- Bulk wheat that has been delivered to port by CBH under Grain Express should not have the Remedial Fumigations Service fee imposed.

PGA

PGA submits that CBH’s ability to set the price at port effectively enables it to discourage up-country investment in competing storage and handling facilities.

After deregulation of wheat export marketing, PGA notes that CBH restructured their fees with:

- an increase in the port fobbing fee from \$8.50 to \$17.10;
- the replacement of the up-country time-based storage fee with an \$8.50 outturn fee.

PGA submits that the \$8.50 fee was effectively transferred to being charged at port rather than up-country consistent with CBH’s pricing policy that states that:

Gross revenue derived from all fees. Because CBH charges a range of fees, its primary factor in setting the level of particular fees is whether the aggregate revenue from all fees will meet all costs.¹⁹⁵

PGA submits that ‘CBH’s prices are not market-based prices, but arbitrary abstractions’.¹⁹⁶ PGA further submits that:

- the \$17.10 fobbing fee at port is excessive and aimed at discouraging competition in up-country storage and handling services. It is not possible to invest in and charge for storage facilities and compete with CBH when faced with the \$17.10 charge. Even if the Grain Express notification is revoked, CBH’s structuring of its fees to favour its own up-country storage (knowing that any lost fees will be recovered at port) stifles competition.
- if CBH did not have monopoly control of the ports, they would not have been able to restructure their fees in 2008 with the intent of ‘thwarting competition’.
- No disputes have been raised because ‘reasonable people have known that it would do no good to complaint to CBH about the pricing. There have been negotiations on elimination of the additional fees at port.

¹⁹⁵ Louis Dreyfus, *Response to ACCC Issues Paper*, 27 May 2011, p.4

¹⁹⁶ Louis Dreyfus, *Response to ACCC Issues Paper*, 27 May 2011, p.4

- CBH's compliance costs would be substantially less 'were CBH genuine in drafting an access agreement that reflected a sincere interest in accommodating the trade rather than attempting to ensure continued exclusivity for themselves.'¹⁹⁷
- When there is no competitive alternative to CBH, and no regulatory ruling on pricing, marketers are cynical about expending resources seeking to change the pricing structure, particularly since they have limited negotiating strength.

PGA submits that CBH's comparison of itself to other states' port operations is inappropriate for a range of historical reasons, including that:

- Western Australia has always been the largest wheat exporting state;
- the entire supply chain was developed with taxpayer subsidies;
- there are natural advantage to Western Australia, such as lesser road transport regulation, which lowers the cost of transport.

PGA submits that CBH is claiming credit for efficiencies that exist despite them.

PGA submits that the central issue for the Proposed 2011 Undertaking is the pricing at port, which currently does not provide incentives to reduce costs or otherwise improve productivity'.¹⁹⁸

PGA states that CBH's port service pricing compares unfavourably with other grain ports globally. PGA further notes that CBH justifies this on the basis of capital invested, but that 'grain producers should not be made to pay more for services they do not require simply in order to offset the monopoly operator's luxury capital expenditure.'¹⁹⁹ Additionally, PGA argues that the original capacity used for port development was 'forcibly deducted from growers'.

PGA submits that the ports are not being utilised efficiently. PGA refers to complaints by marketers about the slow loading of ships. Additionally, PGA notes that the capital and operating costs are higher than what they would be under a competitive system.

PGA refers to CBH's 'consolidated' approach to revenue, cost and capital expenditure as further evidence of monopoly control by CBH. PGA further states that 'every cost must be identified, measured and lowered in order to be lean and efficient' – CBH's claim that it will be too costly to determine costs shows that Western Australian grain producers are being disadvantaged by inefficient supply chain management.²⁰⁰

QRNF

QRNF submits that there is currently 'no transparency regarding whether there is any cross subsidisation between ports or between the ports and the logistics supply chain.'²⁰¹

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 Proposed 2011 Undertaking.

¹⁹⁷ PGA, *CBH Port Access Undertaking*, 27 May 2011, p.4

¹⁹⁸ Ibid., p.5

¹⁹⁹ Ibid., p.5

²⁰⁰ Ibid., p.5

²⁰¹ Queensland Rail National, *CBH proposed port terminal services undertaking*, 27 May 2011, p.3

QRNF suggests that the ACCC consider greater separation of CBH's accounts in order to ensure that the differential prices included in the Proposed 2011 Undertaking are appropriate.

WEA

WEA states that it considers:

CBH's approach of publishing prices for its port terminal services on a non-itemised basis as inappropriate and insufficient to provide the level of transparency required for accredited exporters.²⁰²

WEA notes that CBH's 'consolidated' approach to revenue, cost and capital expenditure allows cross-subsidisation to occur. WEA further notes that exporters are 'unable to determine if their payments to the CBH system are fair and reasonable (and not subsidising other activities/services unrelated to export).'²⁰³

WEA considers the \$17.10 Export Outloading Fee to be an example of the inappropriateness of CBH's approach to pricing, for the reasons below:

- CBH does not provide any itemised list of the services they will provide in return for the \$17.10 fee.
- The Export Outloading Fee was increased from \$6.00 to \$17.10 per tonne in 2009. At the same time receival fees were reduced by \$1.65 per tonne and time-based storage charges eliminated. The lack of transparency and the apparent transferring of costs from up-country storages to the port fee would be unacceptable in the commercial world.
- Removal of the time-based storage appears to be the most potentially anti-competitive. By not reflecting the time based cost in storing grain, CBH is discouraging storage in non-CBH facilities.

F. Ring fencing

F.1 CBH submissions on ring fencing

CBH's submission accompanying undertaking – 31 March 2011

CBH quote the following excerpt from the National Competition Council's submission to the PC Report:

to date little if any evidence has been provided to establish that it is necessary to regulate port terminal services for bulk wheat export ... In such circumstances, the Council considers it is undesirable and risky to continue imposing access regulation to port terminal services ... In the absence of clear evidence of a need for regulated access, unnecessary costs and regulatory burdens are likely to be imposed on wheat export marketers and other participants in wheat markets.²⁰⁴

CBH further notes its agreement with the following statement from the PC Report:

Although the Commission sees merit in ring fencing in certain circumstances, it does not see convincing arguments to enforce ring fencing provisions in what is very much a market

²⁰² Wheat Exports Australia, *Public submission on ACCC Issues Paper*, 20 May 2011, p.1

²⁰³ Wheat Exports Australia, *Public submission on ACCC Issues Paper*, 20 May 2011, p.1

²⁰⁴ Productivity Commission, *Wheat Export Marketing Arrangements – inquiry report no.51*, 1 July 2010, p.181

in transition. In seeking to achieve competitive outcomes, ring fencing measures should be considered as more of a „last resort“ than a first option for a developing market. Further, the Commission considers that there are benefits to be gained from vertical integration in the export of bulk wheat — indeed, the fact that all of the major handlers have acquired a trading arm would attest to this fact. Most of Australia’s overseas competitors are also vertically integrated and to deny such benefits in the Australian context could place domestic traders at a disadvantage relative to other global players.²⁰⁵

CBH notes that the ACCC Draft Decision on GrainCorp’s Proposed 2011 Undertaking does not include any ring-fencing arrangements between GrainCorp’s port operations and its other businesses.

CBH submits that users were able to obtain access to CBH’s port terminal services on acceptable terms in the 2009/10 and 2010/11 seasons without any formal disputes, substantial complaints or breaches of the 2009 Undertaking or PTRs. CBH submits that this demonstrates the success of the current regulatory arrangements and that there is no justification for further ring-fencing measures.

CBH notes that the combination of ownership of the port terminal facilities and an intention to obtain wheat accreditation results in the ‘access test’ requirement. CBH submits that the clear purpose of this aspect of the statutory scheme is not to prevent bare gouging by preferential self-dealing – the focus of consideration of CBH’s Proposed 2011 Undertaking therefore should be non-discrimination.

CBH submits that the 2009 Undertaking and Proposed 2011 Undertaking ensure that CBH cannot preferentially self-deal – the ring-fencing arrangements in place as part of CBH’s Grain Express notification (**Grain Express notification**) prevent this. Additionally, CBH notes that CBH has maintained the robust non-discrimination provision at clause 6.2 and the ACCC continues to have the power to appoint an auditor to examine compliance with that obligation under clause 6.3. CBH submits that there is no evidence that CBH is discriminating in favour of its related marketing entity, CBH Grain.

CBH notes that the market structure includes users of port terminal services that are ‘overwhelmingly large, well resourced global companies’ and that the publish-negotiate-arbitrate model with robust non-discrimination obligations sufficiently addresses the purpose behind the ‘access test’.

CBH submits that, for these reasons, there is no justification for additional ring-fencing arrangements to be required – which would require significantly higher regulatory and compliance costs for no benefit. Due to CBH’s existing ring-fencing measures pursuant to Grain Express, any additional ring-fencing obligations would be detrimental to CBH’s business and result in a significantly less efficient grain supply chain.

CBH submits that its ring-fencing arrangements will remain in place should the Grain Express notification not be revoked by the ACCC. CBH notes that its existing ring-fencing under Grain Express separate CBH’s marketing subsidiary, CBH Grain, from CBH’s other businesses.

CBH notes that, should it be required to ring-fence its port operations from its up-country operations, this would require a second level of obligations at substantial cost. CBH notes that the imposition of additional ring-fencing would mean that CBH had been required to

²⁰⁵ Productivity Commission, Wheat Export Marketing Arrangements – inquiry report no.51, 1 July 2010, p.248

incur the expensive and difficulty of undertaking two distinct ring-fencing arrangements within 5 years; it would also 'threaten the efficiencies generated by Grain Express, which is predicated on the efficient integration of port and up-country functions.

CBH reiterates that ring-fencing was not required in the ACCC's Draft Decision on GrainCorp's Proposed 2011 Undertaking and quotes the ACCC as saying:

based on the practical experience under GrainCorp's 2009 Undertaking, that the non-discrimination, no hindering access and dispute resolution provisions of the Proposed 2011 Undertaking are sufficiently robust to ensure fair access for access seekers... formal ring-fencing rules to support these arrangements are not appropriate at this time.²⁰⁶

Section 44ZZBCA request for information: CBH – 13 May 2011

CBH notes that, like every other port regulated under the WEMA, it does not have ring-fencing arrangements between its port operations and up-country operations.²⁰⁷

CBH submits that it is subject to strict confidentiality obligations under its agreements with access seekers – which prevent it from providing confidential information to third parties unless authorised.

CBH summarises the reasons why it argues ring-fencing is not appropriate in the Proposed 2011 Undertaking:

- Under the 2009 Undertaking 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 2009 undertaking or the 2009 PTRs.
- The 2009 Undertaking (and the Proposed 2011 Undertaking) ensure that CBH cannot preferentially self deal.
- Under the 2009 undertaking and the Proposed 2011 Undertaking, CBH has maintained the robust non-discrimination provision in clause 6.2. Clause 6.3 continues to empower the ACCC to require the appointment of an auditor to examine compliance with that obligation.
- There is no evidence that CBH is discriminating in favour of its related marketing entity, CBH Grain.
- It would threaten the efficiencies generated by Grain Express (whether it was notified or not) which is predicated on the efficient integration of port and up-country functions.
- Under the Proposed Undertaking CBH must provide the ACCC with a copy of any access agreement with CBH Grain.
- It would result in substantial compliance costs for no benefit. Such costs would ultimately be passed onto customers.

²⁰⁶ ACCC, *Draft Decision – GrainCorp Operations Limited's Port Terminal Services Access Undertaking*, 24 March 2010, p. 22

²⁰⁷ As noted at 4.3.1.2 above, CBH's ring-fencing arrangements ring-fence CBH Grain from CBH's other businesses.

- The National Competition Council has indicated that regulation of wheat export is not required.
- The Productivity Commission has indicated that ring fencing is not required.

CBH notes that the three first bullet points (above) were sufficient basis for the ACCC to be satisfied that ring-fencing was not required under GrainCorp's Proposed 2011 Undertaking.

CBH submits that the only information CBH Grain will be able to access that is not available to other exporters is CBH Grain's own confidential information, as provided to CBH.

CBH submits that the ring-fencing arrangements under the Grain Express notification separate CBH Grain from CBH's other businesses. The arrangements were introduced as part of its proposal to bundle its storage, handling and transport services – in order to address potential concerns over the change to CBH's vertically integrated business model that the Grain Express project caused. CBH noted that the clearest concern was the potential for CBH to disclose confidential information to CBH Grain.

CBH states that CBH gathers a substantial volume of information about the grain in its system. CBH notes that it is obliged by contract to keep this information confidential to the person with the entitlement to the grain – CBH offered ring-fencing measures to reinforce this obligation under Grain Express.

CBH submits that most, if not all, of the relevant information (which includes all grains, not just wheat) is acquired at its up-country delivery points and maintained by CBH in its role as up-country storage and handler, not as port operator. The main information CBH holds a port operator is posted on the shipping stem, which prevent preferential self-dealing. Accordingly, CBH argues that it would be inappropriate to include the Grain Express ring-fencing under the Proposed 2011 Undertaking, which is intended only to apply to port terminal services.

CBH notes that the efficiencies of the Grain Express system offset the significant cost of the Grain Express ring-fencing. CBH states that it 'may retain some of the ring fencing measures in order to assure itself of compliance with its contractual obligations and to manage risk under the CCA'.²⁰⁸ However, CBH's contractual obligations and the CCA are sufficient to address any concerns that were previously subject to ring-fencing arrangements.

CBH submits that the ACCC should consider the ring-fencing of port operations and not up-country operations; the regulation of CBH's up-country operations should not be required through the Proposed 2011 Undertaking.

CBH submits that there are many reasons which would make the ring-fencing of port operations 'problematic and inefficient', including that:

- interaction between the up-country and port facilities are 'essential to efficient management of the supply chain'. Ring-fencing would require significant duplication of limited labour resources and business systems; and
- separation would complicate communications and other operations between port and up-country, which would raise the risk of serious disruption to the flow of grain to port.

²⁰⁸ CBH, *Response to ACCC information request*, 13 May 2011, p. 13.

CBH submits that this matter needs to be considered in the context that:

- CBH operates as a non-profit cooperative for the benefit of its grower members;
- there is no evidence of supra-competitive pricing, gold-plating of assets or preferential self-dealing by CBH;
- the ACCC accepted CBH's 2009 undertaking (and those of other operators) without ring fencing measures;
- 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 has never refused a request for access to its port terminals services; and
- there have been no access disputes under the 2009 undertaking.

CBH submits that if the ACCC requires ring-fencing under the Proposed 2011 Undertaking, 'it will risk adding substantial costs to one of Australia's most important export industries, without evidence that those measures are necessary or appropriate.

CBH's supplementary submission – 18 May 2011

CBH referred to information already provided to the ACCC in previous submissions.

CBH notes that the ACCC's Issues Paper did not reference all the issues set out in CBH's supporting submission or the ACCC's Draft Decision regarding GrainCorp's Proposed 2011 Undertaking – but focused on CBH's existing ring-fencing arrangements under the Grain Express notification.

CBH submits that the ACCC has merged two distinct issues: whether the existing Grain Express notification ring-fencing should continue, and whether it is necessary to require CBH to ring-fence its port operations from its up-country operations.

CBH stated that the existing framework is working and appropriate and that ring-fencing arrangements should not be included in the Proposed 2011 Undertaking.

CBH's response to the ACCC's Issues Paper and third party submissions received – 14 June 2011

CBH refers to the submissions from Emerald and Freight Council that reject ring-fencing. Additionally, CBH quotes Emerald as saying: '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'.²⁰⁹ CBH notes that WEA makes a similar point. CBH considers that this further supports that the provisions of the Proposed 2011 Undertaking are appropriate.

CBH notes that Emerald and AGEA both submit that, instead of ring-fencing, an information sharing obligation should be required. In this regard, CBH refers to Emerald's suggestion that 'any notification to CBH Grain regarding spare capacity should only occur as part of an "all

²⁰⁹ Emerald, *Submission to ACCC*, 26 May 2011, p.3

customer email” – and notes that CBH already publishes details of port capacity changes to all users. In response to AGEA’s suggestion that ‘anything that a HBC trading arm sees/receives should be made available to the market’, CBH notes that it is subject to confidentiality provisions. CBH also submits that disclosing the confidential information would also put it at a competitive disadvantage to other marketers (who do not have such an obligation). CBH also notes that AGEA does not state what relevance up-country storage statistics have to a port access undertaking that it directed at regulating the port operations and not up-country operations.

CBH submits that the lack of consistency in submissions is evidence that ring-fencing is not a major issue. CBH notes that what is consistent about the submissions seeking ring-fencing is that they do not provide evidence of why ring-fencing is needed.

CBH notes that WEA’s submissions that CBH Grain should be ring-fenced is grounded in the assumption that CBH and CBH Grain can share information. CBH submits that under the Proposed 2011 Undertaking and access agreements, CBH must keep the information of CBH Grain’s competitors confidential (including from CBH Grain).

CBH refers to Louis Dreyfus’ submissions that ring-fencing should be required between CBH’s port operations and up-country operations – noting that this approach would be:

counter-intuitive to the accepted practice of logistical planning in a holistic sense with all available information at hand.²¹⁰

CBH refers to the PGA’s submission that ring-fencing should be required – noting that it provides no evidence and relies on ‘rather offensive reference’ to CBH Grain operating as a ‘sheltered workshop’.

CBH notes Emerald’s submission that ring-fencing is not appropriate and submits that CBH already publishes details of port capacity changes to all users.

CBH refers to AGEA’s submission that ‘anything that a BHC trading team sees/receives should be made available to the market’. In this regard, CBH notes that it is subject to confidentiality obligations which prevent it from sharing confidential information. CBH states that such an obligation would put CBH and its customers at a competitive disadvantage to other marketers. CBH further notes that AGEA provides no basis on what relevance up-country storage statistics have to a port access undertaking.

CBH’s response to the issues raised at meetings between the ACCC and CBH – 18 July 2011

CBH states that 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)

CBH considers neither is appropriate and that it is important the ACCC clearly determines exactly what conduct ring fencing is intended to prevent.

CBH states that the purpose of ring fencing is to prevent preferential self dealing. CBH contends that this will not occur under the proposed Undertaking as:

²¹⁰ CBH, *Submission to the ACCC*, 14 June, p.14

- *The Undertaking has robust mechanisms to prevent preferential self dealing*
 - The Undertaking has robust non discrimination provisions, with which the ACCC can audit CBH's compliance.
 - The Undertaking has robust non hindering provisions.
 - CBH must provide the ACCC with a copy of any access agreement with CBH Grain.
 - The main information held by CBH as port terminal operator is posted on the stem.
 - The auction system removes the benefit of "insider information".

- *Confidentiality arrangements*
 - CBH does not share information with CBH Grain.
 - CBH has strict obligations of confidentiality under its agreements with access seekers (and throughout the supply chain).

- *CBH's past conduct does not warrant ring fencing*
 - Users were able to obtain access to CBH's port terminal services on acceptable terms for the 2009/10 and 2010/11 seasons without formal disputes under the Undertaking or the Port Terminal Rules.
 - 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*
 - Ring fencing would impose significantly higher regulatory and compliance costs on CBH, which would be passed through to exporters, and destroy the efficiencies of the efficient integration of port and up country functions.
 - Ring fencing would inflict substantial duplication of labour resources and business systems, imposing a substantial increase in costs, and would complicate communications and other operations between up country and port.
 - If the ACCC proposed to ring fence CBH Grain from CBH it is not clear what power the ACCC has to insist on such ring fencing.
 - The significant cost of the Grain Express ring fencing arrangements is offset by the efficiencies of the Grain Express system.
 - If the immunity is removed, CBH's contractual obligations and the CCA are sufficient to address any concerns the subject of ring fencing arrangements.

- *The industry does not see it as an issue*
 - Only two submissions sought ring fencing, the remaining submission sought greater information or supported the proposed Undertaking.
 - The Productivity Commission has recommended against further regulation of bulk wheats exports, primarily on the basis that the costs of regulation outweigh the benefits.

- *CBH's structure provides no incentive to preferentially self deal*

CBH state that it has a number of features which constrain any theoretical incentive to gain monopoly rents or reduce competition:

 - CBH is regulated under the *Bulk Handling Act 1967* which provides for access obligations. The Government can impose a more onerous regime if CBH abuses its position.
 - CBH is owned by growers who are collectively and individually active

- CBH as a grower-owned co-operative has a structure where each shareholder can own a maximum of 5 shares so CBH does not have a dominant shareholder.
 - CBH is a non profit organisation.
 - 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 to pay dividends to shareholders.
- *ACCC does not propose to ring fence other ports*
 - CBH states 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 operations.
 - CBH notes that the ACCC further supported this decision by noting the competitive pressures GrainCorp faces. This decision was confirmed in the ACCC's final decision.
 - CBH states that the ACCC's decision is based on non discrimination provisions, no hindering provisions, dispute resolution provisions, GrainCorp's past conduct, and competitive pressures. CBH claim that four of these factors are as compelling, or more compelling, in the case of CBH.
 - CBH claims that the competitive pressures on CBH listed in Appendix B of the GrainCorp Draft Amendment Notice Explanatory Statement are understated.
 - CBH state that 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.

F.2 Third party submissions in relation to ring-fencing

AGEA

AGEA submits that it is concerned about the ability of vertically integrated bulk handler to use information to the advantage of their trading arm. In particular, AGEA states that the:

ACCC should require BHCs to put in place mechanisms that avoid vertically integrated companies from advantaging their trading arms through access to information/services that are not available to other exporters...anything that a BHC trading arm sees/receives should be made available to the market.²¹¹

AGEA also states that the requirement for bulk handlers to report on their performance indicators for their storage and port businesses separately from the integrated entity would have the potential to drive greater efficiencies.

Emerald:

Emerald expresses the view that ring-fencing would 'have the potential to add significant costs to the supply chain without necessarily exhibiting any demonstrable benefits'²¹². Emerald then states that 'behavioural' ring-fencing should be applied – for example, CBH should only be advised of spare capacity at the same time as all other customers.

²¹¹ AGEA, *Submission to the ACCC Issues Paper*, 20 May 2011, p.5

²¹² Emerald, *Submission to the ACCC*, 26 May 2011, p.3

Emerald submits that the ACCC should have the ability to audit the flow of information between CBH and CBH Grain.

Emerald 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’

Louis Dreyfus

Louis Dreyfus submits that consideration should be given to ring-fencing CBH’s port terminal facilities from the rest of CBH’s business.

PGA

The PGA quotes the PC Report at section 7.2:

Although the Commission sees merit in ring fencing in certain circumstances, it does not see convincing arguments to enforce ring fencing provisions in what is very much a market in transition. In seeking to achieve competitive outcomes, ring fencing measures should be considered as more of a ,last resort0 than a first option for a developing market. Further, the Commission considers that there are benefits to be gained from vertical integration in the export of bulk wheat - indeed, the fact that all of the major handlers have acquired a trading arm would attest to this fact. Most of Australia’s overseas competitors are also vertically integrated and to deny such benefits in the Australian context could place domestic traders at a disadvantage relative to other global players.²¹³

PGA submits that the critical difference is that in competitive markets like the United States there is competition between vertically integrated operators – i.e. no single port operator has full control over the port facilities.

The PGA note that CBH is an incumbent with the advantage of having operated for 70 years in a ‘totally protected, government-mandated marketing system’. PGA states that CBH’s actions to date indicate that they continue to operate as a ‘sheltered workshop’.

WEA

WEA considers that all bulk handling companies that have an associated trading entity should have effective ring-fencing applied since

Bulk handling companies, by virtue of their operations, are privy to information that is not publicly available. Sharing of this information (either inadvertently or intentionally) between the BHC and its associated trading entity gives rise to an information asymmetry.²¹⁴

WEA notes that such information could include (but is not limited to):

- information on location, volume and quality of wheat stocks at port and in up-country storage facilities;
- activities on the shipping stem prior to general publication.

²¹³ Productivity Commission, Wheat Export Marketing Arrangements – inquiry report no.51, 1 July 2010, p.248

²¹⁴ Wheat Exports Australia, *Public submission on ACCC Issues Paper*, 20 May 2011, p.3

In the case of CBH, WEA submits that ring-fencing should be maintained between the bulk handling and marketing divisions under the Proposed 2011 Undertaking. WEA further submits that this ring-fencing should remain in place irrespective of whether the Grain Express notification is revoked by the ACCC.

WEA notes that ring-fencing should prevent the flow of all non-public marketing-related information between the bulk handler and its marketing entity